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EIGHTH ITEM ON THE AGENDA

336th Report of the Committee on Freedom of Association

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Introduction

1. The Committee on Freedom of Association, set up by the Governing Body at its 117th Session (November 1951) met at the International Labour Office, Geneva on 3, 4 and 11 March 2005, under the chairmanship of Professor Paul van der Heijden.

2. The members of Salvadorian, Mexican and Venezuelan nationality were not present during the examination of the cases relating to El Salvador (Case No. 2214), Mexico (Cases Nos. 2338, 2347) and Venezuela (Case No. 2353) respectively.

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3. Currently, there are 134 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 23 cases and interim conclusions in 7 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 Case No. 2340 (Nepal) 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. 2392 (Chile), 2393 (Mexico), 2394 (Nicaragua), 2397 (Guatemala), 2399 (Pakistan), 2400 (Peru), 2401 (Canada), 2402 (Bangladesh), 2403 (Canada), 2404 (Morocco), 2405 (Canada), 2406 (South Africa), 2407 (Benin), 2408 (Cape Verde), 2409 (Costa Rica), 2410 (Mexico) and 2411 (Venezuela) 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. 2068 (Colombia), 2265 (Switzerland), 2270 (Uruguay), 2279 (Peru), 2302 (Argentina), 2317 (Republic of Moldova), 2339 (Guatemala), 2348 (Iraq), 2350 (Republic of Moldova), 2352 (Chile), 2364 (India), 2372 (Panama), 2373 (Argentina), 2374 (Cambodia), 2375 (Peru), 2376 (Côte d'Ivoire), 2378 (Uganda), 2382 (Cameroon), 2384 (Colombia), 2385 (Costa Rica), 2386 (Peru), 2387 (Georgia), 2390 (Guatemala) and 2391 (Madagascar).

Observations requested from complainants

7. The Committee is still awaiting observations or information from the complainants in the following cases: Nos. 2313 (Zimbabwe), 2322 (Venezuela) and 2379 (Netherlands). In

Case No. 2351 (Turkey), the Committee requests the complainant to provide comments on the Government's reply.

Partial information received from governments

8. In Cases Nos. 1865 (Republic of Korea), 2177 (Japan), 2183 (Japan), 2189 (China), 2248 (Peru), 2249 (Venezuela), 2262 (Cambodia), 2286 (Peru), 2298 (Guatemala), 2314 (Canada), 2318 (Cambodia), 2329 (Turkey), 2333 (Canada), 2342 (Panama), 2361 (Guatemala), 2366 (Turkey), 2377 (Argentina), 2396 (El Salvador) and 2398 (Mauritius) the governments have sent partial information on the allegations made. The Committee requests all these governments to send the remaining information without delay so that it can examine these cases in full knowledge of the facts.

Observations received from governments

9. As regards Cases Nos. 1787 (Colombia), 2241 (Guatemala), 2244 (Russian Federation), 2254 (Venezuela), 2258 (Cuba), 2268 (Myanmar), 2269 (Uruguay), 2277 (Canada), 2293 (Peru), 2294 (Brazil), 2309 (United States), 2320 (Chile), 2323 (Islamic Republic of Iran), 2326 (Australia), 2327 (Bangladesh), 2331 (Colombia), 2334 (Portugal), 2337 (Chile), 2341 (Guatemala), 2346 (Mexico), 2349 (Canada), 2355 (Colombia), 2356 (Colombia), 2357 (Venezuela), 2360 (El Salvador), 2362 (Colombia), 2363 (Colombia), 2367 (Costa Rica), 2368 (El Salvador), 2371 (Bangladesh), 2388 (Ukraine), 2389 (Peru) and 2395 (Poland), the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting. In cases Nos. 2292 (United States) and 2319 (Japan), the Committee received the observations of the Governments. It requests nevertheless the complainant organizations and the Governments concerned to transmit any information they might consider relevant so that these cases may be examined in full knowledge of the facts.

Urgent appeals

10. As regards Cases Nos. 2264 (Nicaragua), 2275 (Nicaragua) and 2343 (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.

Withdrawal of complaint

11. The Committee noted that in Case No. 2278 (Canada), the complainant organization, the Association of the Substitutes of the Prosecutor of Quebec, withdrew its complaint because of the adoption of a new law. The Committee also takes due note of the request of the complainant, the International Textile, Garment, Leather Workers' Federation (ITGLWF), to withdraw its complaint in Case No. 2287 (Sri Lanka).

Transmission of cases to the Committee of Experts

12. The Committee draws the legislative aspects of Case No. 2369 (Argentina) to the attention of the Committee of Experts on the Application of Conventions and Recommendations.

Follow-up given to the recommendations of the Commission of Inquiry established to examine allegations of trade union rights violations in Belarus

13. The Committee has taken note of the report of the Commission of Inquiry established to examine the article 26 complaint concerning the observance by the Republic of Belarus 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), which was taken note of by the Governing Body at its 291st Session (November 2004). The Committee notes, in particular, the Commission's suggestion in paragraph 636 that the implementation of its recommendations be followed up by this Committee and the decision by the Governing Body to this effect. The Committee therefore requests the Government to transmit its observations and information relating to the measures taken to implement the Commission's recommendations as soon as possible, taking due account of the deadline set by the Commission in respect of a number of its recommendations.

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

Case No. 2047 (Bulgaria)

14. The Committee last examined this case at its meeting in November 2004 when it urged the Government to initiate the necessary measures immediately so that the Association of Democratic Trade Unions (ADS) and the National Trade Union (NTU) may establish whether they meet the requirements for obtaining representative status at national level. It further requested the Government to indicate whether the two organizations (the Association of Industrial Capital in Bulgaria and the Association of Trade Unions to "Promyana" Alliance) that applied for recognition at the national level in August 2004 have been granted this status and to keep it informed of developments in respect of any requests for recognition [see 335th Report, paras. 31-45].

15. In a communication dated 7 January 2005, the Government indicates that the two organizations which had applied for recognition at the national level were recognized by decision of the Council of Ministers; the Association of Industrial Capital in Bulgaria (AICB) was recognized as a representative employers' organization from 22 October 2004 and the Association of Trade Unions to "Promyana" Alliance (hereinafter the Promyana Alliance) was recognized as a representative workers' organization from 26 November 2004. However, the Confederation of Labour "Podkrepa" and the Confederation of the Independent Trade Unions in Bulgaria (CITUB) appealed the decision recognizing the Promyana Alliance to the Supreme Administrative Court.

16. The Government also indicates that, in accordance with the recommendations made by the Committee in November 2004, it sent a letter to ADS and NTU dated 31 December 2004 explaining the provisions of section 1 of the transitional and final provisions of the Council of Ministers Decree No. 152 of 11 July 2003, for adoption of the Ordinance on the procedures for identifying the presence of criteria for representation of organizations of workers and employees and organizations of employers and on the procedures for applying

to be recognized as representative organizations at national level. The Government states that it clarified in the letter that, while ADS and NTU do not have a status of workers' organization representative at national level, they may request to be recognized as such by submitting the necessary documents for initial identification of criteria for representation to the Council of Ministers, in accordance with section 2, point 1, of the Ordinance.

17. The Government emphasizes that all employers' and workers' organizations have the right to apply for recognition of representativeness at the national level by virtue of section 36 of the Labour Code and the Ordinance, and this of course includes the ADS and the NTU. This same procedure for determining representativeness was recently applied with respect to the AICB and the Promyana Alliance. The Government, however, points out that the Council of Ministers has no authority to initiate this procedure, except in cases where it verifies the prerequisites for representation for those organizations already recognized. The procedure for identification of the presence of criteria for representativeness must be initiated by the workers' or employers' organization concerned. To date, no such request has emanated from ADS or NTU.

18. *The Committee takes due note of the information provided by the Government, including the recognition of representativeness at the national level for the AICB and the Promyana Alliance. The Committee further notes with interest the efforts made by the Government following the Committee's previous examination of this case in November 2004 to clarify to ADS and NTU the procedure that may be followed to request recognition of their representative status at the national level. The Committee trusts that the ADS and the NTU will provide the necessary documentation in accordance with the appropriate procedure should they still wish to be considered for recognition of representativeness at the national level and requests the Government to keep it informed of any developments in this respect. The Committee further requests the Government to keep it informed of the outcome of the appeal made by Podkrepa and CITUB in respect of the recognition of the Promyana Alliance and to furnish a copy of the Supreme Administrative Court judgement as soon as it has been handed down.*

Case No. 2141 (Chile)

19. At its meeting in March 2004, the Committee requested the Government to keep it informed of the outcome of the legal proceedings concerning the death of Luis Lagos and the serious injuries sustained by Donaldo Zamora during the strike at the FABISA S.A. enterprise in May 2001 [see 333rd Report, para. 33].

20. In a communication dated 27 October 2004, the Government states that the 18th Criminal Court of Santiago, which has jurisdiction in this case, is examining the case concerning the alleged manslaughter of the worker Luis Lagos B. and the injuries sustained by Donaldo Zamora. The case is at the plenary stage and a criminal indictment has been filed. The bus driver who ran down and caused the death of Luis Lagos and injured Donaldo Zamora is the subject of legal proceedings and has been released on bail. The family of the deceased worker is acting as plaintiff in the case and is seeking financial compensation for the incident, in addition to any criminal liability that may apply.

21. The Government states that the 6th Labour Court of Santiago ruled that the FABISA S.A. enterprise was responsible for the worker's death. It also ruled that the enterprise must provide financial compensation to the Lagos family, given that the incident was an occupational accident. The Labour Court in its ruling stated that the FABISA S.A. enterprise was responsible for the death of Mr. Lagos, since a company manager had instructed the driver to force his way into the plant premises. The Labour Court also ruled that the enterprise must pay the following sums in compensation to the family of the

deceased man: for loss of earnings – 20,000,000 pesos; for emotional distress – 50,000,000 pesos; and for the four surviving children of the deceased – 60,000,000 pesos.

22. *The Committee takes note of this information, and requests the Government to send a copy of the ruling handed down in the proceedings concerning the death of Luis Lagos and the serious injuries sustained by Donaldo Zamora during the strike at the FABISA S.A. enterprise in May 2001.*

Case No. 2151 (Colombia)

23. The Committee last examined this case at its November 2004 meeting [see 335th Report, paras. 50-65]. On that occasion the Committee made the following recommendations regarding the issues that remained outstanding:

> As to the allegations regarding the mayor of Bogotá's refusal to negotiate collectively and the lack of regulation concerning the right to collective bargaining within the public service, the Committee notes with interest the adoption of Decree No. 137 of 29 April 2004 on the creation of the District Committee for Labour Dialogue and Coordination, established as a coordinating body for labour issues related to public servants of the Capital District. The Committee also notes that, as a first result of the District Committee's functioning, the increase in wages of the public employees of the Capital District has been agreed upon. Moreover, the Committee notes the creation of a forum for dialogue with the Union of Public Servants of the Districts and Municipalities of Colombia (UNES), with the aim of jointly analysing the successive pronouncements of the Committee on Freedom of Association. The Committee requests the Government to continue to keep it informed of the progress made in the area of collective bargaining in the public sector within the Capital District, as well as of any new agreements which might be reached. Taking into account the fact that it has examined various cases involving difficulties linked to collective bargaining in other areas of the public sector, the Committee hopes that similar measures will be adopted in those areas.
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> With regard to the alleged non-compliance with trade union agreements establishing certain advantages in respect of wages and benefits that have been recognized since 1992, the Committee notes that the Government states that Decree No. 1919 was called into question on several occasions before the Council of State and this high court is currently considering a ruling with regard to this issue. The Committee requests the Government to keep it informed as to the results of these proceedings once the rulings have been handed down.
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> As to the allegations regarding the dismissal of trade union officials belonging to SINTRABENEFICENCIAS for having formed a trade union organization in the Cundinamarca district, on which the Territorial Directorate of Cundinamarca was to issue the corresponding decision against the background of the administrative inquiry that has been initiated, the Committee requests the Government to provide it with a copy of this decision.
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> The Committee notes that the Government has not transmitted information on the suspension of the trade union immunity of the trade union officials dismissed from the Bogotá Council (SINDICONCEJO), and the allegations of SINTRAGOBERNACIONES regarding the failure to consult with the trade union during the preparation of a draft by-law aimed at modifying the Basic Statute of the Public Administration of Cundinamarca and reorganizing the structure of the Departmental Administration and requests the Government to transmit its observations in this respect.

24. The Public Servants Union of Districts and Municipalities of Colombia (UNES) sent additional information in a communication of 12 January 2005, indicating that the decision of the Ministry of Labour and Social Protection dated 25 June 2003 did not take into account the appeal lodged by the trade union with the aim of verifying the dismissal of the officials of SINTRABENEFICENCIAS which took place without having lifted their trade union immunity, as it considered that the period for filing such appeal had lapsed.

25. The Government sent additional information in communications dated 29 October and 18 November 2004. As regards the allegations concerning the dismissal of trade union officials of SINTRABENEFICENCIAS for having formed a trade union organization in the Cundinamarca district, the Government states that according to information received from the Cundinamarca charitable institution, restructuring of that body was ordered by its General Board in Decree No. 683 of 29 March 1996 and in Agreements Nos. 011 of 9 July 1996, 012 of 12 July 1996, 07 of 1994 and 016 of 18 July 1996, which provided for changes in staffing and the elimination of some posts. The Government adds that the administration of the charitable institution of Cundinamarca was not informed of the constitution of the trade union until 24 July 1996, by which time the workers had been informed of the elimination of posts through Agreement No. 016. The charitable institution then proceeded with restructuring, issuing Decisions Nos. 1259, 1291, 1297 and 1308 between July and August 1996. The Government states that the elimination of the posts in question involved payment of appropriate compensation in accordance with the collective agreement in force at the time. The Government provides an account of the proceedings initiated by the founding members of the trade union, the great majority of whom have been concluded with rulings favourable to the public body in question.

26. As regards the judicial suspension of the trade union immunity of SINDICONCEJO officials, the Government states that in conformity with Agreement No. 29 of 2001, the Council of Bogotá Capital District has ordered that if posts must be eliminated in connection with changes to staffing in a public body, in cases where for legal reasons the employees in question cannot be removed immediately, they should be allowed to remain in their posts until any factors that prevent their dismissal cease to apply. Accordingly, Decision No. 275 ordered that the public servants with trade union immunity at that time be allowed to remain in their posts. This is still applicable, and none of the trade union officials working for the Bogotá Council have been removed.

27. *As regards the allegations relating to the dismissals of officials of SINTRABENEFICENCIAS for having formed a trade union organization in the Cundinamarca district, the Committee takes note of the information provided by the Government according to which the decisions and agreements regarding the restructuring of the charitable institution of Cundinamarca pre-date the notification given to that public body regarding the constitution of SINTRABENEFICENCIAS, and that the dismissed trade union officials were paid compensation in accordance with the collective agreement in force at the time. The Committee takes note of the fact that the majority of the judicial proceedings initiated by the dismissed officials have been concluded with rulings favourable to the public body. The Committee takes note of the information provided by the trade union organization concerning the administrative decision of the Ministry of Labour that the time period for filing the appeal had lapsed. The Committee nevertheless recalls that in a previous examination of the case, it had requested a copy of the decision arising from the administrative inquiry initiated by the Territorial Directorate of Cundinamarca [see the Committee's 332nd Report, para. 35]. Noting that the Government has sent no observations on this matter, the Committee once again requests the Government to provide a copy of the ruling in question.*

28. *As regards the alleged suspension of the trade union immunity enjoyed by the SINDICONCEJO officials, the Committee notes the Government's information according to which Decision No. 275 ordered that the public servants who at that time enjoyed trade union immunity be allowed to remain in their posts, and that this is still applicable, as none of the trade union officials employed by the Bogotá Council have yet been removed. The Committee expects that any future dismissal of trade union officials resulting from the process of restructuring will take place only after trade union immunity has been suspended in accordance with national legislation.*

29. *As regards the other issues that remained pending in the previous examination of the case, specifically, those concerning: (1) progress made with regard to collective bargaining in the public sector in the Capital District; (2) decisions of the Council of State concerning the legality of Decree No. 1919 which suspended certain wage and benefit payments required under the terms of collective agreements; and (3) the allegations by SINTRAGOBERNACIONES concerning failure to consult the trade union during the preparation of a draft by-law aimed at modifying the Basic Statute of the Public Administration of Cundinamarca and reorganizing the structure of the Departmental Administration, the Committee notes that the Government has not sent any information, reiterates its previous recommendations, and requests the Government to send the requested information without delay.*

Case No. 2084 (Costa Rica)

30. At its meeting in March 2004, the Committee requested the Government to transmit the decision handed down relating to the dismissal of trade union official Mario Alberto Zamora Cruz [see 333rd Report, para. 46].

31. In its communication of 25 August 2004, the Government reports on the decision of the Civil Service Tribunal dated 26 August 2003, that the dismissal of Mario Alberto Zamora Cruz was justified and did not give rise to any liability on the part of the State. The Government adds that an appeal against the decision has been filed with the labour tribunal and is still pending.

32. *The Committee takes note of this information and requests the Government to communicate any ruling handed down by the labour tribunal.*

Case No. 2104 (Costa Rica)

33. At its meeting in March 2004, the Committee requested the Government to keep it informed with regard to issues relating to the dismissal of the trade union official Luis Enrique Chacón, the unfair practices of the University of Costa Rica verified by the administrative authority and the violations of the Ministry of Education in the matter of trade union leave [see 333rd Report, paras. 47-49].

34. The Government states that the proceedings regarding the dismissal of Luis Enrique Chacón, the Ministry of Public Education and the University of Costa Rica are still pending. The Government reiterates the various initiatives and measures on the part of the Ministry of Labour and other authorities to guarantee collective bargaining. The Government also states that the Executive (the President of the Republic and the Ministry of the Presidency), by Decree No. 31905-MP of 29 July 2004, tabled the draft instruments of adoption of ILO Conventions Nos. 151 and 154 for examination by the extraordinary sessions of the legislative assembly which opened on 3 August 2004.

35. *The Committee takes note of this information and requests the Government to keep it informed of any developments with regard to these issues.*

Case No. 2272 (Costa Rica)

36. The Committee last examined this case at its March 2004 session and at that time requested that the Government keep it informed of the outcome of the legal proceedings with regard to the union officials Mr. Rodolfo Jiménez Morales and his wife Ms. Kenya Mejía Murillo and their disassociation from the National Insurance Institute (INS). The Committee also requested that the Government inform it of the outcome of the proceedings

for defamation against Rodolfo Jiménez Morales [see 329th Report, para. 542, approved by the Governing Body at its 289th session (March 2004)].

37. The National Association of Public and Private Employees (ANEP), in its communications of 20 February and 12 April 2004, states that on 24 July 2003 an application was made for enforcement of constitutional rights in the Constitutional Chamber of the Supreme Court of Justice to restore the rights to freedom from persecution and the right to work of Mr. Rodolfo Jiménez Morales. This application was rejected on legal grounds by the Constitutional Chamber leaving it to the ordinary industrial courts to pass sentence. Subsequently, Mr. Rodolfo Jiménez Morales applied for a writ of *habeas corpus* for the order to arrest and imprison put out for him at the time, but this application was declared to have no grounds. The ANEP also alleges persecution against Ms. Kenya Mejía, Mr. Rodolfo Jiménez Morales wife, who was dismissed from her new job at the Banco Popular because her immediate superior alleges that the good relationship between said organization and the National Insurance Institute was at risk. Ms. Kenya Mejía made an application for enforcement of constitutional rights in the Constitutional Chamber in order to be reinstated. The Constitutional Chamber admitted the application and established temporary reinstatement until a legal ruling was made. However, the authorities at the Banco Popular did not recognize this order and proceeded to dismiss her, but this time without management responsibility, protected by the presumption that the Constitutional Chamber would again reject the application on legal grounds.

38. The ANEP condemns the tardiness and inefficiency of the reparation proceedings in the administration of labour justice for anti-union activity and states that the current judicial applications regarding Rodolfo Jiménez Morales and his wife Kenya Mejía Murillo will take years.

39. The Government, in its communications of 25 August 2004 states, on the subject of the outcome of the legal proceedings with regard to the officials Mr Rodolfo Jiménez Morales and his wife Kenya Mejía Murillo, that they are ordinary labour proceedings in which no ruling of first instance has yet been given.

40. Regarding the outcome of the legal proceedings for defamation against Mr. Rodolfo Jiménez Morales, the Government points out that this is a matter of a private nature for which it would be necessary to request information from the complainant when a judicial decision is made. In addition, this action was brought by Mr. Cristobál Zawadski Wojtasiak in a personal capacity and not in his capacity as executive director of the National Security Institute, which is why, in the opinion of the Government, the Committee should not deal with this matter.

41. The Government states, regarding the application for enforcement of constitutional rights brought by Mr. Rodolfo Jiménez Morales referred to by the ANEP, that this application was rejected because it corresponded to ordinary jurisdiction; therefore, passing a verdict on the matter could interfere with the jurisdiction of the ordinary courts. Regarding the application for a writ of *habeas corpus* for the order to arrest and imprison in the first instance (a matter that the Committee had already examined), in relation to the action for defamation against Mr. Rodolfo Jiménez Morales; this application for a writ of Habeas Corpus was rejected because the Penal Court of Justice of the First Justice Circuit of San José declared it to be defaulting in the terms of article 89 of the Code of Penal Procedure by virtue of the fact that the defendant was not able to appear, even though every effort was made.

42. The Government states, regarding the application for enforcement of constitutional rights brought by Ms. Kenya Mejía Murillo, that the plaintiff was indeed reinstated; however, she was dismissed from the new organization where she worked due to unjustified absence.

From the ruling it seems that there is no reason why this would be an unfair dismissal, as it was noted that her last sick note covered the period from 9 to 13 June 2003 and the appellant did not come to work in the days subsequent to 13 June of that year, thus absenting herself unjustifiably.

43. *Regarding the lawsuit for defamation against Mr. Rodolfo Jiménez Morales, the Committee emphasizes that although the Government states that this is a private dispute, given Mr. Rodolfo Jiménez Morales position as a trade union official and Mr. Cristóbal Zawadski Wojtasiak's position as executive director of the National Insurance Institute, it believes it necessary to examine the outcome of the legal proceedings in order to determine whether said official's testimony went too far.*

44. *The Committee reiterates its previous recommendations, requests the Government to keep it informed of the outcome of the legal proceedings with regard to the officials Mr. Rodolfo Jiménez Morales and his wife Ms. Kenya Mejía Murillo; the Committee requests the Government to inform it of the outcome of the proceedings for defamation against Mr. Rodolfo Jiménez Morales and expresses the hope that the procedures in question will be concluded soon.*

Case No. 2316 (Fiji)

45. The Committee examined this case, which concerns the Government's failure to: (1) enforce a Compulsory Recognition Order (CRO) which it had previously issued; (2) counter attempts by the employer (Turtle Island Resort) to avoid recognition of the complainant (National Union of Hospitality, Catering and Tourism Industries Employees – NUHCTIE) through delaying tactics; and (3) counter efforts to prevent workers from joining the union through anti-union dismissals and interference, at its June 2004 meeting [see 334th Report approved by the Governing Body at its 290th Session] and made 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 the 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.

46. In a letter dated 21 July 2004, the Government indicates that it did not fail to enforce the CRO concerning recognition of the complainant NUHCTIE by the Turtle Island Resort. The Government specifies that under the provisions of the Trade Unions (Recognition) Act 1998, the parties affected by the CRO (i.e. the complainant and the employer in this case) had to make all efforts to convene a meeting with the aim of concluding a collective agreement. The Government adds that the law encourages negotiations between the parties without third-party (government) interference to enhance a positive industrial relations

climate among the social partners. The Government will only intervene once a report is received from either party that they are unable to finalize an agreement as stipulated under the Trade Disputes Act, even if one of the parties is using delaying tactics. Similarly, since the union claimed that efforts were made by the company to prevent workers from joining the union through anti-union dismissals and interference, the union could have reported a trade dispute for unfair dismissal and for employer's non-compliance with section 59 of the Trade Unions Act for violating the workers' freedom to join a union of their own choice. This would have provided it with an opportunity to have these matters amicably resolved through the government machinery for settlement of disputes under the Trade Disputes Act. However, the Government notes, the complainant union never reported a trade dispute.

47. As for the Committee's recommendation to the Government to take all necessary measures of inspection, conciliation and enforcement of labour laws with a view to ensuring the implementation of the CRO, the Government states that the complainant had denounced the employer's refusal and delaying tactics in negotiating a collective agreement, and this had led the Government to file charges against the employer for failure to comply with the CRO. However, in reality this was a ploy by the complainant to force the employer to negotiate its log of claims with a view to getting an agreement signed while the case was still before the court.

48. The Government adds that the complainant had not at any time admitted that they had made a first round of negotiations on their log of claims, thus lying to their affiliates abroad that the employer had failed to negotiate and that the Government had never intervened. However, the Government notes, in reality it had been waiting all this time for the complainant's report, since it does not interfere and invoke the settlement machinery until either party requests its intervention by reporting a trade dispute.

49. As for the Committee's recommendation that the facilities to be afforded to workers' representatives should include access to the workplace and to the management of the undertaking for the proper exercise of their functions, the Government notes that the management came to the mainland and held their first negotiations with the union on the collective agreement. Thus, although the management had refused to allow the union to meet their members, they were willing to negotiate over the union's log of claims. Immediately after the CRO was issued, the union vide its letter dated 27 January 2003 submitted its log of claims to the management. However, it was not until five months later that they had arranged for the first negotiations. They never followed up from there until today. The Government considers that, given this situation, it should not be blamed for the inefficiency of others who do no live up to their fundamental responsibilities to the workers whom they purport to represent. The Government adds that due to the union's inaction for about 18 months after the issuance of the CRO, the members withdrew their membership. Following an application for derecognition by the employer on 23 June 2004, an exercise was conducted to determine the percentage of union membership and it was established from the union's records that they did not have a single financial member, hence the Government's decision to withdraw the recognition.

50. As for the allegations concerning the Government's alleged failure to counter repeated attempts by the employer to prevent workers from joining the union through dismissals and acts of interference such as the promotion of a staff association, the Government notes that the union had not reported these cases to the Government. Through the local media, they had stated that about 60 workers were dismissed but not a single complaint was lodged. In 2000, the union had reported the unfair dismissal of two former employees and even though the union was not recognized then, the Government had accepted the report and activated the dispute settlement machinery which resulted in the settlement of their case through the Arbitration Tribunal.

51. The Government adds that section 4(1)(a)(i) of the Trade Disputes Act states that no trade dispute which arose more than one year from the date it is reported under section 3 shall be accepted by the Permanent Secretary for Labour, Industrial Relations and Productivity. The Government considers that the complainant was aware of the above provisions and intentionally did not report the dispute as the one-year period had expired. The one-year period was sufficient for them to report the matters raised and they had no excuse whatsoever for not carrying out such an important task. Furthermore, the union was complaining about the formation of a staff association without actually understanding its role. The association was registered as an industrial association and not as a trade union and therefore could not perform the role of a trade union or represent members on any industrial relation matters.

52. The Government finally states that it intends to legislate on the Industrial Relations Bill by the end of this year so as to further bolster the position of unions and guarantee adequate protection to workers and their organization from any unfair labour practice.

53. *With regard to its request that the Government take all necessary measures to enforce the CRO issued for the recognition of the National Union of Hospitality, Catering and Tourism Industries Employees (NUHCTIE) as the majority union at the Turtle Island Resort, the Committee notes that the Government initially instituted proceedings against the employer with a view to having the CRO enforced but later on formally withdrew the charges on the grounds that the complainant had made false allegations. The complainant had apparently not indicated that the employer had participated in a first round of negotiations and therefore had in fact recognized the union as representative for collective bargaining purposes. The Committee also notes that according to the Government, the complainant did not request the intervention of the Government's settlement machinery in order to overcome any difficulties in the negotiation and remained inactive for 18 months. The Committee finally notes that in June 2004, the complainant's recognition as representative union was withdrawn at the request of the employer since it turned out that the complainant did not have any financial members.*

54. *With regard to its request that the Government 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 notes that according to the Government, the complainant did not report any act of anti-union dismissal and interference by the employer, as it could have done on the basis of section 59 of the Trade Unions Act, so as to have these matters amicably resolved, and as it had done in 2000 with regard to two former workers. On the contrary, according to the Government, the complainant indicated to the local media that 60 workers had been dismissed and let the legal deadline for reporting the trade dispute elapse. Furthermore, according to the Government, the complainant was protesting about the formation of a staff association without actually understanding its role, since such an association could not perform the role of a trade union and represent members on any industrial relations matters.*

55. *While taking due note of this information, the Committee considers that the main issue in this case is whether acts of anti-union discrimination and interference took place to prevent the effective recognition of a newly established union and undermine the latter, despite its apparent recognition by the employer (through participation in a first round of negotiations). The Committee also considers that even if the complainant had not reported acts of anti-union discrimination and interference to the Government, the latter was aware of the complainant's allegations, not only through the local media but also through this Committee which had addressed a specific request to the Government to investigate them. Thus, the Committee is of the view that the Government could have taken certain steps to examine the situation even if the complainant had not reported the case for amicable settlement. The Committee recalls for instance, that governments should take the necessary*

*measures to enable labour inspectors to enter freely and without previous notice any workplace liable to inspection and to carry out any examination, test or inquiry which they may consider necessary, in order to satisfy themselves that the legal provisions – including those relating to anti-union discrimination – are being strictly observed [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 753]. The Committee also recalls that, since inadequate safeguards against acts of anti-union discrimination, in particular against dismissals, may lead to the actual disappearance of trade unions composed only of workers in an undertaking, additional measures should be taken to ensure fuller protection for leaders of all organizations, and delegates and members of trade unions, against any discriminatory acts [see **Digest**, op. cit., para. 700].*

56. *The Committee expresses regret at the withdrawal of the complainant's recognition as representative union. It requests the Government to exercise greater vigilance in the future when it comes to ensuring protection against acts of anti-union discrimination and interference and to take all necessary measures to ensure that an expeditious and effective mechanism is in place to prevent and remedy such acts.*

57. *The Committee takes due note in this respect of the Government's statement that it intends to legislate on the Industrial Relations Bill by the end of this year so as to guarantee protection against unfair labour practices. The Committee hopes that the Government will spare no effort in order to have legislation in this area enacted as quickly as possible. Noting, moreover, that the Government recently ratified Convention No. 87, the Committee strongly encourages the Government to avail itself of the ILO's technical assistance in the process of drafting new legislation.*

58. *With regard to its request that the Government take all necessary measures so that the complainant may enjoy the facilities necessary for the proper exercise of its functions, including access to the workplace and management without impairing the efficient operation of the undertaking, the Committee notes that according to the Government, the management did refuse to allow the union access to the workplace so as to meet their members, but did not refuse to meet the complainant and came to the mainland in order to hold a first round of negotiations. The Committee once again recalls that 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., para. 954]. The Committee reiterates its request to the Government to take all necessary measures so as to ensure that trade unions, including the complainant, enjoy the facilities necessary for the exercise of their functions, such as access to the workplace and the possibility to meet with management and members without impairing the efficient operation of the undertaking and to keep it informed in this respect.*

Case No. 2233 (France)

59. The Committee last examined this case at its November 2003 session [see 332nd Report, paras. 614-646, approved by the Governing Body at its 288th Session]. It concerned alleged restrictions on the right of bailiffs, as employers, to establish and join the organization of their own choosing and to their right to collective bargaining. On that occasion, the Committee requested the Government to amend Order No. 45-2592 of 2 November 1945, which regulates the status of bailiffs, so that bailiffs have the right to organize as an integral part of their status and are able freely to choose the organizations representing their interests in the collective bargaining process and that the organizations in question are exclusively employers' organizations which could be considered to be independent from the public authorities in that their membership, organization and functioning are freely chosen by the bailiffs themselves.

60. In a communication dated 16 September 2004, the Government states that the matter had been referred to the Council of State in August 2003 by the Ministry of Employment, Labour and Solidarity and by the National Union of Bailiffs (SNHJ) appealing the decision of 20 May 2003 of the Paris Administrative Court of Appeal. The Government adds that the Council of State has not yet handed down a ruling on the matter and that this should take place soon. The Government also recalls that it has implemented the necessary steps to ensure that the rights to freedom of association and collective bargaining are respected.

61. *The Committee notes the information sent by the Government and requests it to inform the Committee of the ruling of the Council of State as soon as it is handed down.*

Case No. 1970 (Guatemala)

62. The Committee last examined this case, which concerns murders and dismissals, at its November 2002 meeting [see 329th Report, paras. 48-50]. On that occasion it made the following recommendations, which remain pending:

> The Committee notes once again that the complainant organization has not sent further information concerning the murder of the trade union member Cesáreo Chanchavac. The Committee once again requests the complainants to send further information in respect of this murder. As regards the proceedings concerning dismissals at the Ofelia, La Patria, Santa Fe and La Palmera farms, the alleged dismissals at the El Arco farm and the alleged impossibility of negotiating a collective agreement at the San Carlos Miramar farm, the Committee notes with regret that the Government has not sent any observations in this respect. The Committee once again requests the Government to keep it informed on the rulings that are handed down in relation to these dismissals and to promote the negotiation of a collective agreement at the San Carlos Miramar farm.

63. In a communication of 2 December 2004, the Government states with regard to allegations concerning the La Patria farm, that a conciliation initiative took place in the presence of CGTG representatives and an agreement has been signed through the mediation of the Labour Inspectorate of Mazatenango providing for an appropriate wage settlement. The case has consequently been closed. As regards the Santa Fe and La Palmera farms, the Government notes that according to the case filed with the Labour, Social Security and Family Court of Retalhuelu, the workers concerned have reached a settlement with the employers. In a communication of 19 January 2005, the Government mentions, as regards the allegations concerning the San Carlos Miramar farm, that, on 10 January 2002, under the auspices of the Labour Inspectorate, the legal representative of the farm and the leaders of the trade union have concluded a buy/sell agreement of 400 "cuendras" of the San Carlos Miramar farm, that have been distributed among 18 temporary workers of the farm. The Government adds however that it has been informed that the trade union is not active any more at the farm and that the farm is not being exploited any more.

64. *The Committee takes note of this information. It regrets that the complainant has not sent the further information requested more than two years ago on the murder of the trade unionist Cesáreo Chanchavac. Under these circumstances, the Committee will not pursue its examination of the allegation in question. The Committee requests the Government to keep it informed of developments in the proceedings concerning dismissals at the Ofelia and El Arco farms.*

Case No. 2230 (Guatemala)

65. At its meeting in March 2004, the Committee examined this case relating to the dismissal of 42 trade union members from the municipality of Esquipulas without the judicial authorization provided for in the Labour Code [see 333rd Report, paras. 71-73]. On that

occasion, the Committee requested the Government to continue to make every effort to ensure that the dismissed workers were reinstated and to keep it informed of any judicial or other type of complaint initiated in this respect.

66. In a communication dated 2 December 2004, the Government states that, with regard to collective dispute No. 12-2003 which was being dealt with by the Labour, Social Security and Family Court in the Department of Chiquimula after being filed by 42 municipal employees against the municipality of Esquipulas in the Department of Chiquimula on 19 March 2002, the Court decided to close the case because the workers in question, through the executive committee of the Trade Union of Workers of the Municipality of Esquipulas, had agreed on a settlement with the municipal council which provided for their reinstatement. In a communication of 27 July 2004, the complainant (the CGTG) confirms that the 42 workers in question were reinstated on 16 January 2004, and adds that a collective agreement on working conditions was concluded on 5 March 2004.

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

Case No. 2236 (Indonesia)

68. The Committee last examined this case at its November 2004 session. The Committee recalls that, following difficult salary negotiations with the local union, the Bridgestone Tyre Indonesia Company suspended from work the four union representatives in the negotiations and initiated dismissal proceedings against them for violations of Indonesian law and the collective agreement. In fact, two concomitant processes were set in motion. First, the company initiated dismissal proceedings, which resulted in four decisions from the National Committee for Labour Disputes Settlement (hereafter the "National Committee") authorizing the dismissals, and which were appealed against by both the workers and the company. Second, the complainant organization lodged, on the four union officers' behalf, a complaint for anti-union discrimination, pursuant to section 28 of Act No. 21/2000, in respect of which no conclusions had been reached; in fact, the procedure was delayed notably because of the failure of the former president-director of the company to attend the competent court. During its last examination of the case, the Committee formulated the following recommendations [see 335th Report, para. 971]:

(a) The Committee strongly regrets that to date the Government has not taken the necessary measures to guarantee that the procedure concerning the allegation of anti-union discrimination takes precedence over the dismissal procedures. As appeals have been lodged against the National Committee's decisions, the Committee urges the Government to now take the necessary measures to that effect. The Committee requests to be kept informed both in relation to the measures taken by the Government and any decisions reached in the appeals.

(b) Noting the adoption of Act No. 2/2004 concerning industrial relations dispute settlement, the Committee requests that the Government clarify to what extent this Act provides, in case of anti-union discrimination, means of redress that are expeditious, inexpensive and fully impartial, and, in particular, that it clarify whether the competent bodies under this Act will have the necessary authority to apply the sanctions provided under article 43 of Act No. 21/2000.

(c) Noting that the allegations of anti-union discrimination submitted by the complainant organization on behalf of the four union officers have not led to any conclusion more than two years after their submission: (i) the Committee urges the Government, once again, to take the necessary steps to ensure that the procedure on the allegations of anti-union discrimination be brought to a speedy conclusion in a fully impartial manner, and to keep it informed in this respect, including by providing a copy of any decision reached; (ii) further if the allegations are found to be justified, but that the workers have received formal notification of their dismissals, the Committee requests that the Government ensure, in cooperation with the employer concerned, that the workers are

reinstated or, if reinstatement is not possible, that they are paid adequate compensation; the Committee requests to be kept informed in this regard.

(d) Recalling that freedom of association implies the right of the organizations themselves to pursue lawful activities for the defence of their occupational interests, the Committee requests that the Government look into the allegations that the four union officers were significantly restricted in their union activity while the employment relationship still existed, and to take, if need be, appropriate steps to ensure that the local union may freely organize its activities to defend the occupational interests of its members; the Committee requests to be kept informed in this respect.

69. In a communication of 6 January 2005, the Government submits the following information and observations on the Committee's recommendations set out above. With respect to the dismissal proceedings and the question of their link with the procedure concerning the alleged anti-union discrimination, the Government disagrees with the Committee's recommendation that the examination of allegations of anti-union discrimination should take precedence over the dismissal procedure. The Government states that both procedures are carried out simultaneously in line with the prevailing laws. The Government indicates also that the employer's appeal against the decisions of the National Committee resulted in two decisions dated 21 October 2004 of the National Administrative High Court, according to which the dismissals should occur without any severance pay; these decisions concern the dismissals of Messrs. Nazar and Setio. The National Committee has appealed against these decisions before the Supreme Court. The Government indicates that the appeals lodged by the workers themselves against the decisions of the National Committee are still pending before the National Administrative High Court.

70. Regarding the procedure on the alleged anti-union discrimination, the Government reiterates that it must be conducted on the basis of convincing evidence assembled by the competent authorities. Efforts are still under way to have the former president-director of the company, designated by the Government as "the suspect", appear before the court since he is back in his home country. The Government states that the completion of criminal cases is hampered if the suspect is absent. The Government states that if the allegations of anti-union discrimination are found to be justified but the workers received a formal notification of their dismissals, the Government "could" make efforts to conduct an amicable negotiation between the employer and the workers. Concerning the issue of the means of redress in cases of anti-union discrimination and in particular the relevance of Act No. 2/2004 in this respect, the Government describes the different disputes governed by this Act. The Government adds, at the same time, that it guarantees freedom of association under section 28 (prohibition of anti-union discrimination) of Act No. 21/2000 concerning trade unions. Any infringement to section 28 is considered a crime calling for the application of the sanctions provided for under section 43 of Act No. 21/2000. The competent bodies to apply these sanctions are those competent to sanction any crime, which are: state courts, high courts and the Supreme Court.

71. Regarding the local union's activities in the company, the Government underlines that this union is still in existence and that it functions. Indeed, the union members appointed new union officers who replaced the four former leaders.

72. On a general note, the Government indicates that on 5 January 2005, the Ministry of Manpower and Transmigration once again endeavoured to resolve the case by officially inviting the management of Bridgestone Tyre Indonesia Company to discuss actions to be taken. Unfortunately, the company's management did not attend the meeting.

73. A communication dated 30 December 2004 from the complainant organization, received on 13 January 2005, confirms the information transmitted by the Government. Further, from the complainant organization's communication, it seems that the National Administrative High Court dismissed the workers' appeal in a decision of 8 November

2004 and that this decision was impugned before the Supreme Court by both the four workers and the National Committee. The complainant organization underlines that the four workers have not received formal notifications of their dismissals yet.

74. *The Committee takes note of the information submitted by the complainant organization and the Government.*

75. *With respect to the dismissal procedures, the Committee once again strongly regrets the Government's failure to take the necessary steps to have the procedure on the alleged anti-union discrimination take precedence over the dismissal procedures. These steps have been repeatedly requested by the Committee for the reasons set out in its two previous reports [see 331st Report, para. 514 and 335th Report, paras. 965 and 966]. The Committee must insist that the appropriate steps be taken, all the more since the procedure on the alleged anti-union discrimination has reached a stalemate while the dismissal procedures, although they have not yet resulted in final decisions and formal dismissal notifications, are following their course.*

76. *With respect to the allegations of anti-union discrimination, the Committee recalls that they raised two questions: the general question of the means of redress in cases of anti-union discrimination and the more specific question of the Government's particular responsibility as regards the allegations pertaining to the present case. On the general question, the Committee acknowledges that sections 28 and 43 of Act No. 21/2000 cover two important aspects of the protection against anti-union discrimination: a broad prohibition and dissuasive sanctions in case of violations of this prohibition. The Committee must underline however that the existence of legislative provisions prohibiting acts of anti-union discrimination is insufficient if they are not accompanied by efficient procedures to ensure their implementation in practice [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 742]. The Committee therefore requests the Government to take, as a matter of priority, the necessary measures so that workers who consider that they have been subject to anti-union discrimination, in violation of section 28 of Act No. 21/2000, can have access to means of redress which are expeditious, inexpensive and fully impartial and to keep it informed in this respect.*

77. *With respect to the specific allegations of anti-union discrimination in the present case, while taking due note of the Government's explanation on the delay encountered in the procedure implemented in their respect, the Committee urges the Government to take the necessary measures to expedite this procedure. The Committee expects that the procedure will be completed in the near future in a fully impartial manner. If the allegations are found to be justified, but the workers have already received formal notification of their dismissals, the Committee once again requests that the Government ensure, in cooperation with the employer concerned, that the workers concerned are reinstated or, if reinstatement is not possible, that they are paid adequate compensation. The Committee requests the Government to keep it informed of developments in this respect.*

78. *Finally, the Committee requests the Government to provide copies of the remaining decisions of the National Administrative High Court, the decisions of the Supreme Court in respect of the dismissals as well as of any decision reached with due reasons on the allegations of anti-union discrimination.*

Case No. 2281 (Mauritius)

79. The Committee last examined this case, which concerns the need to revise the Industrial Relations Act in conformity with freedom of association principles, at its November 2004 session [see 335th Report, paras. 152-155]. The Committee noted with interest that, a

White Paper was being prepared by a technical committee for the revision of the IRA and that consultations had taken place with employers' and workers' organizations in this context. The Committee requested the Government to keep it informed of the steps taken for the revision of the IRA and to maintain consultations with the social partners during the revision process.

80. In a communication dated 5 January 2005, the Minister of Labour, Industrial Relations and Employment sought the technical assistance of the ILO in order to further clarify certain concepts in relation to the White Paper on a New Framework for Industrial Relations in Mauritius which had been released on 5 November 2004 and had met with criticism from the employers' and workers' organizations. In a letter dated 7 February 2005, the Government indicates that the mission which took place from 30 January to 5 February 2005 had the opportunity to meet the employers' and workers' organizations, various officials as well as the Prime Minister and was very helpful in resuming dialogue with the social partners and bringing further clarifications on certain crucial principles underlying Convention No. 87. Finally, in a communication dated 11 February 2005, the Government indicated that it approved the ratification of Convention No. 87 and procedures were initiated to deposit the instrument of ratification.

81. *The Committee takes note with interest of the approval of the ratification of Convention No. 87 and the ongoing preparation of new legislation to revise the IRA. It strongly encourages the Government to maintain consultations with the social partners during the process of the revision of the IRA and reiterates its hope that this process will be concluded soon so as to bring the law into full conformity with Conventions Nos. 87 and 98. The Committee requests the Government to keep it informed in this respect.*

Case No. 2205 (Nicaragua)

82. The Committee last examined this case at its November 2002 meeting, and on that occasion expressed regret that the negotiation of a list of demands presented by the José Benito Escobar Workers' Trade Union Confederation (CST-JBE) in the construction sector had gone on for more than a year. The Committee notes with interest that the parties involved and officials from the Ministry of Labour signed agreements in August and September 2002 which ended the dispute. The Committee requested the Government to take steps to ensure that, in future, collective bargaining procedures are carried out within reasonable time limits [see 329th Report, para. 721, approved by the Governing Body in its 285th Session (November 2002)].

83. In a communication dated 22 November 2003, the CST-JBE alleges serious delays in the negotiation of a collective agreement, in contravention of the time limits established by legislation. It adds that the Nicaraguan Construction Chamber (CNC) failed to attend the hearings set by the conciliator, which delayed negotiations, and that the Ministry of Labour has not responded to the complainant's request to appoint the president of the strike council.

84. In its communication of 15 November 2004, the Government states that the collective agreement of 2002 provided for its own revision from 5 February 2003. The Government adds that, according to the employers, a considerable number of construction companies had closed down during the negotiations, while in others, workers were at their lowest productive capacity. The workers' committee complained of the repeated absences of the CNC from meetings. A request was made to the collective negotiations directorate to take steps in accordance with the law (section 385 of the Labour Code) to establish a strike council. The Government adds that, at the request of the members of the trade unions and confederations in this sector, the strike council was appointed within the statutory period once the negotiation process had been exhausted. The Government states that although this

process took longer than the period stipulated by law, extensions were given at the request of the parties for the purpose of consulting their respective leaders and economic sectors on the proposals that had been made. The Government concludes by stating that on 17 August 2004, definitive agreements were reached between the parties.

85. *The Committee takes note of this information and expects that, in future, the process of negotiating the collective agreement will take place within the time limits provided for in legislation.*

Case No. 2288 (Niger)

86. The Committee last examined this case at its March 2004 meeting [see 333rd Report, paras. 805-832]. On that occasion, the Committee made the following recommendations:

(a) As regards the measures taken by the Government to cut back on salaries and the non-compliance on its part with agreements concluded between the Government and the CDTN, the Committee requests the Government to give preference to collective bargaining in determining the conditions of employment of public servants and to respect the agreements which it has freely concluded on this issue.

(b) The Committee requests the Government to take the necessary measures swiftly, so as to ensure, by legislative or other means, that trade union representativeness is determined on the basis of criteria which are in conformity with freedom of association principles and to keep it informed in this respect.

(c) The Committee requests the Government to ensure that compensatory guarantees, such as conciliation and arbitration proceedings, be granted to customs officials who have been deprived of the right to strike and to keep it informed in this respect.

(d) The Committee requests the Government to make swift amendments to the legislation to restrict requisition orders to essential services in the strict sense of the term to public servants exercising authority in the name of the State and to situations of acute national crisis, and to keep it informed in this respect.

87. In its communication of 20 September 2004, the Government provides information on each of the recommendations made by the Committee. It stresses, inter alia, that:

(a) several bargaining frameworks have been set up to allow the social partners to express their opinions on all the measures relevant to them that are planned by the Government:

(i) the creation of an Interministerial Bargaining Committee with the social partners, its aim being to provide regular information for the social partners, to discuss the demands of trade union organizations, to bargain for and conclude agreements with the social partners and to supervise compliance with the terms of agreements concluded with the social partners;

(ii) the creation of the National Committee for Social Dialogue (CNDS), a body responsible for preventing and finding solutions for social conflicts of all types; and

(iii) Nigerian legislation promotes collective bargaining; workers' rights in this area are recognized by sections 173-199 of Decree No. 96-039 of 29 June 1996 and sections 7 and 8 of the Interoccupational Collective Agreement of 15 December 1972;

(b) the process continues of establishing criteria to facilitate the determination of the representativeness of trade union organizations; in this regard, a mission visited the Republic of Benin in August 2004 to gain inspiration from that country's experience in the area of trade union elections;

(c) the right of customs officials to organize is recognized, and several bargaining frameworks have been set up for their demands. This allows their trade unions: (i) to

bargain directly with the General Customs Board and with the Ministry in question; (ii) to bargain with the Interministerial Bargaining Committee through being represented by the trade union centres to which they are affiliated; or (iii) to use the facilitation services of the CNDS at all levels of bargaining whenever they so request;

(d) the process of reviewing the Decree On the Right to Strike of State Officials is developing as hoped with the establishment, by Order No. 0825/MFP/T of 2 June 2003, of a national tripartite committee responsible for implementing the recommendations of one-day conferences on the right to strike and the representativeness of trade union organizations.

88. *The Committee takes note of this information and requests the Government to continue to keep it informed with regard to the development of the process of establishing criteria for the representativeness of trade union organizations and to send it any texts that are relevant in this regard.*

89. *In addition, with regard to the process of reviewing the Decree On the Right to Strike of State Officials, the Committee hopes that the amended text will take account of the Committee's prior recommendation and will restrict requisition orders to essential services in the strict sense of the term, to public servants exercising authority in the name of the State and to situations of acute national crisis. It requests the Government to continue to keep it informed in this regard and to send it a copy of the amended Decree as soon as it is adopted.*

Case No. 1996 (Uganda)

90. The Committee last examined this case at its March 2004 session, where it deplored that, more than four years after the first examination of the case and after repeated demands, some issues were still pending. Recalling that the Uganda Textile, Garments, Leather and Allied Workers' Union (UTGLAWU) was the most representative, if not the sole, organization of workers in the textile sector in Uganda, the Committee once again requested the Government to speed up the process concerning the recognition of the UTGLAWU at Southern Range Nyanza Ltd., and to take measures to remedy this situation. The Committee further requested the Government to provide information: on various legal proceedings filed by the UTGLAWU against a number of companies (Vitafoam Ltd.; Leather Industries of Uganda; Kimkoa Industry Ltd.; Tuf Foam (Uganda) Ltd.; and Marine and Agro Export Processing Co. Ltd.) to obtain recognition for collective bargaining purposes; and on the adoption of two draft bills amending some provisions of the Trade Unions Decree [see 333rd Report, paras. 96-101].

91. In a communication dated 12 January 2005, the Government indicates that it has always pursued a policy of consultation, dialogue and education as a strategy for dealing with disputes relating to non-recognition of trade unions. In this spirit, the UTGLAWU and Southern Range Nyanza Ltd. were given ample time to negotiate, but this has not worked. The Government further states that section 17(2) and (3) of the Trade Unions Act, 2000, which provide for compulsory recognition of a union by an employer, are not applied in practice. The Government adds that it has exhausted all appropriate conciliatory measures, to no avail; the next step is arbitration by the Industrial Court, where the process is under way.

92. As regards the Labour Disputes (Arbitration and Settlement) Bill, and the Labour Unions Bill, elaborated with a view to amending some provisions of the Trade Unions Decree that are inconsistent with freedom of association principles, the Government states that the principles for these Bills are now under consideration of the Ministry of Finance for clearance of financial implications. A certificate will be issued to enable the Ministry of Labour to submit these bills to Cabinet for consideration and adoption.

93. *The Committee takes note of the Government's reply. Pointing out that more than six years have now elapsed since the filing of this complaint, without tangible results, the Committee must emphasize, once again, that employers should recognize, for collective bargaining purposes, the representative organizations of the workers employed by them or organizations that are representative of workers in a particular industry [see* ***Digest of decisions and principles of the Freedom of Association Committe****e, 4th edition, 1996, paras. 821, 823 and 824]. In this connection, the Committee notes with regret that the Government merely states that the provisions of the Trade Union Act that are meant to remedy those situations of refusal to recognize a representative union "are not applied in practice", and stresses that the major responsibility for having such legislation applied in practice rests with the Government. Noting further that the matter is pending before the Industrial Court, the Committee trusts that the latter will handle a decision in the very near future, in view of the inordinate delays already incurred, and requests the Government to provide it as soon as possible with a copy of the said judgment.*

94. *Noting that the Bills amending some provisions of the Trade Unions Decree that are inconsistent with freedom of association principles, will be submitted to Cabinet for consideration and adoption, after clearance by the Ministry of Finance, the Committee trusts that these Bills will be adopted in the very near future and requests the Government to provide it with a copy of these Bills as soon as they are adopted.*

95. *The Committee notes that the Government has not yet provided any information on the legal proceedings filed by the UTGLAWU against a number of companies (Vitafoam Ltd.; Leather Industries of Uganda; Kimkoa Industry Ltd.; Tuf Foam (Uganda) Ltd.; and Marine and Agro Export Processing Co. Ltd.) in order to obtain recognition for collective bargaining purposes. The Committee urges once again the Government to provide without delay information on these legal proceedings.*

Case No. 1965 (Panama)

96. At its meeting in November 2004, the Committee stated that it was awaiting the decision on the dismissal of Darío Ulate and Julio Trejos [see 335th Report, para. 161].

97. In its communication of 5 January 2005, the Government states that to date the court has made every possible effort to locate representatives of the enterprise against which the complaint has been made, but has been unable to do so for more than one year because the enterprise is no longer at the address indicated in the complaint. The Government adds that it is waiting for the workers to seek a court order against the enterprise. According to the documents provided by the Government, this situation has prevented a final decision from being taken. These documents refer in particular to unsuccessful official efforts to locate the employer enterprise.

98. *The Committee takes note of this information and requests the Government to keep it informed of developments.*

Case No. 1785 (Poland)

99. The Committee last examined this case at its March 2004 session, where it requested the Government to continue to keep it informed in respect of the remaining claims pending before the Social Revindication Commission (the "Commission") and the Supreme Administrative Court as well as of any further developments in respect of the Employees' Recreation Fund [see 333rd Report, paras. 116-118].

100. In a communication of 25 October 2004, the Government submits further information relating to the proceedings both before the Commission and the Administrative Courts, regarding the restitution of assets of NSZZ Solidarnosc, forfeited under martial law. As far as the Commission is concerned, the Government indicates that: (1) there is currently one case pending before the Commission; it seems that the last examination of this case took place on 25 June 2004 and was adjourned for an indefinite duration, at the request of the claimant so that it could complete its evidence; (2) the Commission handed down a decision in favour of NSZZ Solidarnosc on 25 June 2004; the decision may be appealed against within 60 days as of the date of its receipt by the parties; (3) in a decision of 7 May 2004, the Voivodship Administrative Court in Warsaw invalidated a decision of the Commission regarding the payment of a compensation by the State Treasury in favour of an "establishment organization" of NSZZ (a workers' organization functioning at the level of a particular enterprise); the case is sent back to the Commission which will re-examine it after the notification of the court's ruling.

101. With respect to the Administrative Courts, the Government indicates that: (1) the Voivodship Administrative Court in Warsaw is examining an appeal lodged against a decision of the Commission by an establishment organization of NSZZ Solidarnosc as well as an appeal lodged by the Federation of Miners' Trade Unions in Poland; (2) an appeal dated 2 June 2004, was lodged with the Supreme Administrative Court against a decision of the Voivodship Administrative Court in Warsaw dated 16 March 2004 dismissing an appeal submitted by an establishment organization of NSZZ Solidarnosc against a decision of the Commission refusing the restitution of assets. The Government underlines in this respect that both courts will determine whether these cases may return before the Commission. Finally, the Government adds that one cannot exclude sporadic claims from establishment organizations of NSZZ Solidarnosc and which could re-ignite proceedings that already resulted in valid decisions (such would be the situation if for example an organization discovers documents existing at the date the decision had been rendered and unbeknownst to the Commission). Indeed, such claims were orally announced to the Commission.

102. *The Committee notes this information that is along the same lines as the information the Government has been providing to the Committee for some time, on the continuing proceedings at the national level regarding the restitution of assets of NSZZ Solidarnosc, forfeited under martial law. Noting that the NSZZ Solidarnosc and its affiliates seem to be availing themselves fully of the recourses available at the national level and that the Committee of Experts on the Application of Conventions and Recommendations is also following the matter within the framework of the application of Convention No. 87, the Committee trusts that the national proceedings will continue to fully involve the organizations concerned and that all the claims will be settled as rapidly as possible.*

Case No. 2255 (Sri Lanka)

103. The Committee last examined this case which concerns certain provisions of the Guidelines for the Formation and Operation of Employees' Councils issued by the Board of Investment (BOI), the overseeing authority for Sri Lanka's free trade zones (FTZs) and the BOI Manual on Labour Standards and Employment Relations, at its November 2004 meeting (see 335th Report, paragraphs 173-180). During its previous examination of the case, the Committee had: (1) noted the observation of the Government that the modifications to sections 5, 12.3 and 13(ii) of the BOI Guidelines for the Formation and Operation of Employees' Councils made pursuant to the recommendations of the Committee, would be presented for discussion and adoption to the National Labour Advisory Council (NLAC) once it is reconstituted and resumes its meetings and requested the Government to keep it informed in this regard; (2) noted the observation of the Government that the issue of the 40 per cent requirement for the recognition of trade union

representativeness would be taken up by the NLAC once reconstituted and requested the Government to keep it informed in this regard; (3) noted that the Government did not indicate any further measures to promote collective bargaining, as previously requested by the Committee and therefore requested the Government to indicate the concrete measures taken to promote collective bargaining in FTZs and to provide statistical data regarding the number of collective agreements concluded in FTZs; and (4) noted that section 9A of the BOI Manual on Labour Standards and Employment Relations had been revised so as to provide trade union representatives access to workplaces in FTZs, under certain conditions but that such access was envisaged only "for the purpose of performing representation functions" and therefore requested the Government to specify the exact scope and meaning of the phrase.

104. In its communication of 4 January 2005, the Government indicates with regard to the first issue noted above that the BOI guidelines were amended on the basis of the recommendations of the Committee and that it is only in respect of the 40 per cent requirement that the government had earlier indicated that action was being taken to bring up the matter at the NLAC.

105. In respect of the 40 per cent requirement for the recognition of trade union representativeness for collective bargaining purposes, the Government indicates that the issue has been noted for listing in the NLAC agenda within the next three months and that further developments in this regard will be notified to the Committee in March 2005.

106. In respect of the third issue mentioned above, the Government indicates that the Ministry has initiated measures to promote collective bargaining in FTZs through the mediation officers of the Department of Labour assigned to the FTZs and the Assistant Commissioners of Labour in charge of the zonal areas and that further intensive measures will be undertaken by the Department of Labour after providing suitable training to the officers who are identified for this purpose. The Government also refers to the annexure to its observations, which according to the Government indicates that three collective agreements were concluded in 2004 and another three are being negotiated. In addition, two more agreements have been concluded as "memorandum of settlement" which falls within the meaning of collective agreement.

107. In respect of the issue of access of trade union representatives being restricted for the performance of trade union functions, the Government indicates that the phrase "representation functions" embraces all activities and functions a trade union may undertake to protect and further the interests of its members. The Government also mentions the functions of branch unions established at the enterprise level and parent unions and explains when the parent union can have access to the workplace. According to the Government, trade unions have established branch unions to deal with the management on personnel and welfare matters and to handle grievances and disputes. Where the branch union fails to reach an accord with the management on any of these matters, the parent union steps in to pursue the disputed or unsettled issues with the management. The parent union itself can raise matters or submit claims affecting the interests of the members directly with the management. Collective bargaining is initiated by the parent union. Collective bargaining negotiations and conclusion of collective agreements are undertaken by the parent unions. For purposes of discussing any issues arising from disputed matters or unions' claims or for negotiating collective agreements, the parent union can seek entry to the workplace within or outside the FTZs. In practice, parent union officials may enter the zone to address annual general meetings of their branch union. The Government indicates that all these aspects fall within the scope of "representation functions" within an enterprise for the purpose of paragraph 9(A)(ii) of the BOI Manual on Labour Standards and Employment Relations.

108. *In respect of the first of the aforesaid issues, the Committee recalls that in its communication of 14 May 2004, the Government had indicated that the modifications to the BOI guidelines need to be presented to the NLAC for discussion and adoption and it had therefore requested the Government to keep it informed in this regard. The Committee notes that the Government in its communication of 4 January 2005 appears to however indicate that the BOI guidelines have been amended and only the issue of the 40 per cent requirement needs to be brought up before the NLAC. In the circumstances, the Committee requests the Government to clarify whether the amendments to sections 5, 12.3 and 13(ii) of the BOI Guidelines for the Formation and Operation of Employees' Councils have come into effect.*

109. *In respect of the 40 per cent requirement for the recognition of trade union representativeness, the Committee notes that the Government has indicated that the issue has been noted for listing in the NLAC agenda within the next three months. The Committee requests the Government to keep it informed in this respect.*

110. *The Committee notes that according to the Government, the Ministry has initiated measures to promote collective bargaining in FTZs through the mediation officers of the Department of Labour assigned to the FTZs and the Assistant Commissioners of Labour in charge of the zone areas and that further intensive measures will be undertaken by the Department of Labour after providing suitable training to the officers who are identified for the purpose. The Government has however not specified what specific measures have been taken and are intended to be taken in this regard. The Committee therefore requests the Government to specifically indicate the measures taken to promote collective bargaining in the FTZs.*

111. *The Committee takes note of the statistical data furnished by the Government which indicates that three collective agreements were concluded in the FTZs in 2004, three are in the process of being negotiated and two agreements were concluded as memoranda of settlements. The Committee also notes that the annexure to the Government's communication of 4 January 2005 indicates that ten trade unions are operating in the zones and that their membership is spread over 54 enterprises and constitutes 10 per cent of the FTZ workforce. The annexure further indicates that an enterprise union affiliated to the All Ceylon Federation of Free Trade Unions had recently signed a collective agreement with the management.*

112. *In respect of the issue of access of trade union representatives to FTZs under section 9A of the BOI Manual on Labour Standards and Employment Relations, the Committee notes that according to the Government, the phrase "representation functions" includes all activities and functions that a trade union may undertake to protect and further the interests of its members. The Committee also notes that the Government has indicated that representatives of branch unions may have access to the workplace to deal with the management on personnel and welfare matters and to handle workers' grievances and disputes, and those of parent unions may have access for the purpose of discussing any issues arising from disputed matters or union claims or for negotiating collective agreements, and to address annual general meetings of the branch union. The Committee notes however that the explanation of the Government does not indicate that trade union representatives may have access for the purpose of communicating to workers, the potential advantages of unionization. The Committee recalls in this context that 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 of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 954]. The Committee therefore requests the Government to take the necessary measures to ensure that trade union representatives can*

also seek access to FTZ enterprises under section 9A of the BOI Manual on Labour Standards and Employment Relations for the purpose of apprising the workers in the enterprises of the potential advantages of unionization.

Case No. 2148 (Togo)

113. This case was last examined by the Committee at its November 2003 session [see the 332nd Report, paras. 166 to 168]. On that occasion, it once again urged the Government to rescind the decrees declaring certain teachers to be absent without leave. The Committee also expressed the hope that the verification committee set up to determine which teachers were affected by the decrees would carry out its investigations very rapidly, and requested the Government to keep it informed of the outcome of those deliberations and of the decisions taken regarding the teachers still affected by the application of the decrees.

114. In its communication of 6 January 2005, the Government states that, in view of the fact that the verification committee has noted considerable differences between the list provided by the National Union of Independent Trade Unions (UNSIT) and that held by the Directorate of Human Resources of the Ministry of National Education, the results of the committee's work cannot be used in their present form, and more in-depth examination within a wider and more consensual framework is required. The Government states in this regard that, given the sensitive nature of the case and the many associated difficulties, it has been agreed with UNSIT that the case will be placed on the agenda of forthcoming social dialogue meetings, which are at an advanced preliminary stage.

115. *The Committee takes note of this information. Recalling once again that the events which gave rise to this complaint date from June 1999 and that the Government has still not acted on the Committee's recommendation, reiterated since March 2002, to rescind the decrees in question [see the 327th Report, para. 804], the Committee strongly reiterates its previous recommendation.*

Case No. 2192 (Togo)

116. The Committee last examined this case at its March 2003 meeting [see 330th Report, paras. 1054 to 1076]. On that occasion, the Committee had noted that the case concerned alleged acts of anti-union discrimination and interference by the company New Seed Processing Industry Oil of Togo (NIOTO) in the carrying out of trade union activities, and made the following recommendations:

- As regards the dismissal of Mr. Awity, General Secretary of the National Trade Union of Food and Agriculture Industries (SYNIAT), by the company NIOTO:
  - (i) the Committee requests the Government to keep it informed of the outcome of the legal proceedings concerning Mr. Awity's dismissal;
  - (ii) should it emerge that the dismissal was indeed motivated by anti-union discrimination, the Committee requests the Government to take immediate measures so that Mr. Awity is reinstated and to keep it informed of any measures taken.
- As regards the refusal of leave of absence: the Committee requests the Government to keep it informed of the reasons given by the NIOTO company for refusing leave of absence to Mr. Abotsi-Adjossou for the purpose of a trade union training.

117. With regard to the dismissal of Mr. Awity, the Government states, in a communication of 6 January 2005, that the case is still pending before the courts. According to the Government, the hearing that was to have been held on 3 August 2004 was postponed to

14 September 2004, and then postponed again to 1 February 2005. The Government states that it will without fail inform the Committee of any future developments in the case.

118. As regards the information requested concerning the refusal to grant Mr. Abotsi-Adjossou leave of absence, the Government refers to a letter in which the managing director of NIOTO states that he received the application for leave of absence on 26 March for a meeting scheduled on 29 March, and that it was not possible to find a replacement for Mr. Abotsi-Adjossou at such short notice. The managing director also states that NIOTO is not, under the laws and regulations currently in force, required to grant requests for leave of absence for employees to attend a trade union round table. In fact, provisions concerning such an obligation – which is strictly limited in scope – apply only to trade union delegates. According to the managing director, Mr. Abotsi-Adjossou did not occupy such a position at the time of the application for leave, and still does not; NIOTO was therefore under absolutely no obligation to grant him trade union leave.

119. *The Committee takes note of the information provided by the Government, which justifies the refusal to grant leave of absence to Mr. Abotsi-Adjossou for the purpose of a trade union training by citing the fact that the notice was too short and the applicant was not a trade union representative.*

120. *With regard to the dismissal of Mr. Awity, the General Secretary of SYNIAT, by the company NIOTO, the Committee reiterates it previous recommendation and requests the Government to continue to keep it informed of any progress made with regard to the judicial proceedings currently under way.*

Case No. 2038 (Ukraine)

121. The Committee last examined this case at its June 2004 meeting when it noted the contradiction between the newly amended section 16 of the Law on Trade Unions, according to which "a trade union acquires the rights of a legal person from the moment of the approval of its statute" and section 3 of the Law of Ukraine on the State Registration of Legal Persons and Physical Persons/Entrepreneurs of 15 May 2003, according to which, "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", as well as section 87 of the Civil Code of 16 January 2003, which provided that an organization acquires its rights of legal personality from the moment of its registration. The Committee requested the Government to provide clarification in this respect [see 334th Report, paras. 79-81].

122. In its communication of 27 August 2004, the Government states that a trade union or an association of trade unions acquires the right of legal personality from the moment of the adoption of its statute (regulations). The primary organizations of the trade union, acting on the basis of its statute, shall also acquire the right of legal personality. The Government indicates that the Law of Ukraine on the State Registration of Legal Persons and Physical Persons/Entrepreneurs has entered into force on 1 July 2004. In accordance with article 4 of this Law, the state registration of legal and physical persons/entrepreneurs shall testify to the fact of the establishment or termination of the activities of a legal person, of the acquisition of a status of an entrepreneur by a physical person or loss of such a status, as well as of the application of other registration procedures, provided for by this Law, by way of making relevant entries into the Unified State Register. Parts 2 and 3 of article 3 of this Law provide that the distinctive features of the state registration of the associations of citizens, including trade unions, could be established by legislation. In accordance with paragraph 3 of the Final Provisions of the Law, the laws and normative and legal

instruments, adopted prior to the enactment of this Law, shall be effective only in respect of those provisions thereof, which do not contradict it.

123. The Government further states that in accordance with part 4 of article 87 of the Civil Code of Ukraine, a legal person shall be deemed established from the date of its state registration. It admits that part 3 of article 3 of the Law of Ukraine on the State Registration of Legal Persons and Physical Persons/Entrepreneurs and part 4 of article 87 of the Civil Code of Ukraine are not in conformity with article 16 of the Law of Ukraine on the Trade Unions.

124. The Government informs that the People's Deputies of Ukraine, Mr. Volynets, Mr. Derkach and Mr. Ekhanurov submitted to the Supreme Rada of Ukraine a draft Law on Introducing Amendments to the Civil Code of Ukraine. It is proposed in article 2 of the draft Law to add in part 4 to article 87 the following sentence: "trade unions shall acquire a status of a legal person from the moment of the approval of their statutes (regulations)".

125. The Government further informs that with a view of implementing the Final Provisions of the Law of Ukraine on the State Registration of Legal Persons and Physical Persons/Entrepreneurs and the instructions of the Cabinet of Ministers of Ukraine of 12 June 2003, No. 35948, the State Committee on Entrepreneurship has developed and submitted to the Government, by its letter of 12 May 2004, a draft Law of Ukraine on Introducing Amendments to Certain Laws of Ukraine with a view of bringing these Laws into conformity with the Law of Ukraine on the Trade Unions. Pending the adoption of the aforesaid Law by the Supreme Rada of Ukraine, the State Committee on Entrepreneurship has sent, by its letter of 12 July 2004, to its territorial offices an explanatory note in respect of including in the Unified State Register of the Legal Persons and Physical Persons/Entrepreneurs the data about their registration.

126. *The Committee notes the information provided by the Government. It hopes that the relevant legislation, which would bring the Law of Ukraine on the State Registration of Legal Persons and Physical Persons/Entrepreneurs and the Civil Code into conformity with the Law of Ukraine on the Trade Union, would be soon adopted. It requests the Government to keep it informed of any developments in this respect.*

Case No. 2079 (Ukraine)

127. The Committee last examined this case at its June 2004 meeting when it urged the Government: (1) to transmit the conclusions of the independent investigation on violations of trade union rights at the "AY-I EC Rovnoenergo" and the "Volynoblenergo" enterprises; and (2) to set up an independent inquiry into the dismissal of Mr. Linnik 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 [see 334th Report, paras. 175-178].

128. In its communication of 27 August 2004, the Government indicates that the Main Direction of the Labour and Social Protection of the Population, in conjunction with the territorial branch of the State Labour Inspection in the Rovno Region carried out the inspection in connection with the complaint, lodged by the chairman of the trade union committee of the All-Ukrainian Trade Union "Capital-Regions". The Government indicates that in the current year, the management of the Open-end joint stock company "AIS Rovnoenergo" has been changed and so has its name (now Close-end joint stock company "AIS Rovnoenergo"). At present, there are two trade union organizations operating at this enterprise: a primary trade union organization of the Trade Union of the Workers of Energy Sector and Power Generating Industry – 1,350 members (Chairman of the trade union committee Mr. M.O. Masich) and a primary trade union organization of the

All-Ukrainian Trade Union "Capital-Regions" – 33 members. During the inspection, the facts of interference of the management of the "AIS Rovnoenergo" with the activities of the trade union organizations were not established.

129. The Government further indicates that the complaints, lodged by the chairman of the primary trade union organization of the All-Ukrainian Trade Union "Capital-Regions" at the "Volynoblenergo" enterprise with the territorial branch of the State Labour Inspection in the Volyn Region, concerning the harassment of himself and of the members of his trade union, were not corroborated.

130. As concerns the dismissal of Mr. Linnik from the Lutsk Bearing Plant, the Government reiterates that it was carried out without violation of the legislation in force. The Government explains that Mr. Linnik, a press-forging plant operator, was dismissed according to paragraph 1 of article 40 of the Labour Code of Ukraine in connection with the reduction of personnel (staff), related to the restructuring at the plant, which was carried out in 1999. The procedure of the discharge of Mr. Linnik was carried out in compliance with the requirements of the legislation in force. The consent to his dismissal from office was given by the shop and plant committees of the All-Ukrainian Trade Union Association "Solidarity of Workers" (minutes of 1 April 1999, No. 36, and of 2 April 1999, No. 3, accordingly). Mr. Linnik was a member of this trade union. Mr. Linnik was notified in writing about his dismissal two months before his dismissal. The Government further points out that Mr. Linnik did not lodge an appeal against his dismissal from work, either with a labour dispute commission or with the court. Finally, the Government indicates that during the inspection, the facts of harassment of Mr. V.A. Linnik for his trade union activity on the part of the management of the Lutsk Bearing Plant were not corroborated.

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

Case No. 2271 (Uruguay)

132. At its meeting in June 2004, the Committee noted the sharp fall, from 95 per cent to 16 per cent, in the proportion of workers in all sectors covered by collective agreements, a fact that was not denied by the Government. The Committee requested the Government to take measures to promote collective bargaining in conformity with Article 4 of Convention No. 98; to examine, with the complainant and all other concerned parties, the state of collective bargaining in the graphic arts sector; and to communicate any measure taken to promote collective bargaining in that sector [see 334th Report, para. 812, approved by the Governing Body at its 290th Session (June 2004)].

133. In its communication of 24 November 2004, the Government states that there is currently a situation of expectation regarding the manner in which collective bargaining will be carried on in the country, given that the right of collective bargaining is not restricted in Uruguay and the convening of sectoral wage councils is one of the commitments of the new Government elect.

134. *The Committee takes note of this information, and requests the Government to communicate any measure adopted with a view to promoting collective bargaining.*

Case No. 2160 (Venezuela)

135. At its meeting in June 2004, the Committee requested the Government to indicate whether the trade unionists Messrs. Amaro, Aular, Sivira, Montero and Acuña remained dismissed

for their participation in the establishment of a trade union [see 334th Report, para. 91, approved by the Governing Body at its 290th Session (June 2004)].

136. In its communication of 5 November 2004, the Government states that the workers Amaro and Aular withdrew their claim before the Supreme Court of Justice (Political/Administrative Chamber). As regards Sivira and Acuña, they applied to the judge on 22 June 2004 to continue examination of the case. Mr. Montero no longer works for the INLACA corporation.

137. *The Committee takes note of this information. It notes that the trade unionists Amaro and Aular withdrew the legal action which they had filed following their dismissal, and that the trade unionists Sivira and Acuña asked the court to continue examination of the case concerning their dismissal. The Committee requests the Government to communicate the details of any ruling handed down. The Committee requests the Government to indicate whether the trade unionist Montero has initiated legal action in connection with his dismissal.*

Cases Nos. 1937 and 2027 (Zimbabwe)

138. The Committee last examined these cases at its March 2004 session [see 333rd Report, paras. 171-176]. On that occasion, the Committee noted the Government's recent ratification of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and trusted that it would take efforts to ensure that its legislation was brought into conformity with the Convention. It therefore urged the Government to amend the Labour Relations Amendment Act No. 17/2002 to ensure that industrial action may be taken in respect of questions of economic and social policy without sanctions and to guarantee that no penal sanctions are taken in case of peaceful strikes and that sanctions are proportionate. In relation to the assault on the trade union leader, Mr. Morgan Tsavangirai, the Committee expressed its deep concern about the Government's lack of cooperation and deplored its persistent refusal to conduct an independent investigation. The Committee urged the Government to ensure that an independent investigation was fully carried to its term with the aim of identifying and punishing the guilty parties, and requested to be kept informed of the measures taken in this regard as well as the results of the investigation. Concerning the investigation into the arson of the ZCTU offices, the Committee requested to be kept informed of any development in this respect.

139. In a communication dated 17 December 2004, the Government stated that there have been no material developments regarding these cases and that it accordingly wished to reaffirm its previously submitted comments and observations.

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

141. *Given the lack of material developments regarding the very serious matters raised by these cases, the Committee is obliged to once again express its deepest concern at the Government's lack of cooperation in relation to the legislative changes necessary to ensure compatibility with the Convention and the holding of independent investigations into the allegations of assault on a trade union leader and arson of union facilities. The Committee recalls that when a state decides to become a member of the Organization, it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including the principles of freedom of association, and reminds the Government of its obligations to respect fully the commitments undertaken by ratification of ILO Conventions [see* ***Digest****, op. cit., paras. 10-11]. The Committee once again repeats its earlier conclusions in these cases and strongly urges the Government to take the*

appropriate steps in this regard. The Committee requests to be kept informed of all developments envisaged or undertaken in relation to the matters raised by these cases.

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142. Finally, as regards the following cases, the Committee requests the governments concerned to keep it informed of any developments relating to these cases.

Case	Last examination on the merits	Last follow-up examination
1826 (Philippines)	March 1996	November 2003
1890 (India)	June 1997	March 2004
1951 (Canada)	June 2001	March 2004
1952 (Venezuela)	March 1999	March 2004
1975 (Canada)	June 2000	March 2004
1991 (Japan)	November 2000	June 2004
2086 (Paraguay)	June 2002	November 2003
2096 (Pakistan)	March 2004	–
2114 (Japan)	June 2002	November 2002
2126 (Turkey)	March 2002	June 2004
2132 (Madagascar)	June 2003	November 2004
2133 (The former Yugoslav Republic of Macedonia)	November 2002	November 2003
2146 (Serbia and Montenegro)	March 2002	November 2004
2150 (Chile)	November 2002	March 2004
2156 (Brazil)	March 2002	November 2004
2158 (India)	March 2003	March 2004
2161 (Venezuela)	March 2003	March 2004
2164 (Morocco)	March 2004	November 2004
2166 (Canada)	March 2003	March 2004
2172 (Chile)	March 2004	–
2173 (Canada)	March 2003	March 2004
2175 (Morocco)	November 2002	November 2004
2180 (Canada)	March 2003	March 2004
2186 (China, Special Administrative Region of Hong Kong)	March 2004	–
2187 (Guyana)	November 2003	November 2004
2196 (Canada)	March 2003	March 2004
2197 (South Africa)	June 2004	–
2200 (Turkey)	June 2004	–
2217 (Chile)	November 2004	–
2226 (Colombia)	November 2004	–
2227 (United States)	November 2003	November 2004
2228 (India)	November 2004	–
2229 (Pakistan)	March 2003	March 2004
2234 (Mexico)	November 2003	November 2004
2237 (Colombia)	June 2003	November 2004

Case	Last examination on the merits	Last follow-up examination
2252 (Philippines)	November 2003	November 2004
2253 (China, Special Administrative Region of Hong Kong)	June 2004	–
2256 (Argentina)	June 2004	November 2004
2257 (Canada)	November 2004	–
2266 (Lithuania)	June 2004	November 2004
2267 (Nigeria)	June 2004	–
2273 (Pakistan)	November 2004	–
2274 (Nicaragua)	November 2004	–
2276 (Burundi)	November 2004	–
2280 (Uruguay)	June 2004	–
2283 (Argentina)	November 2004	–
2285 (Peru)	November 2004	–
2297 (Colombia)	June 2004	November 2004
2303 (Turkey)	November 2004	–
2330 (Honduras)	November 2004	–

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

144. In addition, the Committee has just received information concerning the follow-up of Cases Nos. 2006 (Pakistan), 2017 (Guatemala), 2048 (Morocco), 2050 (Guatemala), 2088 (Venezuela), 2097 (Colombia), 2109 (Morocco), 2111 (Peru), 2118 (Hungary), 2125 (Thailand), 2134 (Panama), 2138 (Ecuador), 2171 (Sweden), 2182 (Canada), 2188 (Bangladesh), 2208 (El Salvador), 2211 (Peru), 2215 (Chile), 2216 (Russian Federation), 2221 (Argentina), 2251 (Russian Federation), 2284 (Peru), 2289 (Peru), 2291 (Poland), 2296 (Chile), 2299 (El Salvador), 2301 (Malaysia), 2304 (Japan), 2305 (Canada), 2308 (Mexico), which it will examine at its next meeting.

CASE NO. 2153

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

Complaint against the Government of Algeria presented by the National Autonomous Union of Public Administration Staff (SNAPAP)

Allegations: The complainant organization alleges obstacles to the establishment of trade union organizations and a trade union confederation and to the exercise of trade union rights, anti-union dismissals, anti-union harassment by the public authorities, and the arbitrary arrest and detention of union members

145. The Committee has already examined the substance of this case at its March and November 2002 and March 2004 meetings, and on those occasions it presented interim

reports to the Governing Body [327th Report, paras. 140-161; 329th Report, paras. 160-174; 333rd Report, paras. 182-215; approved by the Governing Body at its 283rd, 285th and 289th Sessions].

146. The complainant organization sent new allegations and additional information in communications dated 3 May, and 8 and 27 June 2004.

147. The Government has sent its replies in communications dated 3 September and 3 November 2004.

148. Algeria has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). It has not ratified the Workers' Representatives Convention, 1971 (No. 135).

A. Previous examination of the case

149. In its previous examination of the case, the Committee made the following recommendations [see 333rd Report, para. 215]:

(a) The Committee requests the Government to specify reasons for which the complaint of the SNAPAP against the decision to close its Oran premises was, in its view, groundless, to indicate whether the rulings to suspend the complainant organization and to close its Oran office are still in force and, if this is the case, to revoke these decisions.

(b) The Committee urges the Government to take the necessary steps to ensure that the seven workers who were dismissed from the Prefecture of Oran are reinstated in their posts without delay and without loss of pay, and that they receive adequate compensation should reinstatement prove impossible. The Committee requests the Government to keep it informed of all steps taken in this respect.

(c) Regarding the representativeness of the complainant organization, the Committee requests the Government to take legislative or other steps so as to allow the determination of the representativeness of the complainant organization on the basis of objective and pre-established criteria, without revealing the identity of its members – for instance, by organizing ballots. The Committee requests the Government to keep it informed of measures taken in this respect.

(d) The Committee once again urges the Government to take the necessary steps to ensure that workers who are members of the SNAPAP can establish and join federations and confederations of their own choosing. It also requests to be kept informed with regard to the effective recognition of the Algerian Confederation of Independent Trade Unions (CASA) and of the Union of Civil Protection Officers. The Committee reminds the Government that the Office is at its disposal for assistance in this area.

(e) As regards the allegations of violent acts perpetrated by the authorities on 29 January 2003, namely, the beating of union members who were holding a sit-in, the Committee requests the Government to communicate its observations on these allegations without delay.

(f) With regard to the allegations concerning the arrest and detention of Mr. Salim Mecheri, National Secretary of the SNAPAP, Mr. Fodhil Agha and Mr. Djilali Bensafi, members of the trade union branch at the Oran Teaching Hospital (OTH), for posting notices about a lawful general strike in the health sector, and the allegation that the police summoned for questioning Mr. El Hachemi Belkhir, Mr Mohamed Benahmed, Mr. Rabeh Mebarki, Mr. Mokhtar Mesbah, Mr. Benchâa Benatia, Mr. Mohamed Bekhil and Mr. Djeloul Amar Behida, the Committee requests the Government to communicate its observations on these new allegations without delay.

(g) Concerning Mr. Bourada and Mr. Himer who, according to the Government, tried to force their way into the office of the Director of the OTH while addressing insults and

death threats against him, the Committee requests the Government to provide a copy of the judgement by which they were condemned.

(h) Concerning the decision to cancel the transfers of the members of the National Vocational Training Union, the Committee requests the Government to provide its observations on these new allegations.

B. New allegations

150. In its communication of 3 May 2004, the SNAPAP alleges that Mr. Khaled Mokhtari, Secretary-General of the National Union of Legal Personnel (UNPJ), was subjected to disciplinary measures in violation of trade union rights. At the 11 December 2003 session of its national council, the UNPJ had presented a list of demands, one of the essential points on which concerned the opening of negotiations with the ministry involved, and a motion in principle for a sit-in to be held in front of the ministry. As the ministry did not respond to these demands, the executive of the UNPJ decided on 23 April 2004 to hold the sit-in on 5 May. On 27 April, Mr. Mokhtari was suspended from his duties for being absent for the whole of 24 April, despite the fact that he had in fact been recovering from an illness. On 28 April, Mr. Mokhtari was put on probation (meaning that he was obliged to present himself to the authorities four times a week and was prohibited from leaving the *commune*) on the grounds of his having incited a mob. The SNAPAP considers this punishment unjustified and disproportionate and believes it to be an act of intimidation against its members and trade unionists in general.

151. In its communication of 8 June 2004, the complainant organization states that seven trade union members working at the headquarters of the Prefecture of Oran were placed on probation, given suspended sentences of six months and fined DZD5,000. Six trade union members working at the training hospital were remanded in custody for four days, given suspended sentences and dismissed from their positions. The Prefect of Oran is pressurizing workers to withdraw their membership of the SNAPAP and to denounce the involvement of the ILO in the conflicts between the SNAPAP and the Algerian authorities.

152. In its communication dated 27 June 2004, the complainant organization accuses departments of the Ministry of Labour of showing bias by stating their acknowledgement, in a communication of 22 June 2004, of the election of new SNAPAP leadership bodies and the election of Mr. Belkacem Felfoul as the SNAPAP President, which took place at a so-called "extraordinary congress" held at Sidi Fredj on 25 and 26 May 2004. The complainant organization disputes the legitimacy of this congress, and insists that Mr. Malaoui's position as Secretary-General was confirmed at a SNAPAP management conference held in Algiers on 19 June; his term of office will be completed in March 2005 and a congress must be held during the first four months of 2005 with a view to an election.

C. The Government's new reply

153. In its communication of 3 September 2004, the Government presents detailed observations in reply to the recommendations and requests contained in the 333rd Report of the Committee.

154. With regard to the complaint by the SNAPAP regarding the closure of its Oran premises and related issues [Recommendation 215(a) of the 333rd Report], the Government notes that it has sent the Committee its reasons for closing the premises and recalls that the decision to close the premises was based on a bailiff's statement that the SNAPAP trade union section at the Prefecture at Oran was no longer representative in the sense given by sections 34-37bis of Act No. 90-14 of 2 June 1990 concerning forms of exercise of trade

union rights, and that it could therefore no longer carry on trade union activities in the workplace. The closure of the premises is a result of this lack of representativeness. This concerned only the Oran section, and not the organization itself, which continues to carry out its activities freely at national level. In order to reopen an office on Prefecture premises, the trade union section will have to prove its representativeness within the Prefecture by means of elections demonstrating that its membership makes up at least 20 per cent of the total number of eligible workers (section 35 of Act No. 90-14 of 2 June 1990). Under this Act, the SNAPAP is allowed to bring the matter before a competent court of law. However, aware that it would not be able to meet the required legal conditions, it has not taken this path.

155. With regard to the seven workers dismissed from the Prefecture of Oran [Recommendation 215(b)], the Government recalls its previous statement that the sanctions taken against these trade union members resulted from serious professional errors committed by them within a public administration building, namely, behaviour of a type to cause serious disruption to the running of public services. This took the form of a demonstration inside the premises of the Prefecture with signs and placards, followed by hindrances to people's freedom to work, disruption of public order and damage to public property. This led the employer to take the matter to court where the demonstrators were given suspended sentences of three months and charged fines of DZD5,000. After the sentencing, the demonstrators' employer summoned them before a joint committee sitting as a disciplinary council which decided to dismiss them. Therefore, a work relationship could no longer continue between these workers and their employer, the public administration.

156. With regard to the representativeness of the complainant organization [Recommendation 215(c)], the legislation provides that, in the framework of a single employer, those trade unions shall be considered as representative that group together at least 20 per cent of all workers (articles 34-37bis of Act No. 90-14 of 2 June 1990). By virtue of section 40 of the same Act, any organization may establish a structure in any enterprise, institution or administration in order to ensure the representation of the workers covered if it groups together at least 30 workers. The employer organization is obliged to verify the application of these conditions, without any distinction or exception. No trade union organization claiming to be representative at the Prefecture of Oran has provided it with any information that would allow it to verify that organization's representativeness with a view to forming a union section in the workplace. Despite this, the SNAPAP has benefited from financial assistance from the State in the context of the promotion of social dialogue. The Government recalls that Act No. 90-14 has been recognized as being in conformity with Convention No. 87.

157. With regard to the possibility of establishing federations and confederations, the effective recognition of the Algerian Confederation of Independent Trade Unions (CASA) and the Union of Civil Protection Workers [Recommendation 215(d)], the Government states that the SNAPAP is registered as a trade union organization for public administration personnel and not as a confederation of trade union organizations. In a letter dated 20 April 2003, the Government reminded the SNAPAP of the substance of section 4 of Act No. 90-14 of 2 June 1990, which provides that "unions, federations, and confederations shall be governed by the same provisions as those which apply to trade union organizations". In no way does this provision present an obstacle to the establishment of unions or federations. Civil protection officers may form a trade union organization if they so wish; as soon as such an organization is registered, it may affiliate to a confederation of their choice. As regards the CASA, the Government sent its observations to the Committee at the appropriate time, and the competent authority sent, on 30 April 2001, its own observations to the parties that were proposing the establishment of the confederation (a copy of which forms Annex 2 of the Government's communication). These parties, which include the

SNAPAP, have still not replied to these observations to this day; this would indicate that it was an isolated initiative on the part of a single trade union organization rather than an expression of the collective will of [all] the trade union organizations involved. Whatever the case, the competent authority awaits this response in order to be able to complete its examination of the issue.

158. With regard to the allegations of violent acts perpetrated on 29 January 2003 against union members who were holding a sit-in [Recommendation 215(e)], the Government states that the individuals involved were disrupting public order and endangering public and private property, and that this led the authorities to intervene in order to maintain order and protect property and persons. This intervention had nothing to do with any alleged violations of trade union rights; rather, it fell under the authorities' mandate to maintain public order and protect persons and property.

159. As regards the allegations concerning the arrest and detention of Mr. Salim Mecheri, Mr. Fodhil Agha and Mr Djilali Bensafi, and the questioning by police of Mr. El Hachemi Belkhir, Mr. Mohamed Benahmed, Mr. Rabeh Mebarki, Mr. Mokhtar Mesbah, Mr. Benchâa Benatia, Mr. Mohamed Bekhil and Mr. Djeloul Amar Behida [Recommendation 215(f)], the Government states that Mr. Mecheri, Mr Agha and Mr Bensafi insulted, threatened and used force against the Director of the OTH, who requested officers on guard at the hospital to intervene. In a gesture of peace, the Director declined to press charges against the individuals concerned, despite their irresponsible behaviour; they were released and the case was closed. As concerns the seven other trade union members who were civil protection officers of the Prefecture of Oran, these individuals began protest actions on 4 January 2004 by launching a hunger strike and inciting workers to strike and to hinder the freedom of others to work. This constitutes a serious violation of section 34 of Act No. 90-02 of 6 February 1990 concerning the prevention and settlement of [collective] labour disputes and the exercise of the right to strike, and is an offence punishable by prison. Moreover, a bailiff's statement established the fact that the SNAPAP did not have the legally required representativeness necessary to announce a strike. No administrative proceedings have been launched against those involved but a complaint has been submitted to the competent court in respect of the above events.

160. The Government encloses a copy of the judicial decisions given against Mr. Bourada and Mr. Himer [Recommendation 215(g)].

161. Concerning the decision to cancel the release of certain members of the National Vocational Training Union (UNFP) for the purposes of trade union work [Recommendation 215(h)], the Government states that this issue is regulated by Act No. 90-14 of 2 June 1990, which provides that only trade union organizations that are registered and representative at national level may demand the release of members for trade union work and engage in collective bargaining with the employer organization. As it has never submitted an application for official recognition to the competent authority, the UNFP does not legally exist in the terms given in section 4 of Act No. 90-14.

162. The Government adds that conflicts have recently flared up within the leadership of the SNAPAP itself. Its leadership bodies have held several different management congresses, whose legitimacy has not yet been determined by the courts. Thus, Mr. Rachid Malaoui was Secretary-General of the SNAPAP from 2001 until the extraordinary congress of December 2003, which resulted in the election of Mr. Hamna Boumkhila as Secretary-General. On 24-25 May 2004, the SNAPAP held a further extraordinary congress which elected Mr. Belkacem Felfoul (a founder member of the SNAPAP) as Secretary-General. Further, a general labour inspectorate report of 2 August 2004 shows that a complaint was submitted to the Court of El Harrach (Prefecture of Algiers) by Mr. Felfoul against Mr. Malaoui on various grounds relating to the financial management of the SNAPAP and

concerning his recognition as the legitimate Secretary-General of the organization. The Government will provide a copy of the decision of the Court once it has been passed. There are currently three leadership bodies, each of which claims to be legitimate. The internecine squabbles of the SNAPAP have caused it to lose support, harmed its ability to mobilize workers and damaged its representativeness. The election of new leadership bodies of trade unions is regulated by section 14 of Act No. 90-14, which provides that "leadership bodies of trade union organizations shall be elected and renewed in accordance with democratic principles and in compliance with the rules governing them". Where an internal conflict arises, the parties concerned can take the matter before the relevant courts, which are the only competent bodies in this regard. For its part, the administration is observing strict neutrality and is making sure not to favour any one of the factions until the Court has given its decision on the matter.

163. With regard to the allegations of the SNAPAP concerning Mr. Khaled Mokhtari, the Government states in its communication of 3 November 2004 that Mr. Mokhtari's claim to be a member of the "National Union of Legal Personnel" is false and that the founder members of this so-called trade union organization have never submitted an application to be recognized as such, as required by sections 4 and 10 of Act No. 90-14. Like all state employees, Mr. Mokhtari is covered by rules and regulations defining his rights and obligations, and the administrative measures taken against him comply with disciplinary rules for public institutions and administrations. His employer, the Court of El Amria (Prefecture of Aï Temouchent), charged him with forming a mob and hindering people's freedom to work inside the court building. Such behaviour is prohibited by section 100 of the Penal Code and by section 34 of Act No. 90-02 concerning the prevention and settlement of collective labour disputes and the exercise of the right to strike. Mr. Mokhtari was suspended in application of section 131 of Decree No. 85-59, which stipulates that "given the specific nature of the work entrusted to public institutions and administrations and the consequences of this in terms of the professional obligations of the workers in question, a public employee who is undergoing criminal proceedings that prevent her/him from continuing to work shall be suspended immediately. Her/his final position shall not be settled until the decision of the court to prosecute has been confirmed". Thus, the suspension of Mr. Mokhtari is a result of his breach of professional duty and has no connection with the carrying out of trade union activities or his membership of a trade union, as he claims; it is, in fact, a protective measure taken until the Court pronounces its decision. His much vaunted trade union membership does not exempt him from complying with regulations governing labour relations in public administration – in particular, those governing the position of clerk of the court, which impose on him specific obligations. The Government adds that the SNAPAP continues knowingly to support both trade union activities carried out with respect for the law and behaviour by individual state employees that violates professional obligations. The SNAPAP is once again demonstrating a certain thoughtlessness in appealing to the Committee on Freedom of Association without ensuring beforehand that the information it has is, in fact, correct. Like all trade union organizations, the SNAPAP has every opportunity to appeal to competent judicial bodies if it believes undue measures have been taken against it by the administration, but it has never done this. The Government recalls that Act No. 90-14 guarantees the protection of trade union delegates and provides them with the means for this protection. Lastly, the Government points out that, in acting as it has done, the SNAPAP has unjustifiably set itself up as a "confederation", in violation of relevant Algerian legislation. Moreover, in defending a "trade unionist" who is part of a trade union which is itself unregistered and with which the SNAPAP has no structural relationship, the SNAPAP has claimed a prerogative to which it has no right. This is simply one more example of its casual attitude towards relevant national legislation.

D. The Committee's conclusions

164. *The Committee recalls that this case, which it is examining for the fourth time since the submission of the complaint in September 2001, concerns allegations of obstacles to the establishment of trade union organizations and confederations as well as to the exercise of trade union rights, anti-union suspensions and dismissals, acts of harassment by the authorities and arbitrary arrest and detention of trade union members.*

Internal disputes within the SNAPAP

165. *With regard to the internal disputes of the SNAPAP, the Committee notes that three congresses have been held in the recent past by various opposing factions (December 2003, resulting in the election of Mr. Boumkhila; 25-26 May 2004, resulting in the election of Mr. Felfoul; 19 June 2004, confirming the election of Mr. Malaoui) and that, according to the information communicated by Mr. Malaoui on behalf of the SNAPAP in his communication of 27 June 2004, a congress is to be held during the first four months of 2005 with a view to holding an election. The Committee recalls that it is not competent to make recommendations on internal dissensions within a trade union organization, so long as the Government has not intervened in a manner which might affect the exercise of trade union rights and the normal functioning of an organization, and that judicial intervention would permit a clarification of the situation from the legal point of view for the purpose of settling the question of the leadership and representation of the organization concerned [see* ***Digest of decisions and principles of the Committee on Freedom of Association****, 4th edition, 1996, para. 965]. The Committee notes the Government's assurances of neutrality on this matter, but also takes note of the complainant organization's allegations, which claim that the Government has shown bias in favour of Mr. Felfoul by granting written recognition to his election at the Sidi Fedj congress. Noting that an appeal has been brought before the Court of El Harrach in this regard, the Committee urges the Government to maintain an attitude of total neutrality on this matter and asks it to provide a copy of the relevant judgement as soon as possible.*

Representativeness

166. *The Committee notes that several of the allegations and the Government's replies are closely connected to the issue of representativeness – for example, the closure of the SNAPAP's Oran premises, the cancellation of the release of certain members of the National Vocational Training Union (UNFP) for trade union work and the failure to recognize the National Union of Legal Personnel (UNFJ) (see the Committee's conclusions below with regard to each of these issues). The Committee also notes the Government's statement, according to which any organization in the sense given in sections 34-37bis of Act No. 90-14 of 2 June 1990 may establish a structure in any enterprise, institution or administration in order to ensure the representation of the workers covered if it represents 20 per cent of the total number of workers at the establishment in question. The Committee recalls the applicable principles in this respect: on the one hand, the* establishment *of a trade union may be considerably hindered, or even rendered impossible, when legislation fixes the minimum number of members of a trade union at obviously too high a figure, as is the case, for example, where legislation requires that a union must have at least 50 founder members [see* ***Digest****, op. cit., para. 255]; on the other hand, the fact of establishing in the legislation a* percentage *in order to determine the threshold for the representativeness of organizations and grant certain privileges to the most representative organizations (in particular for collective bargaining purposes) does not raise any difficulty to the extent that the criteria are objective, precise and pre-established, in order to avoid any possibility of bias or abuse [see* ***Digest****, op. cit., paras. 309-315]. The Committee nevertheless notes that the additional requirement that*

the authorities make in practice – that of obtaining a list of the names of all the members of an organization and a copy of their membership card – does pose a problem with regard to these same principles. The Committee refers to its previous comments on the risk of reprisals and anti-union discrimination inherent in this type of requirement [see particularly 333rd Report, para. 207] and once again requests the Government to take the necessary steps to ensure that decisions enabling the determination of the representativeness of organizations are taken without the identities of their members being revealed; both the Committee and the Committee of Experts on the Application of Conventions and Recommendations have found that a secret ballot is an especially appropriate method for this purpose. The Committee requests the Government to keep it informed of measures taken in this regard.

167. *With regard to the closure of the SNAPAP's premises at Oran, the Committee notes the latest information provided by the Government, wherein it states that the decision to close these premises, which were situated at the workplace, was taken following a bailiff's statement declaring that the SNAPAP was not deemed representative at the Prefecture in question. The Committee requests the Government to instruct the local authorities once again to provide the SNAPAP with premises in the workplace if, in the context of a procedure that complies with the aforementioned principles, it is determined that the SNAPAP is indeed representative.*

168. *As regards the cancellation of the release of certain members of the National Vocational Training Union for the purposes of trade union work, the regulations of the National Union of Legal Personnel as well as the regulations of the Union of Civil Protection Offices (UFPC), the Committee notes that, once again, a determining factor in this issue is the non-recognition by the authorities of the representativeness of the organizations in question. The Committee recalls that minority trade unions that have been denied the right to negotiate collectively should be permitted to perform their activities and especially to speak on behalf of their members and to represent them in individual claims [see **Digest**, op. cit., para. 313]. Given these circumstances, the Committee requests the Government to take the necessary steps, if requested by the UNFP, the UNFJ and the UFPC, to determine the representativeness of these organizations through a procedure that complies with the principles outlined above and, if they are deemed representative, to grant them all the rights that accompany trade union status.*

Formation of federations and confederations

169. *With regard to the possibility of forming federations and confederations and the recognition of the Algerian Confederation of Independent Trade Unions (CASA), the Committee notes the Government's comments and, in particular, Annex 2, enclosed with the Government's communication, which is the response of the authorities, dated 30 April 2001, to the request for recognition of the CASA. The Committee notes that, besides certain requests for further details regarding the founder members and numerous remarks and questions concerning the internal regulations of the proposed organization, the competent authority states that sections 2 and 4 of Act No. 14-90, when applied together, mean that "… the coming together of two different sectors, as is true in the case of the membership of the National Air Navigation Trade Union in this confederation of public administration sector unions, does not comply with the aforementioned section 2". The letter concludes by rejecting the application.*

170. *The Committee recalls that the right of workers to establish and join organizations of their own choosing implies for the organizations themselves the right to establish and join federations and confederations of their own choosing [see **Digest**, op. cit., para. 606] and that it seems difficult to reconcile with Article 5 of Convention No. 87 any provision of national law prohibiting organizations or public officials from adhering to federations or*

*confederations of industrial organizations [see **Digest**, op. cit., para. 615]. The Committee therefore requests the Government to amend the legislative provisions in question without delay, in order to allow workers' organizations to form federations and confederations of their own choosing, irrespective of the sector to which they belong. The Committee requests to be kept informed of the measures taken in this respect.*

171. *With regard to other aspects of the issue of representativeness, the Committee recalls its previous conclusions on this matter and particularly emphasizes that the Government claims that it initiated a series of meetings, beginning in April 2002, aimed to assist the SNAPAP in forming the CASA, and that it was to carry out a review of legislation concerning freedom of association, in consultation with the social partners, in order to remove the difficulties that might arise from the interpretation of certain provisions of Act No. 90-14 of 2 June 1990 [see 329th Report, para. 166; 333rd Report, para. 210]. It must be admitted that no practical progress has been made. The Committee recalls that the acquisition of legal personality by federations and confederations shall not be made subject to conditions of such a nature as to restrict the exercise of the right to form such organizations [see **Digest**, op. cit., paras. 606-607]. Taking into account the time that has elapsed since the complaint was submitted, and noting that the Government claims to be awaiting the reply of the SNAPAP in order to complete its examination of the case, the Committee urges the Government to initiate consultation with the social partners without delay, in order to remove all the difficulties that might arise in practice from the interpretation of provisions relating to the establishment of federations and confederations and which could, in this case, hinder the recognition of the CASA. The Committee requests that the Government keep it informed of the measures taken in this regard and of the outcome of the discussions undertaken.*

Individual incidents

172. *With regard to the arrest and detention of Mr. Salim Mecheri, Mr. Fodhil Agha and Mr. Djilali Bensafi, the Committee notes the Government's statement that these workers were accused of threatening and insulting behaviour towards the Director of the OTH, but that the latter, in a gesture of peace, did not press charges, and that the workers were released and the case closed. The Committee takes note of this information.*

173. *As regards the questioning by the police of Mr. El Hachemi Belkhir, Mr. Mohamed Benahmed, Mr. Rabeh Mebarki, Mr. Mokhtar Mesbah, Mr. Benchâa Benatia, Mr. Mohamed Bekhil and Mr. Djeloul Amar Behida, the Committee notes the Government's claim that these workers launched a hunger strike on 4 January 2004, incited other workers to strike, and hindered the freedom to work. The Government also maintains that the SNAPAP does not have the legally required level of representativeness to conduct strike action. The Committee first recalls that the right to strike is a legitimate means of defending the economic and social interests of workers. Furthermore, while it does not appear that the fact of making a right to call a strike the sole preserve of trade union organizations is incompatible with the principles of freedom of association, workers, and especially their leaders in undertakings, should however be protected against any discrimination which might be exercised because of a strike and they should be able to form trade unions without being exposed to anti-union discrimination [see **Digest**, op. cit., para. 477]. The Committee also refers to its conclusions above concerning the principles of representativeness. Noting that a complaint on the matter has been submitted to the competent court, the Committee requests the Government to provide it with a copy of the judgement concerning the seven workers as soon as it has been pronounced.*

174. *As regards the seven workers dismissed from the Prefecture of Oran, the Committee notes that, according to the Government, the sanctions were taken against these workers because they had demonstrated inside the premises of the Prefecture, hindered the freedom*

to work, disrupted public order and damaged public property; the courts gave them three-month suspended prison sentences and required them to pay fines of DZD5,000, following which a joint committee, sitting as a disciplinary council, decided to dismiss them. In the Government's view, the work relationship could no longer continue between these workers and their management. While the Committee agrees that persons carrying out trade union activities cannot claim immunity from criminal legislation, it recalls that all penalties in respect of illegitimate actions linked to strikes should be proportionate to the offence or fault committed [see ***Digest****, op. cit., para. 599]. Referring to its previous recommendation on this matter, the Committee requests the Government and the complainant organization to indicate whether any judicial appeal has been lodged against the decision of the joint committee and, if this is the case, to keep it informed of the outcome of this procedure.*

175. *With regard to the acts of violence alleged to have been committed on 29 January 2003 against trade union members holding a sit-in, the Committee notes the Government's statement that the police intervened to maintain order and protect persons and property, and not to hinder freedom of association, as the SNAPAP alleges. In this regard, the Committee recalls that the intervention of the police should be in proportion to the threat to public order [see* ***Digest****, op. cit., para. 582].*

176. *As regards the case of Mr. Mokhtari, the Government replies: that the National Union of Legal Personnel (UNFJ) does not legally exist, as it has never applied for recognition; that Mr. Mokhtari is not a member of any such trade union organization; and that his temporary suspension, pending the outcome of criminal proceedings against him, is a result of serious breaches of his professional duties. The Committee refers to the conclusions stated above with regard to the UNFJ and requests the government to provide it with the judgement on Mr. Mokhtari's case as soon as it has been pronounced.*

177. *Concerning Mr. Bourada and Mr. Himer, the court gave these men suspended sentences of six months' imprisonment and fines of DZD10,000 for contempt of an official on duty (that is, the Director of the OTH) and for entering his office while he was at an official meeting with Ministry of Health officials. However, they were acquitted of the charge of insult and injury, a lesser offence which is included within the offence of contempt of an official. The Committee recalls once again in this respect that all penalties should be proportionate to the offence committed.*

The Committee's recommendations

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

(a) The Committee urges the Government to maintain an attitude of total neutrality with regard to the dispute between the various factions within the SNAPAP, and to provide it with a copy of the judgement on the case as soon as it is handed out.

(b) The Committee once again requests the Government to take the necessary legislative or other steps to enable the representativeness of trade union organizations to be determined without the identities of their members being revealed – for instance, by means of a secret ballot.

(c) The Committee requests the Government to take the necessary steps, if requested by the UNFP, the UNFJ and the UFPC, to determine the representativeness of these organizations through a procedure that complies

with the principles outlined above and, if they are deemed representative, to grant them all the rights that accompany trade union status.

(d) The Committee requests the Government to amend without delay the legislative provisions preventing workers' organizations from forming federations and confederations of their own choosing, irrespective of the sector to which they belong. It urges the Government to consult the social partners without delay in order to remove all the difficulties which might arise in practice from the interpretation of certain legislative provisions on the formation of federations and confederations and particularly, in this case, which might hinder the recognition of the Algerian Confederation of Independent Trade Unions (CASA). The Committee requests to be kept informed of measures taken in this respect.

(e) The Committee requests the Government and the complainant organization to indicate whether any judicial appeal has been lodged against the decision of the joint committee and, if this is the case, to keep it informed of the outcome of this procedure.

(f) The Committee requests the Government to provide it with a copy of the judgement concerning Messrs. El Hachemi Belkhir, Mohamed Benahmed, Rabeh Mebarki, Mokhtar Mesbah, Benchâa Benatia, Mohamed Bekhil and Djeloul Amar Behida, as soon as that judgement has been passed.

(g) The Committee requests the Government to provide it with the judgement concerning Mr. Khaled Mokhtari as soon as that judgement has been passed.

CASE NO. 2344

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

Complaint against the Government of Argentina presented by the National Coordination of State Workers (CONATE)

Allegations: The complainant organization alleges that acts of anti-union discrimination have been carried out (application for lifting of trade union protection and authorization of dismissal) against its deputy secretary

179. The complaint appears in a communication from the National Coordination of State Workers (CONATE), dated May 2004.

180. The Government sent its observations in communications dated 5 October and 3 December 2004.

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

A. The complainant's allegations

182. In its communication dated May 2004, the National Coordination of State Workers (CONATE) states that it is a second-grade trade union organization, made up of various trade unions, collectively known as the New State Workers' Organization (NORTE), each of which is based in their own province or municipality.

183. The complainant organization alleges anti-union discrimination against its deputy secretary, Mr. Raúl Blas Praino, on the part of the authorities of the National Institute of Social Services for Persons Receiving Retirement Benefits and Pensions (INSSJP), for which he has worked since 1982, having worked as a heating engineer for the General Services Office of the Administrative Division of the PAMI 1 Clinic. The complainant organization alleges that the INSSJP filed a legal application with the aim of lifting the trade union protection of Mr. Raúl Blas Praino and obtaining authorization for his dismissal (the complainant organization states that Argentine law establishes that when a worker is a trade union official and for up to a year after the end of his/her mandate, he/she enjoys legal protection against dismissal during that period, unless "just cause" can be demonstrated in terms of labour law). The complainant organization states that Mr. Praino has been accused of having violated his duty of trust towards the INSSJP, when in reality he was on trade union leave, during which time he was working for an inspection committee representing the trade union organization known as the Association of State Workers (ATE), at the request of the latter, a request which was granted by his employer, the INSSJP.

184. The complainant organization believes that it is clear that the allegations contained in this complaint are not merely a series of casual and circumstantial events but represent a process marked by hostility and discrimination, aimed at a trade union official owing to his ideological beliefs and trade union activities, which has no legal basis whatsoever and which was carried out with complete disregard for all the political and legal parameters that go to make up a republic and the rule of law. The official in question cannot possibly be dismissed on grounds of a fictive just cause, as he was on trade union leave, representing the trade union in the post conferred upon him by said body, with the consent of his employer, the INSSJP, which just so happens to answer to the Government. It is also clear to the complainant organization that the discrimination aimed at Mr. Praino is also aimed at CONATE, of which he is deputy secretary. According to CONATE, the attempt to discourage Mr. Praino in his trade union activities is disrupting the very running of the trade union organization.

B. The Government's reply

185. In its communication dated 5 October 2004, the Government states that the complaint is based on the alleged dismissal from the INSSJP of Mr. Raúl Blas Praino, regardless of his trade union rights. The Government further states that trade union rights consist of specific protection for trade union officials from acts of discrimination and this is regulated by articles 50, 52 and related provisions of Law No. 23551. This legislation guarantees workers' representatives a secure job and establishes that dismissal can only take place if "just cause" is demonstrated and, even then, a legal ruling must be handed down, taking this protection away from the worker in question (withdrawal of immunity proceedings).

186. The Government adds that, following consultation with the INSSJP concerning the allegations, it has the following to report: (1) the INSSJP recognizes the existence of trade union immunity in the case of Raúl Praino and proceeded to request the competent judge to issue an exemption of this guarantee as established under the abovementioned article 52 of Law No. 23551; (2) this legal request was made with the aim of dismissing Mr. Praino with just cause and this dismissal is subject to the result of the withdrawal of immunity

proceedings; (3) the reasons for requesting the withdrawal of Mr. Praino's immunity and proceeding to his dismissal are given by the INSSJP in the request for the lifting of trade union protection (more specifically, Mr. Praino stands accused of having participated in the conclusion and implementation of a contract, signed on 20 October 1998, which was prejudicial to the INSSJP's interests. These reasons constitute irregularities in the conclusion of a contract and are in no way connected to any possible trade union activity on the part of Mr. Praino); and (4) the lifting of guarantees (trade union protection), envisaged under article 50 of Law No. 23551, in the case of Mr. Praino and his dismissal is subject to the ruling to be issued as a consequence of the ongoing withdrawal of immunity proceedings.

187. The Government states that, given the facts of the case, there has been no violation of freedom of association whatsoever, since Argentine law provides protection which ensures that trade union representatives may not be suspended or dismissed because of their trade union activities.

188. In its communication dated 3 December 2004, the Government sends a copy of the ruling handed down by the federal judge of Federal Court No. 2 of the City of Rosario, concerning Case No. 754 entitled *National Institute of Social Services for Persons Receiving Retirement Benefits and Pensions* v. *Praino, Raúl, Lifting of Trade Union Protection*, in which the court rejects the application for the lifting of trade union protection in relation to Raúl Blas Praino. Likewise, the Government states that this ruling is currently under review by the Supreme Court after an appeal filed by the PAMI Clinic, in accordance with Argentine law.

C. The Committee's conclusions

189. *The Committee observes that the complainant organization alleges anti-union discrimination against its deputy secretary, Mr. Raúl Blas Praino, perpetrated by the INSSJP, for which he has worked since 1982, which filed a legal request with the aim of obtaining the lifting of trade union protection in the case of Mr. Praino and authorization for his dismissal (according to the complainant organization, Mr. Praino stands accused of having committed acts that he could not possibly have committed, given that he was on trade union leave and working for an inspection committee, a post designated to him by the INSSJP and the trade union organization, ATE).*

190. *The Committee observes that the Government attaches a copy of the request submitted by the INSSJP to the courts, in which it requests that immunity withdrawal proceedings be instigated concerning Mr. Praino, in order to proceed to his dismissal, as a part of which the trade union official in question is accused of having participated in the conclusion and implementation of a contract, signed in 1998, which was prejudicial to the interests of the INSSJP.*

191. *Likewise, the Committee observes that the Government sent a copy of the ruling handed down by the judicial authority of the first instance in which the judicial action regarding trade union protection brought by the INSSJP against Mr. Raúl Blas Praino was rejected. The Committee observes that, in the considerations of its ruling, the judicial authority states that: (1) "... the lack of attention to detail of the applicant's (INSSJP) approach regarding the matter in question cannot be ignored, ..."; (2) "... inevitably, one question arises: either such a lack of detail is the product of a lack of technical legal knowledge on the part of the Institute's management with regard to issues requiring special attention and dedication, and these issues did not receive such treatment or, and this is the crux of the matter, discriminatory behaviour aimed at various trade union representatives, consisting in unequal treatment in similar objective situations, ..."; (3) "The response to the previous question lies in the study of the following points: the general nature of the accusations*

made against Mr. Praino and the lack of detail provided regarding these accusations; the lack of any proof (article 37 of the National Civil and Commercial Procedure (CPCCN) having been strictly applied); the contradictory decisions adopted; the chronological disparity between the events and the dismissals (five years); the incongruity of informing the court of Mr. Praino's suspension, then immediately requesting that he be suspended and then informing the court that he was carrying out his duties as normal; the unequal nature of the approach adopted in objectively similar situations, referred to previously, amongst others"; and (4) "The proof submitted so far is insufficient in this case and the different steps taken by the Institute, which will prove to be extremely costly in financial terms for the Institute, demonstrate inappropriate, inconsistent behaviour and unequal treatment of workers who find themselves in what are, basically, identical situations, and which, thus, displays the anti-union intentions that the Institute is attempting to carry out by legal means".

192. *In these circumstances, observing that: (1) the judicial authority rejected the INSSJP's application regarding trade union official, Mr. Praino, in particular noting in the judgement acts demonstrating anti-union intentions on the part of the aforementioned Institute; and (2) the fact that the Institute appealed against the said ruling, the Committee requests the Government to forward a copy of the decision regarding the appeal as soon as it is rendered.*

The Committee's recommendation

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

Observing that: (1) the judicial authority rejected the INSSJP's application for the lifting of trade union protection and the authorization of dismissal against trade union official Mr. Praino, in particular noting in the judgement acts demonstrating anti-union intentions on the part of the aforementioned Institute; and (2) the fact that the Institute appealed against the said ruling, the Committee requests the Government to forward a copy of the decision regarding the appeal as soon as it is rendered.

CASE NO. 2369

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

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

Allegations: The complainant organizations allege the violation of the right to strike of state employees of the Province of Buenos Aires as a result of the imposition of a compulsory conciliation procedure

194. The complaint is contained in a communication from the Association of State Workers (ATE) and the Confederation of Argentine Workers (CTA) dated 1 June 2004.

195. The Government sent its observations in a communication dated 1 September 2004.

196. 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

197. In its communication of 1 June 2004, the Confederation of Argentine Workers (CTA) and the Association of State Workers (ATE) objected to the decision of the Ministry of Labour of the Province of Buenos Aires to impose a compulsory conciliation procedure in the context of a collective dispute and the approval of this procedure by the National Ministry of Labour.

198. The complainants indicate that article 14bis of the Constitution of Argentina guarantees trade unions the right to strike as a fundamental right. The Province of Buenos Aires quoted the Constituent Convention of 1994 with respect to the reform of the Provincial Constitution which, inter alia, sanctioned section 39 stating that work is a right and a social duty: "The Province recognizes the right to organize and the right of freedom of association, collective agreements, the right to strike and the guarantees of immunity for trade union representatives" and the Province guarantees public employees the right to negotiate their conditions of work and the settlement of collective disputes between the Province and public employees through an impartial body determined by law. Any act or contract which contravenes the guarantees recognized in the present subsection shall be deemed null and void.

199. The complainant organizations allege that, despite the provisions relating to formal protection of the right to strike, the Province of Buenos Aires, via its Undersecretary for Labour, summoned the abovementioned primary trade unions to compulsory conciliation, thus directly curtailing the right to strike, with the Undersecretary in the role of conciliator between the parties to the dispute, despite being an official of the provincial government, which is one of the parties to the dispute. The complainants indicate that Decision No. 1509 states as follows:

> In view of the dispute between the provincial executive authority of the central public administration and self-governing entities within its ambit and the employees thereof represented by the officially established representative trade union organizations of the sector and whereas: … The Undersecretary for Labour of the Province of Buenos Aires resolves: Article 1: To investigate the situation defined as a collective labour dispute by opening the compulsory conciliation procedure between the provincial executive authority of the central public administration and self-governing entities within its ambit and the employees thereof represented by the officially established representative trade unions …; Article 2: To instruct the trade union organizations to refrain from adopting any measure that might directly or indirectly modify the functioning and/or provision of services under their responsibility and to revert to the normal and habitual performance of their duties for the period of the compulsory conciliation procedure …

200. According to the complainants, the abovementioned decision of the Undersecretary for Labour of the Province of Buenos Aires prescribed compulsory conciliation with respect to the pay claim submitted by the complainant organizations. The complainants consider that if the state employer itself can prescribe as it sees fit the suspension of legitimate measures of direct action available to its dependent workers, the exercise of trade union rights, particularly the right to strike, becomes impossible in practice.

201. The complainants state that tension arose in the Province of Buenos Aires from the claim for a wage increase, which had been frozen for nearly ten years, from May 2004, as a

direct consequence of the national Government's decision to award a pay increase to its employees. The complainants point out that, from the start of the dispute until the unlawful call for compulsory conciliation, the parties to the dispute held specific talks on the issue in which the provincial government proposed guidelines for wage increases. These guidelines were rejected by all participants in the negotiations and for this reason alone compulsory conciliation was imposed on the parties, in clear violation of ILO standards.

202. The complainants state that the trade union rejected the call to compulsory conciliation and expressed a series of objections. None of these was taken into account; on the contrary, the Province, committing further procedural irregularities, issued a new writ on 23 June, with a very short deadline, containing the threat of financial penalties, clearly seeking to obstruct the complainants' legitimate right of defence.

203. Finally, the complainants emphasize that, without resolving the substance of any of the submissions made, the Province of Buenos Aires evaded the proper jurisdiction for settling the dispute and took the matter to the National Ministry of Labour, Employment and Social Security. The National Ministry of Labour acknowledged the Province's action and issued Decision No. 166, which ends as follows: "… The Association of State Workers, the Single Union of Education Workers and the Federation of Education Workers of Buenos Aires are hereby required to comply with the rulings of the provincial labour authority having competence in the dispute with the Government of the Province of Buenos Aires, with due regard for the provisions of Act No. 23551 on trade unions." According to the complainants, this pronouncement is riddled with errors purely from the legal point of view. Despite the fact that it is not a judicial body, the National Ministry of Labour is concerning itself with constitutional matters. Even more serious is the fact that it is thereby interfering in the internal affairs of a federal State, the Province of Buenos Aires. Moreover, without having any authority to do so, it is determining the competence of the Ministry of Labour of the Province of Buenos Aires, even though this arrogated authority expressly violates local constitutional provisions, at the same time violating the Constitution of the Nation, inasmuch as article 75(23) thereof acknowledges ILO Conventions Nos. 87 and 151.

B. The Government's reply

204. In its communication of 1 September 2004, the Government states that it is important to remember that launching a conciliation procedure allows the administrative authority to mediate between the conflicting interests and positions, helping to find a peaceful solution to the dispute, with the key contribution being made by the parties concerned. In addition, the conciliation procedure provides a forum for taking stock and bridging differences, with the parties themselves exercising their autonomy and making reciprocal concessions, thereby reaching an agreement which in principle settles the underlying differences. A procedure of this kind should not entail submission to measures which restrict the freedom of negotiation of the parties involved.

205. The Government adds that in Decision No. 1509/04, to which the complainant organizations objected, the nature of the activity affected was assessed, the situation was defined as a collective dispute and consequently compulsory conciliation was prescribed, applying the principles of procedural immediacy and appropriateness, in accordance with the provisions of Chapter III of Act No. 10149. Subjecting the exercise of the right to strike to a time limit cannot be faulted where the duration of the compulsory conciliation process is reasonable and does not entail de facto neutralization of established guarantees. Consequently, the Undersecretariat of the Ministry of Labour of the Province of Buenos Aires, in accordance with section 20 of Act No. 10149 and given the lack of any agreement or solution in the dispute between the provincial executive authority and its employees and

within its own competence, ordered that the dispute should be subjected to compulsory conciliation for the purpose of reaching a peaceful agreement on the issue.

206. The Government states that it should be emphasized that the intervention by the Undersecretariat was extended by the period stipulated in section 28 of Act No. 10149, i.e. 15 days. Indeed, the Association of State Workers (ATE) was notified of Decision No. 1509/04 of 16 June 2004 ordering the opening of compulsory conciliation proceedings. Moreover, the dispute in question came to an end with the acceptance of the offer from the provincial executive authority on 6 July 2004, as can be seen from memo No. 364 sent to the Governor of the Province of Buenos Aires signed by the ATE General Secretary. The Government adds that the conciliation procedure in question is not definitive, nor is it the context in which substantive decisions are taken; as stated above, it is merely a channel of negotiation in which social peace – temporarily – prevails. In other words, it was compulsory for the trade unions to participate in the conciliation procedure (which took place over an extremely limited period of time, as already stated), but they were in no way obliged to accept any proposed solution.

207. As regards the intervention by the National Ministry of Labour, Employment and Social Security to which the complainants objected, the Government indicates that on 24 June 2004 the Ministry issued Decision No. 166/2004 requiring the ATE to comply with the provisions laid down by the competent provincial labour authority in the dispute with the Government of the Province of Buenos Aires, in accordance with the provisions of Act No. 23551. The fourth *whereas* of the above Decision is particularly important inasmuch as it states:

> Whereas in these circumstances it should be noted that this Ministerial Office has recognized in Agreement No. 21 of 28 September 2000 between the National Labour Secretariat and the Labour Secretariat of the Province of Buenos Aires that, in accordance with the regulations in force of the Constitution of the Nation and the Constitution of the Province of Buenos Aires, the National and Provincial Ministries' Acts and Act No. 25212 ratifying the Federal Labour Pact and its provincial equivalent No. 12415, the Government of the Province of Buenos Aires, via its Labour Secretariat, is competent not only to negotiate collectively with the trade union representatives of its own public employees and conclude the relevant collective labour agreements but also to hear and intervene in any labour disputes which arise in its territory.

According to the Government, it is therefore erroneous to maintain that the National Ministry of Labour is not competent to intervene in the dispute, inasmuch as its participation abides strictly by the provisions of Act No. 23551, for which the National Ministry of Labour is the implementing authority.

208. Finally, the Government indicates that the complainants' request that "anti-union" action should be ordered to cease and that the summons to compulsory conciliation issued by the executive authority of the Province of Buenos Aires should be declared null and void, becomes academic since, as stated above, the dispute in question came to an end with the offer proposed by the provincial executive authority on 6 July 2004 being accepted by the trade unions, thereby fully validating the role played by the Ministry of Labour of the Province of Buenos Aires.

C. The Committee's conclusions

209. *The Committee observes that the complainant organizations in the present case allege that in the context of a pay claim, there has been a violation of the right to strike of state employees of the Province of Buenos Aires, guaranteed in the National Constitution and in the Constitution of the Province of Buenos Aires. Specifically, the complainant organizations object to: (1) Decision No. 1509/04 of 16 June 2004, whereby the*

Undersecretary for Labour of the Province of Buenos Aires ordered the opening of a compulsory conciliation procedure between the provincial executive authority of the central public administration and the employees thereof represented by the trade unions, and instructed the trade unions to refrain from adopting any measure that might directly or indirectly modify the functioning and/or provision of services under their responsibility and to revert to the normal and habitual performance of their duties for the period of the compulsory conciliation procedure; and (2) Decision No. 166/2004 of the National Ministry of Labour, instructing, to the same effect as Decision No. 1509/04, the Association of State Workers (ATE), the Single Union of Education Workers and the Federation of Education Workers of Buenos Aires to comply with the rulings of the provincial labour authority having competence in the dispute with the Government of the Province of Buenos Aires.

210. *The Committee notes that the Government indicates that: (1) given the lack of any agreement or solution in the dispute between the provincial executive authority and its employees and within that authority's competence, it was ordered that the dispute should be subjected to compulsory conciliation for the purpose of reaching a peaceful agreement on the issue; (2) the conciliation procedure objected to does not make decisions on substantive matters but is merely a channel of negotiation in which social peace temporarily prevails; (3) the conciliation procedure was extended for the period specified in law – i.e. 15 days – and, although it was compulsory for the trade unions to participate in the conciliation procedure, they were in no way obliged to accept any solution proposed therein; (4) the intervention by the National Ministry of Labour, Employment and Social Security through Decision No. 166/2004 abides strictly by the provisions of Act No. 23551 on trade unions; and (5) the dispute in question was resolved with the acceptance by the trade unions of the offer made by the provincial executive authority on 6 July 2004.*

211. *In this respect the Committee notes with satisfaction that the complainant organizations and the authorities of the Province of Buenos Aires reached an agreement which put an end to the dispute in question.*

212. *The Committee observes that the present case concerns the public administration of a province and that the decision to open the conciliation procedure was adopted by the Undersecretary for Labour of the Province of Buenos Aires. The Committee recalls that "legislation which provides for voluntary conciliation and arbitration in industrial disputes before a strike may be called cannot be regarded as an infringement of freedom of association, provided recourse to arbitration is not compulsory and does not, in practice, prevent the calling of the strike" [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 1996, 4th edition, para. 500]. In these particular circumstances, the Committee emphasizes that it would be desirable to entrust the decision of opening the conciliation procedure to an organ which is independent of the parties to the dispute and requests the Government to bring its law and practice into line with Conventions Nos. 87 and 98. The Committee draws the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*

The Committee's recommendations

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

(a) In the particular circumstances of this case, the Committee emphasizes that it would be desirable to entrust the decision of opening the conciliation procedure to an organ which is independent of the parties to the dispute and

requests the Government to bring its law and practice into line with Conventions Nos. 87 and 98.

(b) The Committee draws the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.

CASE NO. 2370

DEFINITIVE REPORT

Complaint against the Government of Argentina presented by the National Civil Servants' Union (UPCN)

Allegations: The complainant organization alleges that the Government refused to enter into sectoral negotiations in the public sector, despite repeated requests on the part of the former; it also alleges that the Government takes unilateral decisions on issues covered by collective bargaining

214. The complaint appears in communications from the National Civil Servants' Union dated 26 May and 29 June 2004.

215. The Government sent its observations in a communication dated 8 September 2004.

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

A. The complainant's allegations

217. In its communication dated 26 May 2004, the UPCN states that, with the approval of Law No. 24185 of 1992, collective bargaining was definitively adopted as the regulatory instrument regarding employer-worker relations within the public sector, in accordance with the terms of international Conventions Nos. 151 and 154, as ratified by Argentina. The said Law establishes a wide framework for negotiation, given that it has to cover all labour issues which come under employment relations, including matters related to wages. Article 6 of the Law envisages collective bargaining, both at a general and a sectoral level, as well as establishing the nature of the bargaining committees.

218. The complainant organization states that, based on these legal provisions, the representative trade unions of the sector agreed to negotiate collectively concerning working conditions. This resulted in the signing of a collective labour agreement identified by the Decree recognizing it, No. 66/99, which was only signed by the State as employer and the UPCN. It should be pointed out that, from April 2004, another sectoral representative trade union was included in the agreement, the Association of State Workers (ATE). Despite this, on 12 January 2004, the UPCN formally requested the Minister of Labour, Employment and Social Security to open collective negotiations at a sectoral level,

by virtue of the terms of the first title of the aforementioned public sector Collective Labour Agreement No. 66/99 and Law No. 24185 (article 6); this request was never processed, and thus, on 30 March 2004, the same public servant was requested to settle the matter quickly and make an announcement regarding negotiations. The deadline for the announcement regarding negotiations was 20 May 2004, and the silence on the part of the administration concerning this last request therefore constitutes a refusal on the part of the administration to engage in collective bargaining. The negotiation of the sectoral agreements envisaged in Annex II of Collective Agreement No. 66/99 has not taken place, neither have the negotiating committees been integrated, the State employer having adopted an attitude contrary to the terms of the internal and international legal regime.

219. The complainant organization alleges that it has repeatedly requested that these sectoral negotiations be opened, as can be seen from the requests made to the Ministry of Labour on 10 February 2000 and 12 January 2004 and to the Sub-secretariat of Public Administration in July 2003. No response has been forthcoming from the State as employer. The UPCN believes that the State's failure to engage in collective bargaining at the sectoral level, despite repeated requests to that effect, confirms its unwillingness to arrive at an equitable agreement on working conditions in the public sector and that this constitutes a flagrant violation of the principle of good faith which should rule worker-employer relations according to collective labour law. It also contradicts the spirit of negotiations which the ILO Conventions try to reinforce, as well as national standards in force on the issue.

220. The UPCN adds that the State as employer has clearly not complied with the legal obligation to enter into a collective bargaining process. The latter has not assumed its reciprocal duties and takes unilateral decisions on issues which should be resolved through collective bargaining, violating constitutional principles and standards and resulting in damage to the very nature of public employment and, consequently, to those employees represented by the UPCN. More specifically, the complainant organization refers to the following cases in which unilateral decisions were taken by the authorities regarding issues which should have been resolved through a process of collective bargaining:

– resolution SSGP No. 34/03. Published in Official Bulletin No. 30285 of 26 November 2003, modifying resolution SSGP No. 2/02, unilaterally establishes the composition of a consultation committee for the national training system, in violation of the rules on proportional representation set out under article 4 of Law No. 24185 and Chapter X of Law No. 25164, which creates the Standing Fund for Training and Labour Re-qualification. The latter has, so far, not begun its work. The decision was formally contested on 11 December 2003;

– draft General Regulation on recruitment in posts included within the executive hierarchical scale, submitted by the Sub-secretariat of Public Administration, is also aimed at unilaterally dealing with issues which pertain to collective bargaining, in clear violation of the procedure for recruitment in key posts within the National Administrative Profession System (SINAPA). This draft Regulation was contested on 23 December 2003;

– the National Institute of Agricultural and Livestock Technology (INTA): this body carried out the selection of candidates for executive posts, without involving the UPCN as monitor, ultimately refusing to recognize the primacy of the collective agreement. This case was taken before the Standing Committee for Labour Relations (COPAR) (envisaged in article 67 of Collective Labour Agreement No. 66/99 of 12 December 2003);

– National Parks Administration: Resolution No. 205/03 contravened the rights confirmed in the Collective Labour Agreement, in attempting to incorporate changes

to the personnel entry and selection mechanisms concerning the corps of national park guards, a process involving altering the rights and duties established in the hierarchical scale which has been approved through Decree PEN No. 1455/87. This issue should clearly be dealt with through collective bargaining and cannot be decided on unilaterally by the State as employer. This case was denounced before COPAR on 21 November 2003; and

– resolution SSGP No. 7/01 and Decree No. 106/01 which are in violation of the trade union representativity regime envisaged in article 4 of Law No. 24185 and Decree No. 993/91, unilaterally incorporating a trade union organization into the scope of negotiations without that organization having signed the respective collective agreement. The UPCN states that it requested that the regulation in question be revoked.

221. Finally, the complainant organization states that the State as employer recently announced, at a press conference to the representatives of the mass media, that public workers being paid less than 1000 pesos would supposedly benefit from a wage increase of up to 150 pesos (the National Executive has still not published any provision regulating or giving force of law to this decision). This is a clear breach of the collective bargaining process, given that at the same time that this unilateral announcement was being made (without prior consultation), the UPCN was in close contact with certain sectors of the Government, with a view to reaching an agreement on the adjustment of the wages of workers in the sector concerned. It should not be forgotten that, in Argentina, negotiations regarding public workers' hierarchical scale and wages fall within the ambit of collective bargaining and these subjects can only be modified through such a process. More concretely, the State as employer was attempting to unilaterally resolve an issue which required agreement on both sides for its settlement.

222. In its communication dated 29 June 2004, the UPCN states that, on 25 June 2004, it yet again formally requested, this time through an individual request for each sector, to order a convocation for the setting up of the bargaining committees of the sectoral collective agreements for the different hierarchical scales included in the general Collective Agreement for the national public administration No. 66/99. This request, based on articles 5, 6 and 7 of Decree No. 447/93, regulating articles 6 and 7 of Law No. 24185, constitutes the last possible recourse before all the avenues concerning the administrative standards and joint bodies of Argentina have been exhausted. The UPCN adds that, in accordance with the aforementioned standard, the State is obliged to enter into negotiations within 15 days of the presentation of all the necessary legal instruments to this effect. This legal deadline would unfailingly expire on 26 July 2004.

B. The Government's response

223. In its communication dated 8 September 2004, the Government states, in relation to the complaint, that it has not violated Conventions Nos. 151 and 154. The Government emphasizes that, in accordance with article 5 of Law No. 24185, it is the political authorities representing the State that have sole authority when it comes to convoking collective bargaining procedures, having to comply with the procedural safeguards laid down in legislation. The Government adds that, without prejudice to what has already been stated, the question is no longer relevant, given that the negotiations in question have already begun.

224. The Government states that meanwhile, and with regard to the non-compliance on behalf of the State as employer mentioned by the complainant organization, it is appropriate to consider the following:

(i) on 24 November 2003, the Sub-secretariat of Public Administration, acting within its competence, issued resolution No. 34/03 which was published in the Official Bulletin on 26 November 2003 and refers to the establishment of a consultation committee for the national training system. The UPCN appealed against the aforementioned resolution on 11 December 2003, and this led to the issuing of legal opinion No. 4240/03 of 29 December 2003 and its immediate referral to the Legal and Technical Secretariat of the Presidential Office of the Nation for processing by that body in its capacity as the standing legal service of the Sub-secretariat. An appeal lodged by the UPCN is currently being considered;

(ii) with reference to the questions regarding the draft general regulation concerning recruitment in posts included in the executive hierarchical scale, it should be pointed out that the regulation only dealt with labour matters; it should also be pointed out that a draft regulation cannot be contested, neither can related preparatory acts, reports, legal opinions and any other action which, in itself, is not sufficient to give rise to an immediate legal effect with regard to the issue; these acts cannot be contested through administrative or legal channels even though they may suffer from a legal flaw;

(iii) with respect to the situation regarding the National Institute of Agricultural and Livestock Technology (INTA), the Government affirms that a representation was made before the Standing Committee for Labour Relations (COPAR), but the State as employer stated that the relevant study and consultations had been initiated, requesting the trade union organization to grant it more time in which to determine its position. The trade union acceded to this request and it was agreed that the issue would be dealt with at the next meeting of the COPAR; and

(iv) as to the situation concerning the National Parks Administration, the trade unions and the Sub-secretariat of Public Administration signed an Act on 4 May 2004 and a joint resolution was then issued concerning, among other things, the selection process for auxiliary park guards.

225. The Government adds that without prejudice to what has already been said, during the meeting of the COPAR held on 30 March 2004, the UPCN demonstrated its willingness to alter its position so that the issues at hand be better dealt with.

226. As to the allegation of UPCN which calls into question both Decree No. 106/01 and resolution SSGP No. 7/01, through which members can be integrated in the Standing Careers Committee, the Government states that there is no legal obstacle preventing the National Executive, as a part of the powers conferred upon it, from including a monitor from the Association of State Workers (ATE) in the relevant bodies.

C. The Committee's conclusions

227. *The Committee observes that, in the case in question, the National Civil Servants' Union (UPCN) alleges that the State refused to enter into the collective bargaining process at a sectoral level as requested by the complainant organization since February 2000, despite the fact that, under national legislation, labour relations in the public sector, both at a general and sectoral level, should be regulated through collective bargaining. The complainant organization adds that the State has been taking unilateral decisions regarding issues which pertain to collective bargaining and gives examples of decisions which had been adopted on issues which, in its view, should have been the object of collective bargaining.*

228. *Firstly, while regretting the significant delay in initiating the collective negotiations the Committee observes that the Government states that the collective negotiations requested by the UPCN have now begun. The Committee expects that the negotiations will lead to the resolution of the issues at hand in the very near future.*

229. *As to the cases referred to by the UPCN with regard to which the State had supposedly taken unilateral decisions which should have been the object of collective bargaining (more specifically, with regard to resolution SSGP No. 34/03 which establishes the composition of a consultation committee for the national training system; the draft General Regulation on recruitment in posts included within the executive hierarchical scale; the selection procedure for executive posts at the National Institute of Agricultural and Livestock Technology (INTA); and changes to the personnel entry and selection mechanisms concerning the corps of national park guards), the Committee observes that the Government states that during the meeting of the Standing Committee for Labour Relations envisaged in article 67 of collective labour agreement No. 66/99 of 30 March 2004, the UPCN demonstrated its willingness to alter its position so that the issues at hand be better dealt with. In this respect, the Committee trusts that the Government and the UPCN will be able to find a solution to these problems.*

230. *As to resolution SSGP No. 7/01 and Decree No. 106/01 through which, according to the UPCN, a trade union organization which had not signed the respective collective agreement was unilaterally incorporated into negotiations, the Committee observes that the Government states that there is no legal obstacle preventing the National Executive, as a part of the powers conferred upon it, from including a monitor from the Association of State Workers (ATE) in the relevant bodies. The Committee also observes that the complainant organization has not specified that the aforementioned organization is not representative.*

231. *Finally, with regard to the allegation related to the possible unilateral decision of the State to introduce a wage increase of 150 pesos for public sector workers earning less than 1,000 pesos, the Committee observes that the Government has not sent its observations on this matter. The Committee expects that any decisions relative to wage changes in the public sector will be subject to prior consultation with the workers' organizations concerned. The Committee recalls that Article 7 of Convention No. 151 provides that measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organizations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters.*

The Committee's recommendations

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

(a) While regretting the significant delay in initiating collective negotiations, the Committee takes due note of the Government's statement that the collective negotiations requested by the UPCN have now begun. The Committee expects that the negotiations will lead to the resolution of the issues at hand in the very near future.

(b) As to the cases referred to by the UPCN with regard to which the State had supposedly taken unilateral decisions, which should have been the object of collective bargaining, the Committee trusts that the Government and the

UPCN will be able to find a solution to these problems, within the framework of the Standing Committee for Labour Relations envisaged in article 67 of collective labour agreement No. 66/99 of 30 March 2004.

(c) With regard to the allegation related to the possible unilateral decision by the State to introduce a wage increase of 150 pesos for public sector workers earning less than 1,000 pesos, the Committee expects that any decision relative to wage changes in the public sector will be subject to prior consultation with the workers' organizations concerned.

CASE NO. 2324

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

Complaint against the Government of Canada concerning the Province of British Columbia presented by
— the National Union of Public and General Employees (NUPGE), on behalf of
— the BC Government and Services Employees' Union (BCGEU) and
— the Health Sciences Association of British Columbia (HSABC)
supported by
— the Canadian Labour Congress (CLC) and
— Public Services International (PSI)

Allegations: The complainant organization alleges that the Government of British Columbia has adopted a law (Bill 94) which nullifies any clauses of collective agreements in the health sector that restrict or regulate the employer's ability to contract out. The complainant also criticizes the adoption of a law (Bill 18) which allows private contractors to override contracting-out provisions contained in existing collective agreements, and of a back-to-work legislation (Bill 95) putting an end to a legal strike of its members in the newly privatized BC Ferry Corporation

233. The complaint is contained in a communication dated 6 February 2004 from the National Union of Public and General Employees (NUPGE), on behalf of the British Columbia Government and Services Employees' Union (BCGEU) and the Health Sciences Association of British Columbia (HSABC). The Canadian Labour Congress (CLC) and Public Services International (PSI) supported the complaint in communications dated 11 and 16 February 2004, respectively.

234. The Government of Canada transmitted the reply of the Government of British Columbia in a communication dated 16 September 2004.

235. Canada has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). It has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), nor the Collective Bargaining Convention, 1981 (No. 154).

A. The complainant's allegations

Background

236. In its communication of 6 February 2004, the National Union of Public and General Employees (NUPGE) states that it represents 337,000 members across Canada, and is an affiliate of the Canadian Labour Congress and Public Services International. This complaint concerns two distinct sets of legislation:

– the first one is Bill 94, enacted as the Health Sector Partnerships Agreement Act, S.B.C. 2003, c.93, and is submitted on behalf of the BCGEU and the HSABC;

– the second one deals with Bill 18, enacted as the Coastal Ferry Act, S.B.C. 2003, c.14; and Bill 95, enacted as the Railway and Ferries Bargaining Assistance Act, S.B.C. 2003, c.99, submitted on behalf of the 4,300 members of the BC Ferry and Marine Workers' Union, an affiliate of the BCGEU.

237. Pointing out that this is the fourth complaint against the current Government of British Columbia in just over two years, the complainant organization emphasizes that the Freedom of Association Committee ruled that the six pieces of legislation at issue in Case No. 2180 violated Convention No. 87; the Committee requested the Government to repeal one of these Acts and to amend the five other ones, and called upon the Government to refrain from taking such action in the future and to restore appropriate and meaningful collective bargaining with public sector employees. The Government's attitude was, at best, dismissive towards the ILO and basic freedom of association principles. Despite claims that the Government was initiating discussions with social partners to bring about improvement and change, the reality is that it is continuing its legislative attacks on BC workers and their unions. The confidence of unionized employees in both private and public sectors continues to be undermined by recent legislative interferences. The Government has an increasingly poor record of violating workers' rights through an abuse of its legislative powers.

The Health Sector Partnerships Agreement Act (Bill 94)

238. According to NUPGE, the legislation challenged here provides employers with the unilateral right to eliminate provisions in freely negotiated collective agreements, which provide substantial protection for workers; employers are given the right to avoid the terms of binding collective agreements by contracting out to related employers that are not covered by such agreements.

239. The Act applies where a public sector employer enters into an agreement with a private sector contractor to provide capital for construction, renovations or equipment in a health-care facility, or to provide non-clinical services in such facility. The Act voids key provisions of collective agreements that prevent contracting out of work, and prevents workers and their unions from accessing important statutory rights under provincial labour relations legislation. This is the second phase of the Government's attempt to interfere with the freedom of association of workers in the health sector; the first one was Bill 29, the Health and Social Services Delivery Improvement Act, which interfered with the rights of direct employees of health sector employers and led to massive contracting out of work

and lay-off of employees in that sector (Bill 29 was the subject of complaint No. 2180 to the Freedom of Association Committee). The Act deals with employees of contractors and is meant to restrict their ability to form unions and to improve their terms and conditions of employment.

240. Sections 4 and 5 of the Act nullify any clause in collective agreements that "restricts, limits or regulates the employer's ability to contract out outside of the collective agreement for the provision of non-clinical services". Where work is contracted out, the contractor's collective agreement cannot contain provisions that limit its ability to contract out the work itself. For example, a health sector employer can now contract out food services to a contractor, who can then contract some or all of the work to a low-wage, non-union employer; if that contractor is unionized, there can be no restrictions on its ability to contract out work. This is therefore a clear attack on workers' freedom of association, since the employer can always respond to a union attempt to improve terms and conditions of employment by simply contracting out the work.

241. In addition, section 3 of the Act overrides section 38 of the Labour Relations Code which provides for "common employer designation" by empowering the Labour Relations Board to treat two employers as one if they carry on activities and have common control and direction; the purpose of that provision is to prevent a unionized employer from simply setting up a non-union operation to avoid a collective agreement, by allowing the Labour Relations Board to declare that the collective agreement applies to the non-union operation. Section 3 of the Act eliminates this protection by providing that section 38 of the Code does not apply to a contractor with a health sector employer. Thus, if a unionized contractor contracted with a health sector employer to provide cleaning services, that contractor could set up a second non-union company; under the previous regime, the union could apply to the Labour Relations Board to have them declared as common employers. The Act now prevents such an application. It is a clear attempt to prevent unionization and interfere with workers' right freely to associate.

242. Furthermore, under section 35 of the Labour Relations Code, if a business is sold or transferred, the union certification and collective agreement apply to the new owner. The Act now provides that if a contractor sells the business, the union cannot use the successorship provisions of the Code. Again, this is a clear attempt at limiting the workers' ability freely to associate.

243. Since Canadian jurisprudence has established criteria for determining who is the true employer of employees, it is not unusual for an employer whose workers are unionized to claim that it does not have to pay a worker according to the collective agreement because that worker is allegedly a contractor rather than an employee; to prevent this, under Canadian case law, unions could challenge such a claim by establishing such factors as who gives directions to, and controls, that employee. Section 6(3)(b) of Bill 29 (see above) attempted to limit the application of the jurisprudence in this area. Sections 4 and 5 of the Act take it one step further by requiring that it should be demonstrated that an employer has the subjective intent to have the employee fully integrated within the operations and working under the employer's direct control and supervision. Therefore, even if a union can establish all the objective criteria proving that a person is an employee of the employer, its application could be defeated if it does not establish the employer's intent that this person would be an employee.

244. The complainant organization concludes that the Act is a direct attack on the freedom of association of workers in the health sector. It is meant to keep that sector low wage and to interfere with the workers' ability to form unions: if a business is sold, the union has to re-unionize the workplace; if a union is formed, an employer can simply contract out the work, even if the collective agreement prohibits contracting out; an employer can simply

set up a non-union company to do the work, and the union will have to re-unionize the employer; or an employer can simply continue to contract out and continue to set up non-union companies, in response to efforts to unionize and improve terms and conditions of employment.

245. When examining Case No. 2180, which dealt with Bill 29, the Freedom of Association Committee noted that that Bill "… introduced major changes to the existing system of labour relations in the health and social sectors, which affected previously negotiated collective agreement provisions and will have a lasting effect on the collective-bargaining regime of employees in these sectors"; and it made a number of recommendations that the Government should follow in this respect [330th Report, para. 305]. Only ten months later, the Government passed Bill 94 which, to all intents and purposes, is an extension of Bill 29, and chose to ignore completely the Committee's recommendations. As was the case with all labour relations legislation introduced by the current Government in the last two-and-a-half years, there were absolutely no consultations with any of the unions representing workers affected by the legislation prior to its introduction.

The Coastal Ferry Act (Bill 18)

246. Prior to the adoption of the Coastal Ferry Act, ferry services in British Columbia were the sole responsibility of the Provincial Government. NUPGE alleges that the Act, adopted in March 2003 to facilitate the creation of a privately owned company, the BC Ferry Corporation (the Corporation), threatens the job security of the 4,300 members of the BC Ferry and Marine Workers' Union (BCFMWU).

247. Again, the workers affected by the Act and their unions were not consulted prior to the introduction or adoption of the legislation. One of the obvious reasons for that lack of consultation is that the Act is designed as an additional means in the de-unionization of the provincial ferry system. The workers concerned have been opposed to that legislation since it was introduced, not only by reason of its restrictive and anti-union bias, but also because they consider it is bad public policy, with profit-making being the dominating factor, at the expense of safety, reliability and affordability of ferry services.

248. Section 25 gives precedence to the Act over the Labour Relations Code. This basically nulls and voids all freedom of association principles and protections established in the Code, which provides that powers and duties under the Code must be exercised in a manner that: recognizes the rights and obligations of employers, employees and trade unions; encourages the practice and procedures of collective bargaining; encourages cooperative participation between employers and trade unions; promotes conditions favourable to the orderly and expeditious settlement of disputes; minimizes the effects of labour disputes on persons not involved in these disputes; ensures that the public interest is protected during labour disputes; and encourages mediation as a dispute resolution mechanism. By placing this particular legislation above these principles, this puts the Act and the Ferries Commissioner (the official in charge of the regulation of ferry operators, under Part 4 of the Act) beyond the reach of the provincial Labour Code, and ensures that the Government and the new private Corporation are not constrained by collective-bargaining obligations in furthering the Government's privatization agenda.

249. The most offensive part of the legislation is section 26, which provides that the Act prevails over freely negotiated agreements, as follows: "A collective agreement that conflicts or is inconsistent with this Act is void to the extent of conflict or inconsistency ... If a provision of a collective agreement requires the BC Ferry Corporation to negotiate with a trade union to replace provisions of the agreement that are null and void as a result of this legislation, that provision is deemed not to apply in respect of this Act." This clause allows the Government to cancel any negotiated term of an agreement that is inconsistent

with the application of the Act. For example, it has been used to reduce from two to one the number of directors representing the union on the Board of Directors of the Corporation. Such unilateral legislative action, that has become the common practice of the current Government, demonstrates its continued disregard for basic principles of freedom of association.

250. The Act further threatens the employment security of workers of the Corporation by establishing contracting out as the preferred method of service delivery within ferry services. While section 38(1) of the Act states that: "Ferry operators are to be encouraged to seek additional or alternative service providers on designated ferry routes through fair and open competitive processes", section 69 actually compels them to do it on an "ongoing basis". This is completed by section 40, which mandates ferry operators to provide the Ferries Commissioner with a record of their attempts to subcontract service delivery, such as requests for proposals, responses to these proposals, unsolicited proposals, etc.

251. The cumulative effect of these provisions is to threaten severely the union security of workers of the ferry system; it denies them basic rights as workers and seriously undermines the rights and protections deriving from Convention No. 87 and freedom of association principles.

The Railway and Ferries Bargaining Assistance Act (Bill 95)

252. The Railway and Ferries Bargaining Assistance Act is clear evidence in support of the preceding allegations. This Act, introduced and proclaimed on 9 December 2003 in the context of a round of collective bargaining between the newly privatized BC Ferry Services Inc. and BCFMWU, is essentially a strike-breaking legislation that the Government tried to use to end a strike that had begun less than 48 hours prior to the introduction of the Act.

253. In early September 2003, BCFMWU began its first collective-bargaining round with the newly privatized company. The parties exchanged bargaining proposals in mid-September. After several weeks of negotiations where the employer refused to make concessions, the union held a strike vote which gave it a 97 per cent strike mandate from the 82 per cent participating members. On 3 November, BCFMWU returned to the bargaining table where the employer continued to demand concessions even after the two days of mediation (3 and 4 December) that it had requested. On 5 December, BCFMWU gave the 72 hours' strike notice required by law, stating that it would go on strike at 5 a.m. on 8 December; the union also agreed to suspend strike action between 19 and 29 December so as not to inconvenience the travelling public during the holiday season.

254. Negotiations to establish an essential service level broke down over the next few days as the union continually faced opposition from the company over the staffing of scheduled sailings. By the time the strike had started, Labour Relations Board hearings had facilitated a compromise on essential services crewing. On 7 December, only hours after the beginning of the strike, the union agreed to the mediator's request to return to the bargaining table and, in a show of good faith, agreed to ease back on strike activity by providing more workers than called for in the Essential Services Order.

255. Unknown to the union at that time, Bill 95 was already in process (it is in fact an updated version of an Act dating back to 1976). It was introduced and proclaimed on 9 December as the Railway and Ferries Bargaining Assistance Act, 2003, to turn the legal strike into an illegal one, and put an end to it. Under the Act, the Labour Minister was empowered to call for an 80-day cooling-off period, which would effectively render the strike illegal. The Act contains absolutely no measures to provide impartial procedures such as arbitration to

settle the dispute. Instead, the Government's interference complicated the negotiations by not allowing the strike to continue; it removed all incentives for the company to settle and allowed it to resist union demands, with no pressure to bargain in good faith.

256. The Act, along with the additional severe restrictions placed on the bargaining rights of BCFMWU members by the Coastal Ferry Act (described above), would have made it next to impossible to negotiate a free and fair collective agreement. In these circumstances, BCFMWU and its members decided to remain firm and continue their strike until they had achieved a tentative collective agreement. On 12 December, realizing that the parties' positions were far apart, the mediator declared bargaining at an impasse; he proposed that the parties accept binding arbitration and that he be appointed special interest arbitrator to settle outstanding issues, which both parties accepted. The union agreed to have its members return to work by 10 a.m. that day, and the employer agreed not to discipline any union member for any strike activity, legal or illegal.

257. The complainant organization states that it is proud to have been able to achieve a freely negotiated settlement through agreed binding arbitration, but emphasizes that it was not facilitated in any way by the adoption of strike-breaking legislation. The legislative interference in the collective-bargaining process was solely designed to restrict workers' rights and tilt the bargaining process in favour of the employer. BCFMWU members were able to achieve a voluntary negotiated collective agreement, albeit with the threat of legal sanctions hanging over their heads. The Act was nevertheless proclaimed and is still in force.

Conclusions sought

258. Recalling that Canada ratified Convention No. 87 in 1972, after securing approval from all provincial governments, including British Columbia, the complainant organization states that in its 28-year history, there has never been a government that has so consistently violated the rights of thousands of workers, neither has there been a government in Canada that has been the subject of so many ILO complaints, than the current Provincial Government of British Columbia. No provincial government has ever shown such contempt for the ILO and the basic principles on which it was founded. At the same time the Governing Body was ruling on the previous complaints concerning British Columbia, the Government was introducing legislation (Bill 18) that was in direct contradiction with the recommendations contained in the 330th Report of the Freedom of Association. The Prime Minister of the Province was quoted on 28 March as saying he had no intentions of making such changes to comply with the ILO ruling: "I feel no pressure whatsoever … I was not participating in any discussion with the UN." Experience has shown repeatedly that this Government does not believe in free collective bargaining and is prepared to legislate a contract if it cannot obtain what it wants at the bargaining table. It is obvious that this Government has no understanding of, and no respect for, basic principles of freedom of association and its international obligations as signatory to ILO Conventions.

B. The Government's reply

259. In its communication of 9 September 2004, the Government states that none of the Acts complained of infringe on the substantive provisions of Convention No. 87, since they do not restrict workers' rights to establish organizations of their own choosing, to draw up their constitutions and rules, elect their representatives, organize their administration and formulate their programmes. The Government states that it continues to support the collective-bargaining process in the Province, as evidenced by the 53 collective agreements negotiated since January 2002 in the public sector, and the substantial

reduction of labour disputes: prior to the election of the current Government, there were 80 strikes in 2000; 18 in 2002; and only eight in 2003.

The Health Sector Partnerships Agreement Act (Bill 94)

260. The budget for health services in British Columbia grew from $8.4 billion in 2000-01 to $9.5 billion in 2001-02, and $10.4 billion in 2002-03. The 2003-04 budget has increased health spending to $10.5 billion, and the estimated cost of health services will rise to $11.3 billion by 2006-07. The Act is a response to the pressing need to reduce the rising cost of health care. Public-private partnerships designated under the Act are a cost-effective way to increase capacity in the health-care system.

261. Under the Act, a private sector partner who makes a capital investment in a new or upgraded health facility and negotiates an agreement with the Province to provide non-clinical services, will have the same flexibility as health authorities in managing its workforce through contracts to deliver non-clinical services. The Act will assist in the development of new health-care facilities by clarifying the rules for public-private partnerships in the health sector.

262. The Act prevents a private sector partner, a contractor and a subcontractor from being declared "common employers" under section 38 of the Labour Relations Code ("the Code"). Where a unionized private sector partner contracts with a non-unionized contractor for the provision of services, a common employer declaration would impose a collective agreement upon the latter's employees without providing them with an opportunity to indicate whether they wish to be represented. Unions would naturally prefer that section 38 apply in such circumstances as it results in the unionization of a group of employees without the usual costs and efforts. Exempting the parties from the application of section 38 of the Code allows them to make their own decision regarding the bargaining agent, if any, that they wish to have represent them.

263. The Government admits that the Act does void any provision of a collective agreement that restricts, limits or regulates the right of private sector contractors to contract outside the collective agreement for the provision of non-clinical services, but argues that this restriction on the scope of bargaining is necessary to give private sector partners and contractors the discretion to decide on the most efficient and cost-effective manner of providing non-clinical services. The Government concludes that these restrictions on the scope of bargaining do not contravene Convention No. 87 since they do not restrict workers' rights to establish organizations of their own choosing, to draw up their own constitutions and rules, elect their representatives, organize their administration and formulate their programmes.

264. The purpose of the Act is to create a framework for viable partnerships in the health sector. Unless the parties intend that an employee be fully integrated with the operations and working under the direct supervision and control of another employer, that employee cannot be considered to be employed by another employer. This clarification is necessary due to the frequently close working conditions: for example, medical staff in an operating room may request cleaning staff to have the operating room cleaned up between surgeries, but there is no intent for the medical staff to supervise or control the cleaning staff.

265. The successorship provisions in the Code are designed to preserve the rights of employees and unions when there is a disposition of business; they require a discernible continuity in the business, rather than in the work performed. In a genuine subcontracting or loss of business to a competitor, the work is performed by a new business, rather than being a continuation of the pre-existing business: as a result, under existing law in British Columbia, successor rights are not available in cases of subcontracting or loss of business

to a competitor. The successorship provisions in the Act clarify the application of the existing law, rather than making substantive changes to the existing laws on successorship. An exemption from successorship provisions does not preclude the affected group of employees from requesting certification and negotiating their own collective agreement. The Government concludes that the successorship provisions in the Act do not infringe on the substantive provisions of Convention No. 87 since they do not restrict workers' rights to establish organizations of their own choosing, to draw up their constitutions and rules, elect their representatives, organize their administration and formulate their programmes.

The Coastal Ferry Act (Bill 18)

266. The Government states that, over the next two years, $2 billion will be required to replace ageing ships and upgrade terminals in the BC Ferries system; accessing outside capital to finance these improvements will reduce the risk to taxpayers of higher government debt. The Act transformed British Columbia Ferry Services Inc., a taxpayer-supported Crown Corporation, into an independent, regulated company. To protect consumers and the public, the Act established an independent regulator to ensure that services are provided and that rate changes are reasonable. This regulated framework also provides incentives for the company to be efficient and innovative, and encourages services that compete with it. The Act deems the employees of the previous Crown Corporation to be employees of the new company; it also creates a maintenance subsidiary of the new company and designates some employees of the previous Crown Corporation to be employees of the new maintenance subsidiary. The Act clarifies that the new company and the maintenance subsidiary are separate employers.

267. The allegation that the new company is not constrained by the obligations of collective bargaining is incorrect. The new company and its employees remain subject to the Code. In order to provide good value to the public, ferry operators are encouraged to seek additional or alternative service providers through fair and open competitive processes, but these parties would be required to provide services in accordance with the Code; in particular, the Act does not contain any restriction on successorship, union representation or bargaining.

268. Section 25(1) of the Act provides that "in the event of conflict between this Act and the Labour Relations Code, this Act prevails". This is conventional language used to assist in the interpretation of the legislation. That provision does not result in a general abrogation of the rights provided under the Code. In fact, it has no effect unless there is a conflict between the Act and the Code; and, as there is no conflict between these two pieces of legislation in respect of the substantive rights provided by the Code as regards successorship, union representation and bargaining, these rights are unaffected. The complainant's assertion that this provision "basically nulls and voids all freedom of association principles and protections established in the Code" is completely without foundation.

269. The Government concludes that the Act does not infringe on the substantive provisions of Convention No. 87 since it does not restrict workers' rights to establish organizations of their own choosing, to draw up their constitutions and rules, elect their representatives, organize their administration and formulate their programmes.

The Railway and Ferries Bargaining Assistance Act (Bill 95)

270. This Act allows the Government to impose a cooling-off period not exceeding 90 days if a disruption of railway or ferry services threatens the economy or welfare of the Province or

its citizens. It does not provide the authority to impose the terms of a collective agreement but merely creates a process for the parties to continue bargaining. It amends a 1976 Act, to update references to the parties and to related legislation.

271. In the most recent round of bargaining, the parties commenced contract negotiations on 8 September 2003. By early December, the talks had broken off and hostility was developing. Pursuant to the Act, the Government ordered an 80-day cooling-off period and appointed a special mediator to work with the parties. The Act requires the resumption of normal operations during the cooling-off period. The assertion that the Act "contains absolutely no measures to provide impartial procedures such as arbitration to settle the dispute" is incorrect. The Act requires that upon declaring a cooling-off period, a special mediator must be appointed to assist the parties in settling the terms of a collective agreement.

272. As regards NUPGE's statement that it is proud that BCFMWU and BC Ferry Services Inc. were able to achieve a voluntary negotiated collective agreement, and while it is true that the parties agreed to binding arbitration, the Government points out that they have not yet completed negotiations for a new collective agreement. In fact, more than six months after the enactment of Bill 95, there are still 150 unresolved bargaining issues. In view of the complexity and intractability of issues to be negotiated, the imposition of an 80-day cooling-off period was a very reasonable intervention in the dispute. The Act is even-handed legislation that is intended to facilitate a resolution of bargaining disputes that have reached an impasse, in railways or ferries services; it permits only a temporary suspension of the right to strike.

273. The Government concludes that the Act does not infringe on the substantive provisions of Convention No. 87 since it does not restrict workers' rights to establish organizations of their own choosing, to draw up their own constitutions and rules, elect their representatives, organize their administration and formulate their programmes.

C. The Committee's conclusions

274. *The Committee notes that this complaint concerns three Acts adopted by the Government of British Columbia in connection with labour relations in two sectors, namely: (a) in health and social services, Bill 94, enacted as the Health Sector Partnerships Agreement Act, S.B.C. 2003, c.93; and (b) in ferry services, Bill 18, enacted as the Coastal Ferry Act, S.B.C. 2003, c.14, and Bill 95, enacted as the Railway and Ferries Bargaining Assistance Act, S.B.C. 2003, c.99.*

The Health Sector Partnerships Agreement Act (Bill 94)

275. *The Committee notes that the complainant organization alleges that the Act: violates the rights of freedom of association of employees providing non-clinical services in the health sector; suppresses for these workers some of the protections provided by the Labour Relations Code (in particular successorship provisions) and by national jurisprudence (e.g. the notion of employee); takes precedence over the terms of existing collective agreements; and was adopted without any consultation of affected workers and their unions. The Government replies that the Act does not violate the rights of workers under Convention No. 87, that it is a response to the need to reduce rising health-care costs, that public-private partnerships designated under the Act are a cost-effective way to increase capacity in the health-care system, and that the Act creates a framework for viable partnerships in the health sector.*

276. *The Committee firstly points out that the allegations concerning this Act cannot be considered in isolation from its previous conclusions and recommendations on a related piece of legislation in the same sector, namely the Health and Social Services Delivery Improvement Act (Bill 29). The Committee had noted in that respect that Bill 29 introduced major changes to the existing system of labour relations in the health and social sectors, which affected previously negotiated collective agreement provisions and would have a lasting effect on the collective-bargaining regime of employees in these sectors. The Committee therefore recommended that full and detailed consultations be held with representative organizations, under the auspices of a neutral and independent facilitator, to review the collective-bargaining issues raised in connection with Bill 29 [see 330th Report, Case No. 2180, para. 305(b)(iii)]. The Committee also requested the Government to ensure in future that appropriate and meaningful consultations be held with representative organizations when workers' rights of freedom of association and collective bargaining may be affected [see 330th Report, para. 305(d)], which was not done here.*

277. *The Committee notes that the Health Sector Partnerships Agreement Act is essentially legislation that gives employers in this sector more flexibility to contract with private sector partners for the provision of non-clinical services. The explanatory note of the Bill mentions that it is meant to "facilitate development and implementation of public-private partnerships in the health sector, enabling improved delivery of cost-effective non-clinical services to the public". To achieve this objective, article 6(1) of the Act provides inter alia that "A collective agreement that conflicts or is inconsistent with this Act is void to the extent of the conflict or inconsistency" and article 6(2) prevents any third-party intervention ("labour relations board, arbitrator or any person") in this respect. Therefore, protections that might have been negotiated in previous collective agreements on contracting out and subcontracting, or legal and case-law protections that might have existed in this respect (including successorship and "common employer" provisions in the Code) are severely restricted, if not cancelled.*

278. *The Committee recalls that a legal provision that allows the employer to modify unilaterally the content of signed collective agreements, or to require that they be renegotiated, is contrary to the principles of collective bargaining [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 848]. The Committee also recalls that while a contraction of the public sector and/or greater employment flexibility (for example in the present case, through increased recourse to subcontracting) do not* in themselves *constitute violations of freedom of association, there is no doubt that these changes have significant consequences in the social and trade union spheres, particularly in view of the increased job insecurity to which they can give rise; workers' organizations should therefore be consulted as to the scope and form of the measures adopted by the authorities [see* ***Digest****, op. cit., para. 934]. The Committee emphasizes once again, as it did in Case No. 2180, the importance of consultations in such cases, where previously negotiated protections are taken away through legislation. Such a unilateral action by the authorities cannot but introduce uncertainty in labour relations that, in the long term, can only be prejudicial.*

279. *The Committee therefore requests once again the Government to abstain in future from cancelling through legislation existing provisions in negotiated collective agreements, and to undertake meaningful and adequate consultations when preparing and adopting legislation affecting the rights of workers.*

The Coastal Ferry Act (Bill 18)

280. *Noting that this legislation was passed to privatize ferry services, the Committee recalls that it can examine allegations concerning economic rationalization programmes and*

*restructuring processes, whether or not they imply 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 and interference against trade unions [see **Digest**, op. cit., para. 935]. Noting that section 26 of the Act does provide that "A collective agreement that conflicts or is inconsistent with this Act is void to the extent of the conflict or inconsistency", the Committee reiterates the principle mentioned above in connection with Bill 94, i.e. that a legal provision which allows the employer to modify unilaterally the content of signed collective agreements, or to require that they be renegotiated, is contrary to the principles of collective bargaining. Stressing the importance of consultations in such cases, the Committee requests once again the Government to refrain in future from cancelling through legislation existing provisions in negotiated collective agreements, and to undertake meaningful and adequate consultations when preparing and adopting legislation affecting the rights of workers.*

The Railway and Ferries Bargaining Assistance Act (Bill 95)

281. *The Committee notes that this legislation (an updated version of the Railway and Ferries Bargaining Assistance Act, 1976, c.48) was passed in the context of a legal strike launched by the BC Ferry and Marine Workers' Union (BCFMWU) during their first round of negotiations with the newly privatized BC Ferry Services. The Act, which made the strike illegal and imposed a return to work, was adopted a mere 48 hours after the beginning of the strike, while the parties were still negotiating and the union had already agreed to a suspension of strike action between 19 and 29 December so as not to inconvenience the public during the holiday season.*

282. *The Committee recalls that the right to strike is a fundamental right of workers and of their organizations as a means of defending their economic interests [see **Digest**, op. cit., para. 473] and that ferry services do not constitute essential services in the strict sense of the term. However, in view of the difficulties and inconveniences that the population living on islands along the coast could be subjected to following a stoppage in ferry services, an agreement may be concluded on minimum services to be maintained in the event of a strike [see **Digest**, op. cit., para. 563]. This is particularly so in view of the circumstances at hand as described by the complainant: a legal strike that had barely lasted 48 hours; a partial suspension of the strike by the union; and negotiations under way. The Committee concludes that the Government's intervention in such circumstances constituted a violation of freedom of association principles. The Committee considers that it would be more conducive to a harmonious industrial relations climate if the Government would establish a voluntary and effective mechanism which could avoid and resolve labour disputes to the satisfaction of all parties concerned; if, despite the existence of such a mechanism, the workers decide to take industrial action, a minimum service could be maintained with the agreement of the parties concerned. The Committee therefore urges the Government to consider establishing a voluntary and effective mechanism for the prevention and resolution of disputes, including the provision of voluntarily agreed minimum services, rather than having recourse to back-to-work legislation. The Committee requests to be kept informed of developments in this respect.*

283. *In view of the number and nature of complaints against British Columbia it has had to deal with in the recent past, the Committee feels bound to note that two of the three Acts complained of in the present case (Bills 94 and 18) and for which there should have been meaningful consultations, were adopted at the very moment, or shortly after, the Committee had pointed out that repeated recourse to legislative restrictions on collective bargaining can only, in the long term, prejudice and destabilize the labour relations climate if the legislator frequently intervenes to suspend or terminate the exercise of rights recognized for unions and their members. Moreover, this may have a detrimental effect on*

*workers' interests in unionization, since members and potential members could consider useless joining an organization the main objective of which is to represent its members in collective bargaining, if the results of such bargaining are constantly cancelled by law [see 330th Report, para. 304; see also **Digest**, op. cit., para. 875]. Deploring that the Government, in a very short period of time, reiterated such a stance, which is not conducive to harmonious labour relations and does not promote collective bargaining, and recalling the importance that should be attached to full and frank consultations on matters of mutual interest between public authorities and representative workers' organizations [see **Digest**, op. cit., paras. 926-927], the Committee requests once again the Government to conduct in future full and frank consultations with representative organizations in those instances where workers' rights of freedom of association and collective bargaining may be affected.*

The Committee's recommendations

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

(a) Noting that the adoption of the Railway and Ferries Bargaining Assistance Act constituted a violation of freedom of association principles, the Committee requests the Government to consider establishing a voluntary and effective mechanism for the prevention and resolution of disputes, including the provision of voluntarily agreed minimum services, rather than having recourse to back-to-work legislation. The Committee requests to be kept informed of developments in this respect.

(b) Noting that the adoption of the Health Sector Partnerships Agreement Act and of the Coastal Ferry Act violated freedom of association principles in as much as these cancelled provisions of previously negotiated collective agreements, the Committee requests the Government to amend these two acts so as to bring them in line with Convention No. 87, and once again requests the Government to abstain from adopting such legislation in the future. The Committee requests to be kept informed of developments in this respect.

(c) Noting that the Government did not hold full and frank consultations with representative organizations for the elaboration and adoption of the Health Sector Partnerships Agreement Act and of the Coastal Ferry Act, the Committee once again requests it to hold such consultations in future where workers' rights of freedom of association and collective bargaining may be affected.

(d) The Committee recalls that the technical assistance of the ILO is at the Government's disposal if it so wishes.

CASE NO. 2046

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

Complaint 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, 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

285. The Committee last examined this case at its June 2004 meeting [see 334th Report, paras. 321-360].

286. The Government sent its observations in communications dated 1 September 2004 and 20 and 24 January 2005.

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

A. Previous examination of the case

288. At its meeting in June 2004, when it examined allegations relating to acts of anti-union discrimination and persecution at a number of companies, the Committee made the following recommendations on the matters still pending [see 334th Report, para. 360]:

(a) […]

(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) […]

(d) […]

(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, SINALTRABET and UNITAS on grounds of legal flaws, the Committee once again urges the Government to register USITAC, SINALTRABET 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 in order to suspend 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 Committee requests the Government to indicate whether the workers have lodged appeals against the decisions to dismiss them […];

(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 Social Protection 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. (In this communication, SINALTRAINBEC stated that on 28 March 2004 the Trade Union of Workers in the Beverages and Foodstuffs Industry (USTIBEA) was formed, and that the company was notified on 2 April 2004. In spite of this, on 17, 19 and 26 April 2004, Cervecería Unión S.A. dismissed SINALTRAINBEC officials William de Jesús Puerta Cano, Luis Fernando Viana Patiño, Edgar Darío Castrillón Munera and Alberto de Jesús Bedoya Ríos without cause, alleging serious disciplinary offences. The complainant adds that the company wanted, without its employees' consent, to extend working hours for staff training.)

B. The Government's reply

289. In its communications dated 1 September 2004 and 20 and 24 January 2005, the Government sent its observations on the recommendations made by the Committee at its last meeting. The Government also sent the comments of the Cervecería Unión S.A. company concerning certain recommendations of the Committee.

290. With regard to item (b), concerning the alleged dismissing and sanctioning of workers belonging to SINALTRABAVARIA for participating in a strike at the company on 31 August 1999, the Government states that the Ministry of Social Protection carried out an administrative investigation and, by resolution No. 00222 of 8 February 2002, refrained from taking any measures against Bavaria S.A., a decision which was confirmed by resolution No. 1340 of 16 July 2002, leaving the company cleared of any blame. The Government adds that the company reports that ordinary proceedings have continued according to the timescales and in the manner established by domestic legislation, and that considerable progress has been made.

291. Thus, in the ordinary labour proceedings brought by Mr. Luis Alfredo Quintero Velásquez against Malterías de Colombia S.A., the Ninth Labour Court of the Bogotá Circuit delivered its verdict on 2 April 2004, clearing Bavaria S.A. of each and every allegation made. However, it did order payment of damages to the plaintiff, since it considered that the offence committed by the plaintiff, although proven, was not serious. The Government states that the aforementioned verdict clarified that the dismissal was not motivated by the plaintiff's participation in the strike, since it occurred only for the reasons given by the employer in its letter terminating the contract, which made no mention whatsoever of the national strike of 31 August 1999. The Government states that this verdict has been appealed by the legal representatives of both parties and is awaiting a decision from the Upper Tribunal of Bogotá.

292. In the ordinary labour proceedings brought by Alfonso Maigual Valdez and José Luis Salazar against Bavaria S.A., the Sixteenth Labour Court of the Bogotá Circuit declared the probatory term closed and set a date for the verdict to be given on 19 November 2004. The Government states that the dismissals in this case were likewise not motivated by the participation of the workers concerned in a national strike, but by their failure to fulfil their contractual and legal obligations.

293. With regard to item (e), 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, the Government reports that SINALTRABAVARIA has not taken any legal measures against resolution No. 00015 of 10 January 2003, in which the Ministry of Social Protection refrained from sanctioning Bavaria S.A., finding, as a result of the appropriate investigation, that there had been no closures, but rather voluntary retirement of workers. The aforementioned administrative act was confirmed by decree on 24 February 2004. The Government states that, according to Bavaria S.A., some workers had approached the labour judges asking that they annul the conciliation agreements signed because of the retirement scheme, but that the legal verdicts had cleared the company, and that they reiterated that the workers had decided freely and voluntarily to accept the retirement scheme offered by the company.

294. With regard to item (f), concerning 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 Government states that, given the legal and actual impossibility of reinstating those persons protected by a judicial verdict ordering their reinstatement, 60 out-of-court conciliation settlements were reached, between the same number of workers protected by trade union immunity and the company in liquidation. In accordance with the principles of the Civil Service Division of the Council of State, the company issued 58 resolutions in respect of 64 plaintiffs, stating the physical and legal impossibility of reinstatement, and releasing and paying to the former workers the wages and benefits arrears owed from the time the posts were abolished until the notification of an administrative act declaring reinstatement to be impossible. At present, 34 trade union immunity proceedings are still awaiting a ruling.

295. With regard to item (g), concerning the refusal to register the trade union organizations USITAC, SINALTRABET and UNITAS on grounds of legal flaws, the Government explains in various replies that, from the procedures carried out while these organizations were being registered, it was discovered that they did not meet the legal and constitutional requirements for registration. The Government adds that, during this process, the members of these organizations were able to discuss the administrative procedures giving rise to the refusal to register these unions and have access to legal redress, and that, since they did not do so, the respective decisions were made final. Furthermore, the Government states that, in the verdict given on 30 June 2004 by the Labour Decisions Division of the Upper Tribunal of Bogotá, fundamental observations were made regarding the illegality of the trade union UNITAS, and that in one section of its verdict the Tribunal stated:

> … we understand that this is not the case with the branch industry UNITAS – which was created to defend the right to organize – since it violates this concept by using the term "branch". This union does not meet the necessary conditions for this, nor to call itself a "trade union grouping", which raises particular and special issues with which this court is not in agreement, ... since it considers that the matter in hand is effectively an abuse of law on the part of the plaintiff. In short, Mr. Héctor Rodríguez Peña's request for trade union immunity cannot be supported by the court, since his case is not entirely typical, as has been recorded in

> similar decisions. For this reason, the union's claims are abusive, since it is using a new trade union grouping which does not have the aims set out in article 39 of the Constitution, but rather the aim of avoiding retirement (which annuls trade union immunity) because it grants certain workers the privilege of not being dismissed or affected in their employment activities unless for a reason previously described by a labour judge on the basis of protecting the right to organize, as has been observed. In this case, Mr. Rodríguez Peña has defended his job security by employing a legitimate legal concept but in an almost abusive manner, and for this reason the court cannot uphold his case on the basis of the facts as presented and given the special nature of the case.

296. The Government states that domestic legislation concerning the inclusion of trade unions on the Ministry's trade union register has not been the subject of observations by the Committee of Experts on the Application of Conventions and Recommendations and that, in the present case, the national administrative authorities concluded that the trade unions did not fulfil the legal requirements for registration. The Government undertakes to keep the Committee informed with regard to the legal actions brought to contest the decisions made by the Ministry of Social Protection.

297. With regard to item (h), concerning 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 Government states that the Ministry of Social Protection is not competent to pursue investigations intended to achieve reinstatement of or payment of damages to the workers dismissed, inasmuch as it falls within the competence of the labour judges. The Government states that Cervecería Unión S.A. has reported that some workers "joined" the non-existent trade union USITAC, and were dismissed, allowing for the normal procedures to be exhausted, on the grounds of serious offences having been committed. Those workers who did not agree with this decision brought their case before the ordinary courts, which cleared Cervecería Unión S.A. on all counts. Similarly, the verdict of the First Labour Court of Itagui in the case brought by Mr. Carlos Alberto Monsalve Luján, delivered on 20 October 2003, cleared Cervecería Unión S.A. on the grounds that the alleged trade union immunity did not apply. This verdict was confirmed by the Labour Division of the Upper Tribunal of Medellín on 3 February 2004, on the basis that "the legal creation of the Itagui executive committee of the Trade Union of the Foodstuffs, Beer, Malts, Drinks, Juices, Soft Drinks, Water and Carbonated Drinks Industries of Colombia (USITAC) was not upheld during these proceedings". Equally, on 6 February 2004, the same court cleared Cervecería Unión S.A. on all counts in the case brought by Mr. Omar de Jesús Ruiz. This verdict was confirmed by the Upper Court of Medellín.

298. With regard to item (i), concerning the actions taken by the enterprise in order to suspend the trade union immunity of William de Jesús Puerta Cano, José Everardo Rodas, Alberto Ruiz and Jorge William Restrepo, the Government states that the enterprise has ceased proceedings to lift trade union immunity since they were no longer necessary, given that William de Jesús Puerta Cano, José Everardo Rodas, Alberto Ruiz and Jorge William Restrepo did not enjoy trade union immunity as the Itagui executive committee of SINALTRAINBEC did not fulfil the minimum requirements for its existence, and as such it cannot take valid actions or be representative, since no body which does not have legal capacity can be the subject of rights or obligations.

299. With regard to item (j), concerning the dismissal of members of the complainant organization SINALTRAINBEC, the Government states that the company has reported that:

> ... given the length of service with the company of the members of this trade union, some members voluntarily opted for the early retirement scheme, which offers conditions far above the average, such as monthly allowances which exceed the basic salary, social security cover, retirement bonuses, and interest-free loans to the value of the last monthly allowance before

the date on which the old age pension is awarded by social security. For their part, some other workers opted to retire by mutual consent, and in these cases the company paid a very representative cash bonus.

According to the company's statement, all workers, regardless of trade union membership, could have benefited from the early retirement scheme or requested retirement by mutual consent, provided that they fulfilled the appropriate requirements. This is why the early retirement scheme and bonus on retirement by mutual consent have been taken up by workers in a wide range of grades, including heads of department, heads of area, secretaries and auxiliaries, among others.

300. With regard to item (k), concerning the untimely closure of COLENVASES, and the forwarding of verdicts, it should be pointed out that in January 2000 the company and the Government submitted a report which explained in detail the procedure followed in the closure of COLENVASES, appending documents concerning the complaints presented by SINALTRABAVARIA, none of which was successful. Similarly, the verdicts given by the jurisdictional authorities in the proceedings brought by SINALTRABAVARIA, which were likewise unsuccessful, were provided. The company and the Government have on various occasions given ample explanation of the aforementioned closure, submitting resolutions and verdicts. The Government does not understand, therefore, what has happened to this information and to the additional documents submitted. The Government requests the Committee to pay more attention to replies submitted. The Government further states that the resolutions issued by the then Ministry of Labour and Social Security are currently the subject of debate before the administrative judicial authorities.

301. With regard to item (l), concerning disciplinary measures against members of SINALTRABAVARIA, the Government states that the Ministry of Social Protection, by resolution No. 000105 of 13 January 2004, resolved the complaint presented by Mr. Nelson Germán Zarate against Bavaria S.A. regarding a disciplinary measure against him, and that the Ministry decided to refrain from taking administrative enforcement measures against the company. The decision was not appealed and was duly made final and archived.

302. The Government states that, in general, a trade union has recourse to administrative and legal channels to uphold any rights it feels have been infringed, noting that the administrative authorities monitor and control compliance with labour law, while the legal authorities consider controversies which merit value judgements in order finally to establish how a right should be recognized. The Government adds that, according to the company, Mr. Nelson Germán Zarate Carvajal brought ordinary labour proceedings against Bavaria S.A. to obtain a declaration of illegality in respect of the sanction imposed by the company, which was resolved by a verdict delivered on 11 June 2004, which cleared Bavaria S.A. and has been made final.

303. Similarly, Mr. José Angel Molina Arévalo took action against Bavaria S.A. in order to obtain a declaration of illegality in respect of the disciplinary measure imposed. The case was heard by the Twentieth Labour Court of the Bogotá Circuit, which considered that no evidence of compliance with one of the conventional requirements had been presented to the court, making the measure illegal, and consequently ordered payment of wages equal to 60 days' salary, which were paid to the plaintiff together with the appropriate legal costs. The company states that this exhausted the channels available for disciplinary measures. The Government expresses its profound surprise at the section of the recommendation in which it is invited to "take measures" to adapt its legislation and legal procedures in line with Conventions Nos. 87 and 98.

304. With regard to item (m), 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 Social Protection 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 Government states, with regard to pressure on workers to resign from the trade union, that as yet the union has been unable to prove its claims, since there exists neither a verdict convicting the company nor an administrative decision sanctioning the company for the aforementioned pressure.

305. Regarding the denial of trade union leave, the Government states that Bavaria S.A. has not been convicted of the alleged denial of trade union leave. Regarding the delay on the part of the Ministry of Social Protection in dealing with matters brought to its attention, the Ministry has fulfilled its duties and obligations in accordance with the powers given to it in law. A different situation arises when, through lack of legal interest on the part of the trade union, complaints have to be archived, which is currently happening in the Thirteenth Inspectorate, which allowed a period of two months for the trade union to register interest in the investigation filed under no. 7898, dated 4 April 2003. When this period expired on 11 July 2004, no interest had been registered and the case is now waiting to be archived.

306. Regarding the registration of trade union executive committees, the Government reiterates that such bodies must act within the law and their own statutes, and thus any actions which contravene the provisions thereof cannot be endorsed by the Ministry of Social Protection. However, the members of such bodies can form new bodies by fulfilling the legal requirements. Finally, Bavaria S.A. has clarified that no cooperatives formed by dismissed staff are operating at the company.

307. With regard to item (o), concerning the failure to implement the Committee's recommendation for the reinstatement of or payment of full compensation to Mr. Romero, the Government reports that, in its verdict of 20 June 2000, the Upper Tribunal of Medellín revoked the verdict given by the Second Labour Court of Itagui, which had cleared Cervecería Unión S.A. in the case brought by Mr. Romero. The Tribunal ordered the company to pay Mr. Jaime Rodrigo Romero González the sum of $28,360,500 in damages for wrongful dismissal and $1,511,614.60 in indexing. The Labour Annulment Division of the Supreme Court of Justice decided on 12 September 2001 not to annul the above verdict. On 21 November 2001, once all the legal processes had been completed, the company, complying with the verdict of the Upper Tribunal of Medellín, proceeded to pay the amounts owed in damages and indexing, to which had been added payment of costs. The total value of the sum paid was thirty-eight million, eight hundred and thirty-three thousand, seven hundred and forty-eight pesos and eight cents ($38,833,748.08).

308. With regard to item (p), concerning SINALTRAINBEC's allegations regarding the dismissal without cause of SINALTRAINBEC officials William de Jesús Puerta Cano, Luis Fernando Viana Patiño, Edgar Darío Castrillón Múnera and Alberto de Jesús Bedoya Ríos for alleged serious disciplinary offences, despite their being SINALTRAINBEC officials and protected by trade union immunity as the founders of USTIBEA, the Government states that in Colombia, as in other countries, the food industry differs from the alcoholic beverages industry, and this gives rise, naturally and not as an expression of trade union discrimination, to the impossibility of forming "branch unions" bringing together workers from both types of industry. It was for this reason, and not for those alleged by the complainants, that the Territorial Directorate of Cundinamarca issued resolution No. 001662 in April 2004, refusing to register the trade union USTIBEA. This refusal is in line with the requirements that the Committee on Freedom of Association has formed on the basis of the text of Conventions dealing with freedom of association, and is not the product of an arbitrary decision by the administration but corresponds to formal requirements which have previously been set out clearly and precisely in legislation. Regarding the dismissal of union officials William de Jesús Puerta Cano, Luis Fernando

Viana Patiño, Edgar Darío Castrillón Munera and Alberto de Jesús Bedoya Ríos, the Government states that, taking good manufacturing practices as a starting point for implementing quality assurance systems, and in order to comply with state regulations in this area, and to develop the powers it has, as an employer, to organize training activities to that end, the company arranged training for staff in the bottling section, where the above workers are employed. They failed to comply with instructions by not attending the training, as is explained in the reply sent by the company. The sanctions imposed by the company for failing to comply with instructions were not the result of trade union activity on the part of these union officials, but of their disobedience.

C. The Committee's conclusions

309. *With regard to the recommendation contained in paragraph 360(b) of the 334th Report, concerning the alleged dismissing and sanctioning of workers belonging to SINALTRABAVARIA for participating in a strike at the company on 31 August 1999, the Committee notes the information supplied by the Government that in one of the cases brought the company was ordered to pay damages to one of the dismissed workers, a decision which was appealed by both the company and the worker, and that the other case is still awaiting a verdict. The Committee recalls that justice delayed is justice denied [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 56] and requests the Government to take the necessary measures to expedite the judicial procedure under way and to continue to keep it informed in this regard.*

310. *With regard to subparagraph (e) of the recommendations 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, the Committee takes note of the information provided by the Government according to which SINALTRABAVARIA has not taken any legal measures against resolution No. 00015 of 10 January 2003, in which the Ministry of Social Protection refrained from sanctioning Bavaria S.A., finding, as a result of the appropriate investigation, that there had been no closures, but rather voluntary retirement of workers, and that the aforementioned administrative act was confirmed by decree on 24 February 2004. The Committee also notes that, according to the Government's information, the actions brought by some workers before the labour courts to annul the conciliation agreements signed as a result of the retirement scheme were all decided in favour of the company, since it was considered that the workers had decided freely and voluntarily to accept the retirement scheme offered by the company.*

311. *With regard to subparagraph (f) of the recommendations concerning 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 notes the Government's statement that 60 out-of-court conciliation settlements were reached, between workers protected by trade union immunity and the company in liquidation, and that 58 resolutions were issued in respect of 64 plaintiffs, stating the physical and legal impossibility of reinstatement, and releasing and paying to the former workers the wages and benefits arrears owed from the time the posts were abolished until the notification of an administrative act declaring reinstatement to be impossible. The Committee further notes that, at present, 34 trade union immunity proceedings are still awaiting a ruling. The Committee requests the Government to take the measures necessary to ensure, bearing in mind the time elapsed, that the procedures still to be completed for payment of salaries*

and benefits to the remaining workers are finalized quickly, and to keep it informed in this regard.

312. *With regard to subparagraph (g) of the recommendations concerning the refusal to register the trade union organizations USITAC, SINALTRABET and UNITAS on grounds of legal flaws, the Committee notes the Government's statement that the trade unions affected have not appealed the administrative decisions refusing registration and that they have therefore been made final. The Committee also notes the verdict delivered on 30 June 2004 by the Labour Division of the Upper Tribunal of Bogotá, confirming that the trade unions did not fulfil the necessary legal requirements for their formation and establishing the existence of an abuse of law by the founder members in seeking to form new organizations. The Committee once again reminds the Government that Article 2 of Convention No. 87, ratified by Colombia, states: "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." This right therefore gives rise to two possibilities: either joining an existing organization or forming a new one, independent of those already established. Similarly, the Committee recalls that, although the founders of a trade union should comply with the formalities prescribed by legislation, these formalities should not be of such a nature as to impair the free establishment of organizations [see* ***Digest****, op. cit., para. 248]. The Committee thus requests the Government to guarantee respect for this principle and to take measures to ensure that, as soon as the minimum requirements are fulfilled, the authorities proceed with registration of the trade unions USITAC, SINALTRABET and UNITAS.*

313. *With regard to subparagraph (h) of the recommendations concerning 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 had requested 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 had lodged the corresponding appeals and what was the outcome. The Committee notes the Government's statement that according to information supplied by Cervecería Unión S.A., some workers who joined the trade union USITAC, which had been declared non-existent as a result of its registration being refused, were dismissed, allowing for the normal procedures to be exhausted, on the grounds of serious offences having been committed; the workers who disagreed brought their cases before the ordinary courts, which cleared Cervecería Unión S.A. on all counts, on the grounds that the workers did not enjoy trade union immunity, given that, as the Committee has observed in the previous paragraph of this case report, the organization USITAC had had its registration refused for failing to fulfil certain legal requirements. These legal decisions have been confirmed by the appeal courts.*

314. *With regard to subparagraph (i) of the recommendations concerning the actions taken by the enterprise in order to suspend the trade union immunity of William de Jesús Puerta Cano, José Everardo Rodas, Alberto Ruiz and Jorge William Restrepo, the Committee notes the Government's statement that the enterprise has ceased proceedings to lift trade union immunity, given that William de Jesús Puerta Cano, José Everardo Rodas, Alberto Ruiz and Jorge William Restrepo did not enjoy trade union immunity as the Itagui executive committee of SINALTRAINBEC did not fulfil the minimum requirements for its existence, and as such could not take valid actions. The Committee requests the Government to inform it as to whether the union officials have been finally dismissed and to give the reasons for such action being taken.*

315. *The Committee observes that this point is related to subparagraph (p) of the Committee's recommendations concerning SINALTRAINBEC's allegations regarding the subsequent dismissal without cause of SINALTRAINBEC officials and founders of the Trade Union of Workers in the Beverages and Foodstuffs Industry (USTIBEA), who also include William de Jesús Puerta Cano, together with Luis Fernando Viana Pariño, Edgar Darío Castrillón Munera and Alberto de Jesús Bedoya Ríos, on the grounds of serious disciplinary offences. The Committee notes that, according to the Government, the officials were dismissed for not attending a training meeting. The Committee requests the Government to take measures to ensure that an independent investigation is carried out to establish whether these dismissals took place following suspension of trade union immunity, bearing in mind that, according to the information supplied by the Government, workers can only be reinstated once they have begun the appropriate legal action, and to keep it informed of any legal action begun or cases brought with this aim. The Committee recalls that if the competent authorities determine that the dismissals were of an anti-union nature, the unionists in question should be reinstated in their posts.*

316. *As regards the legal impossibility to form industry unions grouping workers of various types of industry, the Committee recalls that, in conformity with Article 2 of Convention No. 87, workers have the right to form organizations of their own choosing and consequently it is for workers to determine the union structure they desire.*

317. *With regard to subparagraph (j) of the recommendation concerning the dismissal of members of the complainant organization SINALTRAINBEC, the Committee notes the Government's statement that, according to the company, some members were dismissed with just cause for violating the company's working rules and other applicable regulations, while others voluntarily accepted an early retirement scheme. The Committee requests the Government to keep it informed of any legal proceedings brought in respect of these dismissals and early retirement schemes.*

318. *The Committee observes that this point is closely related to subparagraph (n) of the Committee's recommendations in its previous examination of the case, when it requested the complainant organization SINALTRAINBEC to provide further information regarding the dismissal of members through an early retirement scheme. The Committee observes in this regard that the complainant has not provided any additional information.*

319. *With regard to subparagraph (k) of the recommendations concerning the closure of the COLENVASES plant, leading to the dismissal of 42 workers and seven union officials without trade union immunity being suspended and without complying with the Ministry of Labour's resolution which authorized the closure but ordered the prior application of clauses 14 and 51 of the collective agreement in force, the Committee notes the Government's statement that in January 2000 the company and the Government submitted a report which explained in detail the procedure followed in the closure of COLENVASES, appending documents concerning the complaints presented by SINALTRABAVARIA and a copy of the verdicts given by the jurisdictional authorities in the proceedings brought by SINALTRABAVARIA, all of which found in favour of the company and expresses its surprise that this information was not taken into account by the Committee. The Committee considers that all the information submitted by the complainants and by the Government has been duly taken into account. The Committee observes, however, that in this case the legal proceedings concerned are those subsequently brought against resolutions Nos. 2169, 2627 and 2938 on this matter before the administrative judicial authorities, in respect of which the Government stated in a previous examination of the case [see 332nd Report, November 2003, para. 455] that it would provide a copy of the relevant decisions as soon as they were issued. This being the case, the Committee again requests the Government to keep it informed of the results of the above legal proceedings and to send a copy of the decisions made.*

320. *With regard to subparagraph (l) of the recommendations concerning disciplinary measures against members of SINALTRABAVARIA, the Committee notes that, according to the Government, the ordinary legal proceedings brought by the workers concerned were resolved in one case in favour of the company and in the other in favour of the plaintiff. In the latter case, the Committee notes the Government's statement that damages were duly paid to the worker and that all the legal proceedings brought against Bavaria S.A. in this regard were thereby exhausted. The Committee also notes the information supplied by the Government that, in situations of this nature, a trade union has recourse to administrative and legal channels to uphold any rights it feels have been infringed, noting that the administrative authorities monitor and control compliance with labour law, while the legal authorities consider controversies which merit value judgements in order finally to establish how a right should be recognized.*

321. *With regard to subparagraph (m) of the recommendations 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 Social Protection 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 notes the Government's statement with regard to pressure on workers to resign from the trade union that, as yet, the union has been unable to prove its claims, since there exists neither a verdict convicting the company nor an administrative decision sanctioning the company for the aforementioned pressure. The Committee recalls that no person should be dismissed or prejudiced in his or her employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see **Digest**, op. cit., para. 696]. The Committee requests the Government to ensure the full application of this principle.*

322. *With regard to the allegations concerning the denial of trade union leave, the Committee notes the Government's statement that Bavaria S.A. has not been convicted of the alleged denial of trade union leave. The Committee observes that the Government does not clearly specify whether proceedings have been brought against the company in this regard and, if so, whether they found in favour of the company. The Committee requests the Government to keep it informed in this respect. In any event, the Committee recalls that, in accordance with paragraph 10 of the Workers' Representatives Recommendation, 1971 (No. 143), workers' representatives should be afforded the necessary time for carrying out their representation functions and that, while workers' representatives may be required to obtain permission from the management before taking time off, such permission should not be unreasonably withheld [see **Digest**, op. cit., para. 952]. The Committee requests the Government to ensure respect for these principles in the future.*

323. *With regard to the delay on the part of the Ministry of Social Protection in dealing with matters brought to its attention, the Committee notes that, according to the Government, the Ministry has fulfilled its duties and obligations in accordance with the powers given to it in law, but that, on various occasions, complaints have been archived through lack of legal interest on the part of the trade union.*

324. *With regard to the registration of trade union executive committees, the Committee notes that the Government reiterates that trade unions must act within the law and their own statutes, and that, if they do not, then they cannot be taken to be legally constituted by the Ministry of Social Protection, but that, nevertheless, the members of such bodies can form new bodies by fulfilling the legal requirements. The Committee also notes that, according to the Government and information supplied by Bavaria S.A., no cooperatives formed by dismissed staff are operating at the company.*

325. *With regard to subparagraph (o) of the recommendations concerning the failure to implement the Committee's recommendation for the reinstatement of or payment of full compensation to Mr. Romero, the Committee notes that, in its verdict of 20 June 2000, the Upper Tribunal of Medellín ordered the company to pay Mr. Jaime Rodrigo Romero González the sum of $28,360,500 in damages for wrongful dismissal and $1,511,614.60 in indexing, a decision which was confirmed by the Labour Annulment Division of the Supreme Court of Justice on 12 September 2001. Consequently, on 21 November 2001, once all the legal processes had been completed, the company, complying with the verdict of the Upper Tribunal of Medellín, proceeded to pay the amounts owed in damages and indexing, to which had been added payment of costs.*

The Committee's recommendations

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

(a) With regard to the alleged dismissing and sanctioning of workers belonging to SINALTRABAVARIA for participating in a strike at the company on 31 August 1999, the Committee recalls that justice delayed is justice denied and requests the Government to take the necessary measures to expedite the judicial procedure under way and to continue to keep it informed of the results of the actions and proceedings brought.

(b) With regard to 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 take the measures necessary to ensure, bearing in mind the time elapsed, that the procedures still to be completed for payment of salaries and benefits to the remaining workers are finalized quickly, and to keep it informed in this regard.

(c) With regard to the refusal to register the trade union organizations USITAC, SINALTRABET and UNITAS on grounds of legal flaws, the Committee recalls that, although the founders of a trade union should comply with the formalities prescribed by legislation, these formalities should not be of such a nature as to impair the free establishment of organizations and requests the Government to take measures to ensure that, as soon as the minimum requirements are fulfilled, the authorities proceed with registration of the trade unions USITAC, SINALTRABET and UNITAS.

(d) With regard to the actions taken by the enterprise in order to suspend 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 inform it as to whether the union officials have been finally dismissed and to give the reasons for such action being taken.

(e) With regard to the alleged subsequent dismissal without cause of SINALTRAINBEC officials and founders of the Trade Union of Workers in the Beverages and Foodstuffs Industry (USTIBEA), who also include William de Jesús Puerta Cano, together with Luis Fernando Viana Pariño, Edgar Darío Castrillón Munera and Alberto de Jesús Bedoya Ríos, on the grounds of serious disciplinary offences, the Committee requests the Government to take measures to ensure that an independent investigation is carried out to establish whether these dismissals took place following suspension of trade union immunity, and bearing in mind that, according to the information supplied by the Government, workers can only be reinstated once they have begun the appropriate legal action, to keep it informed of any legal action begun or cases brought with this aim. The Committee recalls that, if the competent authorities determine that the dismissals were of an anti-union nature, the unionists in question should be reinstated in their posts.

(f) As regards the legal impossibility to form industry unions grouping workers of various types of industry, the Committee recalls that, in conformity with Article 2 of Convention No. 87, workers have the right to form organizations of their own choosing and consequently it is for workers to determine the union structure they desire.

(g) With regard to the dismissal of members of the complainant organization SINALTRAINBEC, and the early retirement schemes adopted by the company and accepted by some members, the Committee requests the Government to keep it informed of any legal proceedings brought in respect of these measures.

(h) With regard to the closure of the COLENVASES plant, leading to the dismissal of 42 workers and seven union officials without trade union immunity being suspended and without complying with the Ministry of Labour's resolution which authorized the closure but ordered the prior application of clauses 14 and 51 of the collective agreement in force, the Committee again requests the Government to keep it informed of the results of the legal proceedings brought by SINALTRABAVARIA before the administrative judicial authorities concerning resolutions Nos. 2169, 2627 and 2938 and to send a copy of the decisions made.

(i) With regard to the allegations presented by SINTRABAVARIA concerning pressure on workers to resign from the trade union, the Committee requests the Government to take measures to guarantee the full application of the principle that no person should be dismissed or prejudiced in his or her employment by reason of trade union membership or legitimate trade union activities.

(j) With regard to the allegations presented by SINTRABAVARIA concerning the denial of trade union leave, the Committee requests the Government to ensure respect in future for the principles contained in paragraph 10 of the Workers' Representatives Recommendation, 1971 (No. 143), and to indicate whether proceedings have been brought against the company in this respect and, if so, whether the outcome was in favour of the employer.

CASE NO. 2239

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

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 accord 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

327. The Committee last examined this case at its June 2004 meeting [see 334th Report, paras. 381 to 396]. The National Union of Workers in the Weaving, Textiles and Clothing Industry (SINALTRADIHITEXCO) sent new allegations in a communication dated 9 July 2004 and the Trade Union of Glass and Allied Workers of Colombia (SINTRAVIDRICOL) in a communication dated 12 August 2004.

328. The Government sent its observations in communications dated 1 and 9 September 2004, 24 January and 15 February 2005.

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

A. Previous examination of the case

330. In its previous examination of the case, the Committee made the following interim recommendations [see 334th Report, para. 396]:

(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.

B. New allegations

331. The National Union of Workers in the Weaving, Textiles and Clothing Industry (SINALTRADIHITEXCO) states that in August 2002 the companies Tejicondor S.A. and Fabricato S.A. merged, and that the merged company currently has more than 3,000 workers employed through associated labour cooperatives. It adds that the new company unilaterally annulled the collective agreement signed by Fabricato S.A. revoking the economic rights of workers which had previously been recognized. The complainant also states that the company has refused to grant trade union leave or to take part in collective bargaining concerning the list of claims presented on 11 June 2003, and that the Ministry for Social Protection has not convened the Arbitration Tribunal requested by the complainant on 16 June 2003.

332. Lastly, the complainant reports the murder of Mr. Luis Alberto Toro Colorado, a member of the national executive committee of SINALTRADIHITEXCO.

333. In its communication of 12 August 2004, the Trade Union of Glass and Allied Workers of Colombia (SINTRAVIDRICOL) states that the investigation carried out by the Government to comply with the recommendations made by the Committee in its previous examination of the case was insufficient, since it was limited to statements being taken from two company witnesses and the workers who had made the complaint. The investigating body then declared the matter to fall outside its competence. The complainant states that it has lodged an appeal against this declaration of incompetence.

C. The Government's reply

334. Regarding the dismissal of more than 100 workers belonging to SINALTRADIHITEXCO from Tejicondor S.A., and the subsequent contracting of workers through associated labour cooperatives (COOTEXCON and Gente Activa), the Government states that the Constitutional Court overturned the verdicts given by the Third Civil Municipal Court and the Tenth Civil Court of the Medellín Circuit as a result of the writs of protection presented against Tejidos el Cóndor, S.A. (Tejicondor S.A.).

335. With regard to whether workers in cooperatives in general, and in particular in the case of COOTEXCON and Gente Activa, can form their own organizations in order to defend their interests or join a trade union, the Government states that within cooperatives, in accordance with their nature, philosophy and legal regulation (Act No. 79 of 1988), the members exercise their constitutional right to freedom of association by forming their own cooperative or by joining a cooperative, in complete freedom, and enjoying the same rights as other members. As members, they are the cooperative's only bosses, for which reason they deal with administration, supervision and ensuring the future and development of the cooperative, and form its administrative body, elected by its members. Cooperatives in Colombia have their own established organization to defend their rights and interests, known as the National Confederation of Cooperatives (CONFECOOP).

336. The Government adds that, in accordance with the decision of the Constitutional Court contained in verdict No. C-211 of 2000, no superior-subordinate relationship exists between cooperatives and their members, since a member, by their nature, is not a worker dependent on the institution. Consequently, the concept of a contract of employment, which is essential in order for a trade union to exist, as laid down in law, does not exist in cooperatives. From this it can be deduced, with perfect clarity, that only employees and persons classed as workers as defined in section 22 of the Substantive Labour Code are entitled to form trade unions. Other persons engaged in activities not stemming from a contract of employment may form other types of association, as laid down by article 38 of the Constitution. Consequently, being an employee or worker, as defined in article 39 of the Constitution and sections 353 and 356 of the Substantive Labour Code, is an essential prerequisite for forming a trade union.

337. Regarding the Committee's request that a copy of the statutes of the two cooperatives concerned as well as a copy of "all the legislative provisions on cooperatives" be sent, the Government does not follow-up on this, and wishes to make clear that this is not in order to avoid a debate on the issue, but rather because it considers that it falls beyond the mandate of the Committee to study the legislation and practice of the cooperative movement, the principal characteristic of which is that its members, by their nature, are not united by an employment relationship. The Government therefore questions the usefulness of requesting documents which have nothing to do with matters relating to freedom of association, since labour cooperatives are self-help, non-profit-making organizations.

338. With regard to the allegations relative to the assassination of Luis Alberto Toro Colorado, member of the national executive committee of SINALTRADIHITEXCO, the Government indicates that the Attorney General's Office instituted a preliminary investigation assigned

to the 5th public prosecutor of the Bello district (file No. 138833) which is currently at the collection-of-evidence stage.

339. With regard to the new allegations presented by SINALTRADIHITEXCO, in relation to the refusal of the Tejicondor S.A. company to grant trade union leave, the Government states that, by resolution No. 3097 of 3 December 2003, a fine equivalent to five monthly minimum wages was given to the company for violating the right to organize, but this resolution was overturned on appeal due to lack of sufficient proof to substantiate the allegations thus leaving the parties free to have recourse to the courts.

340. With regard to the allegations relative to the refusal to negotiate a list of claims, the Government states that, by resolution No. 2854 of 10 November 2003, the company was exonerated of the accusations because SINALTRADIHITEXCO had become a minority trade union as a result of the merger between Tejicondor S.A. and Fabricato in 2002. An appeal was lodged against this resolution and the parties were left free to have recourse to the ordinary courts by resolution No. 3253 of 1 December 2004.

341. With regard to the allegations made by SINTRAVIDRICOL concerning the dismissal of Mr. Carlos Mario Cadavid and the suspension of union official Mr. José Angel López, the Government states that the Territorial Directorate of Antioquia of the Ministry of Social Protection began an administrative labour investigation into Cristalería Peldar S.A., Envigado factory, and issued resolution No. 01797, dated 22 July 2004, which established that the matter did not fall within the competence of the Ministry, bearing in mind that in the present case, which concerns a disciplinary action against a union official and the dismissal of a union member, it is important to recall one of the verdicts of the Upper Tribunal of Medellín, Labour Division, which stated on this subject: "Within the powers of subordination that an employer has is the right to give orders and impose regulations and sanctions on its employees. This includes specifically the opportunity to bring disciplinary proceedings which may end in sanctions or dismissals; in this case, the workers concerned have the option of taking their case to the ordinary labour courts where, following further detailed examination, a judge will decide whether or not the actions taken were justified in law." The Government states that, with regard to the aforementioned resolution, procedures for the case to be reheard and appeals procedures have been brought by both the company and the union, and that, once a verdict has been given, a copy of it will be provided. The Government adds that, given the above, it is up to the workers to begin proceedings through the ordinary courts.

342. The Government further states that, according to information received from Cristalería Peldar S.A., Envigado factory, the allegations of violations of the right to freedom of association were made by the local committee for Envigado, and not by the National Executive Committee. In response to these allegations, the company claims that the measures taken by the company do not represent a company policy of violating the right to freedom of association, but rather that the isolated cases of these two workers are being made to appear as violations of freedom of association by the local committee for Envigado, and that in reality they are nothing more than simple differences in administrative criteria between the company and the said local committee in the face of disciplinary measures taken at the Envigado factory. Such conflicts are common in worker-employer relations when workers fail to comply with their obligations in carrying out their contractual duties.

343. In the case of Mr. Carlos Mario Cadavid, the termination of contract without just cause with payment of damages was due to the fact that this individual, by means of his constant speeches, hindered and even on occasion prevented other workers from exercising their free right to attend open dialogue meetings organized periodically by the company to pass on information on various important aspects of the company's development, meetings

which were also held with the union as established in section 7 of the collective agreement in force, which lays down that every six months the company chairman shall hold a meeting with SINTRAVIDRICOL in order to discuss and resolve problems which have not been solved at labour relations meetings and in order for the management to pass on information on important aspects of the company's development, among which is the quality assurance process. These meetings are called one month in advance to allow SINTRAVIDRICOL to send, in the 15 days before the meeting, a list of the issues it intends to discuss.

344. The conduct on more than one occasion of this worker was annoying and worrying for his colleagues, who complained of his attitude to their supervisors but, for fear of reprisals, would not support their complaints with written statements or give evidence before a judge or inspector concerning the issue. Thus, given the difficulty of obtaining evidence which would lead to disciplinary proceedings to terminate his contract of employment with just cause, the company decided to dismiss him without just cause with payment of damages as laid down in the collective agreement, which exceed the legal minimum established in the Substantive Labour Code by between 1 and 100 per cent.

345. In the case of Mr. José Angel López, this union official decided on one occasion that workers would not sign an attendance list, which the company must maintain for the purposes of monitoring and testing by the bodies which certify the quality of its products, at a training course being provided for a group of workers, which included Mr. López, because the attendance list being used contained a general observation that the hours involved would be counted as hours of training. Colombian law lays down that employers with more than 50 employees working 48 hours in the week shall be obliged to ensure that those employees have the right to spend two hours of the working week, to be counted as employer's time, engaged in training, cultural, sporting or recreational activities.

346. Mr. López berated the other workers attending the course, demanding that they did not sign the attendance sheet or attend the remaining sessions of the training course. When this happened, the director of personnel came to the room where the course was being held and spoke to Mr. López, drawing his attention to the fact that if he had any complaints about the attendance list he should make them through the proper channels, such as at the labour relations meetings between company and union held every fortnight in accordance with the collective agreement in force, or directly through the personnel office as convenient. Mr. López's reaction was to tear up the attendance list which the other workers attending the course had already signed and, as a result, the company decided to proceed with the disciplinary action provided for in the collective agreement, and so held three suspension hearings at which the union official in question was present, accompanied by two SINTRAVIDRICOL representatives, following which the company considered that the employee's actions should be punished to ensure that, in the future, it would be understood that the proper channels should be used to make any complaints.

347. According to the Government, the company adds that relations between Cristalería Peldar S.A. and the union have for many years been based on mutual respect and open dialogue, and the company hopes that these relations will continue with the peace of mind which comes from knowing that conceptual differences which may arise between the two sides will be resolved with maturity and dignity. Proof of this is the minute made on 8 January 2004, which describes the satisfactory end to the negotiations concerning the collective labour dispute which arose when a list of claims was submitted to Cristalería Peldar S.A. by SINTRAVIDRICOL on 11 November 2003. A new collective agreement was signed by Cristalería Peldar S.A. and its employees on 19 January 2004, applicable from 21 November 2003 to 20 November 2005.

348. With regard to the allegations presented by the WFTU concerning the forced signing of a collective agreement with member and non-member workers at GM Colmotores, which implied the automatic resignation of a high percentage of SINTRAIME workers, the Government states that, according to information provided by the company, GM Colmotores has never entered into irregular, much less illegal, contracts, given that domestic legislation (in addition to various international laws) views the concept of an associated labour cooperative as a legal and valid means of contracting workers. According to the Government, the company explains that no worker directly employed by the company has been replaced by a cooperative contractual relationship, since the aim of contracts with cooperatives is completely at variance with the social objectives of GM Colmotores and that the tasks assigned are not carried out by directly employed workers.

349. The company thus denies the existence of a policy of liquidating the trade union through the use of different types of contract, since the company, acting within the law, has employed its workers using employment contracts, both permanent and fixed-term, and this does not threaten the free exercise of trade union rights, as the duration of a contract of employment does not prevent membership of a trade union, since this is clearly established as a fundamental right in article 39 of the Constitution, developed in section 353 of the Substantive Labour Code, subrogated by section 38 of Act No. 50 of 1990, and modified by section 1 of Act No. 584 of 2000, and at international level in ILO Convention No. 87, which concludes that the essential prerequisite for belonging to a trade union is to be qualified as a worker and obviously to have the free will to join. Furthermore, the Constitutional Court has ratified the validity and legality of associated labour cooperatives and, consequently, the cooperative system of associated labour is equally legal.

350. With regard to the allegations of blackmail and deception in dismissing staff, the Government states that, according to the company, the dismissals took place voluntarily and with no pressure. The Government adds that, according to the points made in these allegations, the regional directorate of Cundinamarca initiated the appropriate administrative labour investigation which has yet to deliver a verdict and that, once a decision has been made, a copy of the resolution will be provided.

351. In respect of the application of the collective agreement to non-affiliated workers, the Government states that the company has reported that the non-affiliated workers negotiated and signed a collective labour accord *(pacto colectivo)*, a concept provided for in domestic labour legislation in section 481 of the Substantive Labour Code. The Government also indicates that all conventional assistance and benefits were paid by the company while the accord was in force. Finally, the Government states that the company denies any direct or indirect responsibility for the weakening of the trade union, since, in the company's view, such weakening is due to internal conflicts between different officials and members which have been developing ever since the union based at GM Colmotores decided to merge with the branch union SINTRAIME.

D. The Committee's conclusions

352. *Regarding the dismissal of more than 100 workers belonging to SINALTRADIHITEXCO from Tejicondor S.A., and the subsequent contracting of workers through associated labour cooperatives, who, according to the complainants, do not enjoy the rights to freedom of association and collective bargaining, the Committee recalls that in its previous examination of the case it requested the Government to: (1) send a copy of the decision of the Constitutional Court revoking the reinstatement orders given as a result of the writs of protection presented; (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.

353. *The Committee regrets that the Government has not yet sent a copy of the requested verdict of the Constitutional Court and requests it to do so without delay. With regard to the right of workers in cooperatives to establish their own organizations in order to defend their interests or join a branch trade union, the Committee notes that, according to the Government, because of the nature of cooperatives, in which the dependent relationship characteristic of a contract of employment and essential for the establishment of a trade union does not exist, workers who belong to a cooperative may not establish or join a trade union, which has not prevented cooperatives from forming an organization known as the National Confederation of Cooperatives (CONFECOOP) with the aim of defending the interests of cooperatives. The Committee also regrets to observe that the Government has refused to send the legislation on cooperatives and the statutes of the cooperatives COOTEXCON and Gente Activa which it requested in its previous examination of the case. In this regard, although it realizes that cooperatives represent one particular way of organizing production methods, the Committee cannot cease consideration of the special situation of workers with regard to cooperatives, in particular as concerns the protection of their labour interests. The Committee deeply regrets this situation and considers that such workers should enjoy the right to join or form trade unions in order to defend those interests. It requests the Government to take the appropriate steps to guarantee full respect for freedom of association. The Committee reminds the Government that the technical assistance of the Office is at its disposal.*

354. *With regard to the allegations made by SINTRAVIDRICOL concerning the dismissal of Mr. Carlos Mario Cadavid and the suspension of union official Mr. José Angel López, the Committee in its previous examination of the case requested the Government to take steps to ensure that an independent investigation be 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 so, to take steps to ensure that Mr. Cadavid be reinstated without delay with payment of the wages and benefits owing to him, that the suspension of Mr. López be revoked and that he receive any unpaid wages and benefits that were owing to him. The Committee notes that the complainant has stated that the investigation carried out by the Ministry of Social Protection was insufficient and resulted in a declaration of lack of jurisdiction, against which an appeal has been lodged.*

355. *The Committee further notes that the Government reports that, according to Cristalería Peldar S.A., the measures taken were not the result of the trade union activities of Mr. Cadavid and Mr. López, but of their repeated poor conduct. In fact, Mr. Cadavid was dismissed following a disciplinary procedure for incessantly interrupting labour meetings and Mr. López was suspended for refusing to hand over the attendance list for a training course held during working hours. The Committee observes that there is a discrepancy between the allegations presented by the complainant and the Government's statement as regards the reasons for the measures being taken (in the previous examination of the case, the complainant alleged that Mr. Cadavid was dismissed for attending a trade union course and that Mr. López was punished for refusing to sign and retaining an attendance list in protest at being obliged to attend a training course outside working hours). The Committee notes that the Administrative Tribunal has declared that the matter does not fall within its jurisdiction and that therefore it has not investigated the true reasons for the dismissal. The Committee notes however that both the company and the complainant have appealed this decision. Consequently, the Committee urges the Government to take the appropriate measures without delay to ensure that these appeals are resolved and to keep it informed of the results of the appeals and of any other legal action which may be brought in this regard.*

356. *With regard to the serious allegations presented by the WFTU concerning the forced signing of a collective accord* (pacto colectivo) *with member and non-member workers at GM Colomotores, which implied the automatic resignation of a high percentage of National Union of Workers in Metal Mechanics, Metallurgy, Iron, Steel, Electro-metals and Related Industries (SINTRAIME) workers, the Committee notes the Government's statement that, according to GM Colomotores, the non-affiliated workers signed a collective accord permitted in law, which did not prevent the company from fulfilling all its conventional obligations. The Committee further notes the Government's statement that, with regard to these matters, the regional management of Cundinamarca has launched an administrative labour investigation and that a copy of its decision will be provided. With regard to the signing of collective accords, the Committee recalls that, in examining similar allegations presented in other complaints against the Government of Colombia, it underlined "that the principles of collective bargaining must be respected taking into account the provisions of Article 4 of Convention No. 98 and that collective accords should not be used to undermine the position of the trade unions" [see 324th Report, Case No. 1973, 325th Report, Case No. 2068 and 332nd Report, Case No. 2046 (Colombia)]. The Committee requests the Government to take the necessary measures to ensure that workers are not pressured into accepting against their will a collective accord which implies resignation from a trade union and to keep it informed of the result of the investigation launched by the regional directorate of Cundinamarca.*

357. *With regard to the allegations concerning the murder of Mr. Luis Alberto Toro Colorado, a member of the national executive committee of SINALTRADIHITEXCO, the Committee notes the information submitted by the Government, according to which the Attorney General's Office instituted a preliminary investigation assigned to the 5th public prosecutor of the Bello district (Case No. 138833), which is currently at the stage of collection of evidence. The Committee requests the Government to keep it informed of the result of this investigation.*

358. *With regard to the new allegations made by SINALTRADIHITEXCO concerning the unilateral annulment by Tejicondor S.A. which merged with Fabricato S.A. of a collective agreement signed by Fabricato S.A., the refusal to grant trade union leave or to convene the Arbitration Tribunal requested by the complainant in June 2003, the Committee takes note of the information provided by the Government according to which a fine equivalent to five monthly minimum wages was given to the company for violating the right to organize, but this resolution was overturned on appeal due to lack of sufficient proof to substantiate the allegations, thus leaving the parties free to have recourse to the courts. With regard to the allegations relative to the refusal to negotiate a list of claims, the Committee notes that, by resolution No. 2854 of 10 November 2003, the company was exonerated of the accusations because SINALTRADIHITEXCO had become a minority trade union as a result of the merger between Tejicondor S.A. and Fabricato S.A. in 2002. An appeal was lodged against this resolution and the parties were left free to have recourse to the ordinary courts by resolution No. 3253 of 1 December 2004. The Committee recalls that agreements should be binding on the parties [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 818] and that, in accordance with Paragraph 10 of the Workers' Representatives Recommendation, 1971 (No. 143), workers representatives should be afforded the necessary time for carrying out their representation functions and that, while workers' representatives may be required to obtain permission from the management before taking time off, such permission should not be unreasonably withheld [see* ***Digest****, op. cit., para. 952]. The Committee urges the Government to ensure respect for these principles and requests the Government to keep it informed of any legal action taken in this respect.*

The Committee's recommendations

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

(a) Regarding the dismissal of more than 100 workers belonging to SINALTRADIHITEXCO from Tejicondor, and the subsequent contracting of workers through associated labour cooperatives, who, according to the complainants, do not enjoy the rights to freedom of association and collective bargaining, the Committee deeply regrets this situation and considers that such workers should enjoy the right to join or form trade unions in order to defend their interests. It requests the Government to take the appropriate steps to guarantee full respect for freedom of association. The Committee reminds the Government that the technical assistance of the Office is at its disposal.

(b) With regard to the allegations made by SINTRAVIDRICOL concerning the dismissal of Mr. Carlos Mario Cadavid and the suspension of union official Mr. José Angel López, bearing in mind the discrepancies between the allegations made by the complainant and the information supplied by the Government, the Committee urges the Government to take the appropriate measures without delay to ensure that the appeals lodged are resolved and to keep it informed of the results of the appeals and of any other legal action which may be brought in this regard.

(c) With regard to the serious allegations presented by the WFTU concerning the forced signing of a collective accord* (pacto colectivo) *with member and non-member workers at GM Colomotores, which implied the automatic resignation of a high percentage of workers from the National Union of Workers in Metal Mechanics, Metallurgy, Iron, Steel, Electro-metals and Related Industries (SINTRAIME), the Committee requests the Government to take the necessary measures to ensure that workers are not pressured into accepting against their will a collective accord which implies resignation from a trade union and to keep it informed of the result of the investigation launched by the regional directorate of Cundinamarca in this regard.

(d) With regard to the allegations concerning the murder of Mr. Luis Alberto Toro Colorado, a member of the national executive committee of SINALTRADIHITEXCO, the Committee requests the Government to keep it informed of the result of the investigation launched.

(e) With regard to the new allegations made by SINALTRADIHITEXCO concerning the unilateral annulment by Tejicondor S.A. which merged with Fabricato S.A. of a collective agreement signed by Fabricato S.A., the refusal to grant trade union leave or to convene the Arbitration Tribunal requested by the complainant in June 2003, on which administrative resolutions were issued which left the parties free to have recourse to the ordinary courts, the Committee recalls that agreements should be binding on the parties and that, in accordance with Paragraph 10 of the Workers' Representatives Recommendation, 1971 (No. 143), workers' representatives should be afforded the necessary time for carrying out their representation functions and that, while workers' representatives may be required to obtain

permission from the management before taking time off, such permission should not be unreasonably withheld. The Committee urges the Government to ensure respect for these principles and requests the Government to keep it informed of any legal action taken in this respect.

CASE NO. 2300

DEFINITIVE REPORT

Complaint against the Government of Costa Rica presented by — the International Confederation of Free Trade Unions (ICFTU) and — the International Transport Workers' Federation (ITF)

Allegations: Declaration of illegality of a strike called by workers at the Committee for Port Administration and Economic Development of the Atlantic Coast (JAPDEVA) in Puerto Limón for non-compliance with the collective agreement; threats of sanctions for participating in the strike; violent eviction of workers from their places of work by police leaving a number of people wounded; arrest of 15 trade unionists, subsequently freed; hiring of strike-breakers; interference of the Office of the Ombudsman with the terms of the collective agreements by questioning their constitutionality before the Constitutional Chamber of the Supreme Court

360. The complaint was presented by the International Confederation of Free Trade Unions (ICFTU) in a communication dated 23 September 2003. This organization sent additional information in a communication dated 6 April 2004. In a communication dated 16 August 2004, the International Transport Workers' Federation (ITF) associated itself with the ICFTU's complaint.

361. The Government sent its observations in communications dated 2 February and 25 August 2004.

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

A. The complainants' allegations

363. In its communications dated 23 September 2003 and 6 April 2004, the International Confederation of Free Trade Unions (ICFTU) alleges that, on 16 September 2003, the Trade Union of the Workers at the Committee for Port Administration and Economic Development of the Atlantic Coast (SINTRAJAP) in Puerto Limón began a strike demanding the application of the terms of their collective agreement, which had been pending for three months. Other trade unions in the sector from the Limón region, which

were also experiencing similar problems, joined the strike. In total, the strike had the participation of around 6,000 workers.

364. The ICFTU adds that the Government, through the Ministry of Labour, brought an action to declare the strike illegal before the industrial courts. According to the ICFTU, the Government threatened workers, through announcements on the television and other media, that workers who missed two days of work would be dismissed.

365. Also, the ICFTU adds, heavily armed police undertook a wide-ranging and violent operation to evict workers from their places of work in order to take control of the Committee for Port Administration and Economic Development of the Atlantic Coast (JAPDEVA) terminal at the port in Moín, beating them and throwing tear gas at them, leaving several workers seriously injured. During this operation the following were arrested:

– 12 officials or members of the JAPDEVA union: Johnny Alcázar Alcázar, Carlos Brenes Vargas, Danne Lemones Smith, Anthony Recio Espinosa, Mauro Brenes Mora, Víctor Soto Araya, Oscar Nelson Wilson, Wilberth Chavarria Chavarria, Horacio Brown Brown, German Dávila Cubillo, Karl Myrie Hart and Douglas Dávila Matamoros; and

– three members of the Petroleum, Chemical and Similar Workers' Union (SITRAPEQUIA): Armando Alvarez Morales, Daniel Aguirre and Héctor Vega Obando.

366. The ICFTU points out that they were all freed on 17 September 2003; but nevertheless, the respective authorities gave the order to begin port operations with the help of strike-breakers, non-unionized workers and workers of other nationalities, after government negotiations with the Governments of Colombia and Venezuela about sending technicians and professionals from these countries, experts in the fields of petroleum and ports, to operate the system of pumping and filling tankers, as well as for the loading and unloading of merchandise on the quay. The ICFTU encloses a document showing that Colombian technicians answered the call. According to the ICFTU, the Government even managed to illicitly hire and move a Columbian tug with a crew of the same nationality, to carry out the port services of loading and unloading.

367. Finally, the ICFTU points out that the strike ended on Saturday, 20 September 2003, at 8 p.m. with a promise to continue dialogue and negotiation.

368. The ICFTU reports that the strike took place in the context that the SINTRAJAP union, along with the Federation of the Workers of Limón (FETRAL) and the civil organization *Limón en lucha* had presented a list of demands to the Government, which, besides respect of the collective agreement, included demands from civil society to increase public infrastructure and social security. The ICFTU explains that the Government established a dialogue process with the unions and civil society and, as a result, signed an act of negotiation on 31 May 2003 in which it committed to fulfilling various points, including compliance with the current collective agreement between SINTRAJAP and JAPDEVA. As three months after signing the act of agreement the Government had not complied with its commitment to respect the current collective agreement, and this added to the threat of cancelling the rights of the union members covered by the collective agreement, workers affiliated to SINTRAJAP exercised their right to strike, in accordance with national law, on 16 September 2003.

369. Finally, the ICFTU alleges that the Government has created a legal body called the *Defensoría de los Habitantes* (Office of the Ombudsman) which, at the request of the state

enterprise JAPDEVA, is encouraging the non-recognition and distortion of the rights agreed in the collective agreements in the belief that any benefit agreed in a collective agreement that is greater than those contained in the Labour Code is illegal.

370. The ICFTU specifies that, among others, the Office of the Ombudsman, the regulatory authority of the public services and several members of the Libertarian Party have claimed that the collective agreement between the JAPDEVA and the SINTRAJAP is unconstitutional despite the fact that the Ministry of Labour declared that said collective agreement dated 7 August 2002 "is in keeping with the legal regulations in force, not observing flaws in form and content". It has emerged from the ICFTU's complaint that there have been other cases where collective agreements in the public sector have been challenged in the Constitutional Court.

B. The Government's reply

371. In its communications of 2 February and 25 August 2004, the Government states that the complainant organization, under the pretext of supposed non-compliance with the act of agreement of 31 May 2003, which is essentially political, is trying to justify a strike movement (16-20 September 2003). This act does not contain labour demands; it was signed between trade union organizations, civil organizations and government representatives and was drawn up within the framework of strengthening constructive dialogue, with the aim to deal with the needs of various social and economic sectors of the province of Limón, in accordance with the economic means of the Government of the Republic. It contains various requests to, among others, companies like JAPDEVA and RECOPE and sectors such as agriculture; it deals with the issue of landfill, as well as the plan for regional development of the Atlantic coast and the issue of public safety, among others.

372. In its complaint, the complainant organization does not clearly specify what the alleged non-compliances with the act or the collective agreement are, and it does not mention the Government's efforts in the province of Limón to guarantee to meet the requests of all the socio-economic sectors involved. The motives of the strike were nothing to do with defending labour rights and the Government made every effort to take all measures necessary to fulfil the agreements reached (in its response the Government lists numerous measures, procedures and efforts relating to the agreements). Between making the agreements and the start of the strike, the authorities maintained dialogue and agreement and even asked the religious authorities to intervene to help get the search for shared solutions back on track. It is not true that the Ministry of Labour asked the enterprise JAPDEVA to bring an action for the strike to be declared illegal. The enterprises JAPDEVA and RECOPE requested the ruling and the judicial authority (in the first and second instance) declared the strike illegal as it involved public services essential for the economic life of the country, whose paralysis causes significant serious and immediate damage to certain goods. The judicial authority found that the strike action was not intended to protect the economic interests of the unionized workers but rather that it was taking place as an act of solidarity for the adverse economic situation that the province of Limón is going through which was not per se a situation affecting the whole workforce. Article 375 of the Labour Code states that strikes will not be permitted in the public services.

373. Regarding the alleged threats of dismissal for workers who missed two days of work, the complainant organization does not identify the authority that is meant to have made this declaration. In any case, what is shown by the complainant is the legitimate consequence of illegal strike action (article 377 of the Labour Code). However, in this case, no worker was dismissed because of the aforementioned illegal strike. The enterprise JAPDEVA merely lowered workers' salaries from 15 to 19 September 2003, in accordance with the

Freedom of Association Committee's principle that salary deductions for days of strike gives rise to no objection from the point of view of freedom of association principles. The enterprise RECOPE denies non-compliance with the collective agreement and threatening workers for exercising their right to strike.

374. Regarding the alleged unjust police action, the Government declares that the 200-strong police force was not armed and only had tear gas and white smoke in some cases and in no cases had firearms. Neither did they evict the workers from their places of work (in fact they had not entered these places). The police action in some areas was due to disturbances or blockages of the public highway or where it was necessary to avoid damage to fuel storage plants. In these cases they cleared the areas and apprehended those responsible for the disturbances who were handed over to the Public Prosecutor's Department. The police action was rational, restrained and proportionate and within the framework of the laws governing police behaviour (efforts of prevention, security and to conserve public order). The Government rejects the allegations that workers were beaten, leaving several workers injured. The Constitutional Chamber of the Supreme Court allows the police to use harmless tear gas of the lowest level of irritation that does not have any side effects and does not warrant medical attention, when public safety, human life or the security of goods is affected.

375. On another matter, regarding the alleged use of strike-breakers and non-unionized workers from other areas, including the use of a foreign tug, to restart operations suspended by the strike action in the port in Moín, the enterprise JAPDEVA points out the following:

> It is worth mentioning that the motives of the strike were nothing to do with defending labour rights. Moreover, they were motivated by their own interests of by-issues over which the administration as employer has exclusive competence.
>
> In the motives contained in the "list of demands" were various complaints, for example, regarding port safety and the maintenance of equipment and other things.
>
> As was indicated at the beginning, because it involved the provision of essential public services – as declared by the Office of the Attorney General of the Republic, the Constitutional Chamber and the labour courts themselves, the Government of the Republic endeavoured to continue these services with workers from outside JAPDEVA, which is not illegal; on the contrary, acting in such a way was a right that is enshrined in the most fundamental acts of government and administration and is not detrimental to any type of trade union activity.

376. Above all, what the Government of Costa Rica achieved was to guarantee the continuity of an essential public service with those workers available, having taken into account that one of the immediate consequences of the illegal action was the paralysis of fuel distribution throughout the country as well as paralysing Costa Rica's only Atlantic port, dedicated to exports and imports, which, however you look at it, and from a legal perspective, could not be allowed.

377. Regarding the unconstitutionality case brought by the Ombudsman against the 2002 JAPDEVA collective agreement, the Government points out that the Constitutional Chamber has not yet ruled and that the Minister of Labour has appeared at the trial to defend the right of collective bargaining, considering that, should the collective agreement be declared unconstitutional for reasons of proportionality, rationality or equality, it would violate Convention No. 98, ratified by Costa Rica.

378. The Government sends abundant documentation relating to its declarations.

C. The Committee's conclusions

379. *The Committee observes that in this case the allegations refer: (1) to the declaration of illegality of a strike by workers in the port sector and the fuel sector in the province of Limón, to the intervention of the police to evict workers leaving a number of people wounded and the arrest of 15 trade union members (freed shortly afterwards) and to the hiring of strike-breakers to replace the strikers; and (2) to the bringing of a legal action of unconstitutionality against various provisions of the collective agreement in force, particularly at the decision of the Ombudsman.*

380. *The Committee notes the Government's declarations according to which: (1) the motives of the strike were nothing to do with defending labour rights and refer to supposed non-compliance with the act of agreement of 31 May 2003 (signed between the authorities, trade unions and civil society) which is essentially political and refers to issues such as "landfill", "public safety" and "plan for regional development"; (2) the declaration of illegality of the strike was not requested by the authorities but rather by the enterprises JAPDEVA and RECOPE and the judicial authority in the first and second instance declared it illegal as it involved essential public services in which article 375 of the Labour Code does not permit strikes; (3) regarding the alleged threat of dismissals, the complainant organization does not mention which authority is alleged to have made it but article 377 of the Labour Code permits sanctions of this kind in cases of illegal strike; (4) no worker was dismissed because of the strike in question; (5) the police did not evict workers from their places of work, they were not carrying firearms and only in some cases used tear gas and white smoke where there were disturbances or blockages of the public highway or to avoid damage to fuel storage plants and always in a rational, restrained and proportionate manner and within the framework of legal standards; (6) those responsible for the disturbances were apprehended and handed over to the Public Prosecutor's Department; (7) the Government rejects the allegations that workers were beaten leaving several people wounded; (8) the Government and the enterprise JAPDEVA secured the continuity of services during the strike with workers from outside the enterprise because it involved an essential public service, given that the strike would lead to the paralysis of Costa Rica's only Atlantic port and of fuel distribution; and (9) the Government denies that the collective agreement was breached.*

381. *The Committee notes that the strike in question took place from 16 to 20 September 2003 and that it ended when the parties reached an agreement on 20 September.*

382. *Regarding the Government's statement that the motives of the strike had nothing to do with the defence of labour rights and referred to supposed non-compliance with the act of agreement of 31 May 2003 (which the Government encloses), the Committee observes that said act was signed by the authorities and trade union and civil society organizations, and that, although it may fundamentally contain numerous clauses about economic development of the port of Limón region, it contains certain labour-related clauses or clauses which contain possible benefits for workers (for example, negotiations to revise the basic salary of certain workers so that they are paid a salary that conforms with the international parameters of the region; tripartite commission charged with finding a solution in the sense that six docking companies that are the exclusive property of the workers can bid or be hired); the agreement of 20 September 2003 that ended the strike also has clauses in favour of certain categories of workers. The Committee concludes that the act of agreement of 31 May 2003 constitutes an exercise of collective bargaining and therefore if the trade unions believe that it was not fully respected they had the right to call a strike to achieve that objective as long as essential services in the strict sense of the term are not involved.*

383. *The Committee has found on previous occasions that the establishment of minimum services in the case of strike action should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population* (essential services in the strict sense of the term)*; (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an* acute national crisis *endangering the normal living conditions of the population; and (3) in* public services of fundamental importance *[see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 556]. The Committee observes that in this case, there was no minimum service and the authorities hired workers to replace the strikers. The Committee considers that a minimum service could be required in the petroleum sector and ports (loading and unloading) and that it would be desirable that such service be defined with the participation of the authorities, trade union organizations and employers.*

384. *Regarding the arrest of workers, freed shortly afterwards as the complainant organization recognizes, the Committee notes that the Government indicated that those arrested were responsible for disturbances and blocking public highways and that they were handed over to the Public Prosecutor.*

385. *Regarding the legal action for unconstitutionality brought before the Constitutional Chamber of the Supreme Court by the Ombudsman against various provisions of the collective agreement for the port sector, the Committee has been informed that this issue has been submitted to and is being examined by the Committee of Experts, as well as that within the framework of the proceedings of said Committee, the Government has requested a mission of technical assistance for March 2005, as well as the establishment of a dialogue process with employees of the ILO and experts from said Committee.*

The Committee's recommendation

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

> ***While it notes that the conflict at the origin of the present case was resolved when a collective agreement was signed, the Committee requests the Government to amend the Labour Code in line with Conventions Nos. 87 and 98 so as to allow strikes in the public sector when they do not involve essential services in the strict sense of the term.***

CASE NO. 2214

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

Complaint 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 (ISSS), illegal wage deductions were made for 11 people (some of them trade union members), 18 people were dismissed (some of them trade union members), two trade union members were transferred or prevented from applying for a job in violation of the arbitration award in force, and trade union members and their vehicles were searched. The complainant organization also refers to the refusal of the ISSS to recognize a coalition between two the trade unions for the purpose of reviewing the arbitration award, and to the eviction of the trade union from its premises

387. The Committee last examined this case at its meeting in June 2004, and on that occasion presented an interim report [see 334th Report, paras. 468-490, approved by the Governing Body at its 290th Session in June 2004]. The Government sent new observations in a communication dated 8 October 2004.

388. 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

389. At its meeting in June 2004, the Committee made the following recommendations on the allegations that remained pending [see 334th Report, para. 490]:

(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.

B. The Government's reply

390. In its communication of 8 October 2004, the Government states that none of the terminations of the contracts of 18 workers at the Salvadoran Social Security Institute (ISSS) has any connection with the exercise of trade union rights. The Government adds that the 18 persons in question presented formal applications to the courts, in most cases demanding the payment of compensation or arrears of wages. The results of these were as follows:

– three workers were awarded compensation for wrongful dismissal, another was awarded payment of wage arrears, and a ruling was given in favour of two workers on the grounds that their constitutional rights had been violated;

– an application (compensation for wrongful dismissal) is currently being considered by the courts, as well as another application regarding payment of wage arrears; in

another case, the appeals court quashed the ruling that had been made in favour of the ISSS;

– a ruling in favour of the ISSS was handed down in one case concerning an application for compensation for wrongful dismissal, and in eight cases concerning demands for arrears of wages.

391. As regards the alleged transfer or attempts to prevent workers from applying for posts, which concerned Dr. Teresa de Jesús Sosa and Dr. Darío Sánchez (who, according to the complainant, were members of SIMETRISSS), the Government states that it is not clear that Dr. Sosa was a member of the union, and that in any event she had as far back as January 2000 resigned from her post at the ISSS. The Government adds that the ISSS does not know which post Dr. Darío Sánchez wished to apply for, but points out in any case that under the terms of the arbitration award, the selection process is in the hands of a board comprising representatives of the ISSS and the trade union, and all workers can apply for new or vacant positions.

392. As regards the illegal wage deductions affecting 11 people (including trade unionists), the Government does not know the names of the people involved; it points out that, under the terms of the Labour Code and the arbitration award currently in force, a worker is required to justify absences and that if absences were not paid, it was because there was no good reason for them.

393. As regards the searches of SIMETRISSS members and their vehicles and the hiring of armed guards supposedly to curtail trade union rights, the Government indicates that there have frequently been criminal acts in various ISSS centres, including the Medical Surgical Hospital and the Specialized Treatment Hospital, where there have in the past been cases of theft or removal of various drugs that are difficult for individuals to obtain from pharmacies without a prescription, as well as of medical equipment that is difficult and expensive for the ISSS to buy on the national market. For this reason, senior management decided from 2001 onwards to order searches of all vehicles leaving ISSS premises, including vehicles driven by visitors and other authorized persons. This was a response to the need to ensure the safety of ISSS workers, as well as visitors and authorized persons, and to protect the Institute's property.

394. As regards the recruitment of armed guards, the Government states that the ISSS, from 2000 onwards, has hired the *Compañía Salvadoreña de Seguridad S.A. de C.V.* (COSASE) and the *Servicios Conjuntos de Seguridad S.A. de C.V.* (SERCONSE), both of which have been legally constituted in El Salvador and provide security services to various public and private institutions. Hiring of private security services is permitted under the terms of section 18(h) of the Act respecting the Salvadoran Social Security Institute, and the selection process complied with the Act on procurement and hiring in the public service. At no time were these initiatives intended to curtail trade union freedoms.

395. As regards the dismissal of 30 members of the STISSS, the Government states that these were due to criminal acts committed by the workers concerned against the Institute's property and staff. Despite this, in June 2004, the new management of the ISSS initiated a process of dialogue and consultation to clarify and resolve any disputes. Evidence of this is the establishment of a STISSS-ISSS subcommittee to review all the recent dismissals independently of any pending court decisions. As a result of this initiative, following an exhaustive review process, an agreement was reached with the STISSS to reinstate a group of 44 workers who had been dismissed for different reasons from 2001 onwards, including the 30 STISSS members named in this complaint. Currently, the 30 workers concerned are working for the Institute under the same conditions before their dismissals.

396. As regards the refusal to recognize the coalition of STISSS and SIMETRISSS for the purpose of reviewing the arbitration award, the Government states that the Division of Administrative Law of the Supreme Court of Justice has not handed down a ruling on the matter.

397. With regard to the allegation concerning eviction of the union from the premises it occupies, the Government states that the Attorney-General's office has not yet taken a decision on the matter.

C. The Committee's conclusions

398. *The Committee notes that the pending allegations in this case concern the following issues: dismissal of 18 workers and 30 trade union members employed by the Salvadoran Social Security Institute (ISSS); illegal wage deductions affecting 11 persons (including trade unionists); transfer of or measures to prevent two workers from applying for posts, in contravention of the arbitration award in force; searches of trade union members and their vehicles; arbitrary refusal to recognize the coalition of the trade union organizations STISSS and SIMETRISSS for the purpose of negotiating a review of the collective agreement; and violent and arbitrary eviction of the union from its premises by the Institute.*

399. *As regards the allegations of dismissal, the Committee notes with satisfaction the Government's statement to the effect that the 30 members of the STISSS who had been dismissed have been reinstated in their posts, together with 14 other workers. The Government notes also that, with regard to the other 18 dismissed workers, the courts ruled in favour of six of the workers, and in favour of the ISSS in nine cases, that proceedings concerning two workers have not been concluded, and that the application in another case was rejected. The Committee notes the Government's statements to the effect that none of the 18 cases was connected with the exercise of trade union rights, and that in the judicial proceedings the workers sought only compensation or payment of wage arrears.*

400. *The Committee also notes that, according to the Government, Dr. Teresa de Jesús Sosa (who, according to the complainant, had been transferred) resigned from her post at the ISSS in January 2000, and it is not clear that she was a trade union member. As to the Government's statements regarding the allegation that Dr. Darío Sánchez, a member of the union, had been prevented from applying for a post, the Committee notes that the complainant has not indicated which post was involved, and that new or vacant posts in the ISSS are filled by a board comprising representatives of the ISSS and the trade union.*

401. *As regards the alleged illegal wage deductions affecting 11 workers (including trade union members), the Committee regrets that the complainant has not provided any of the information requested, in particular the names of the workers concerned. It notes the Government's statements that it does not have the names of these individuals, and that according to the Labour Code and the arbitration award in force, workers are required to justify their absences, and that if a worker was not paid the wages due, it was because of insufficient reasons for the absence from work.*

402. *The Committee also notes the Government's statements regarding the searches of vehicles and the hiring of private armed guards, in which it emphasizes that these measures are legal and intended to ensure security and prevent thefts of expensive medical equipment or other property belonging to the Institute. The Committee regrets that the complainants have not yet provided the information which it had requested on these matters, and indicates that it will not continue with the examination of these issues if the requested information has not been sent by its next meeting.*

403. *Lastly, the Committee requests the Government:*

(i) to keep it informed of:

– *any court decision regarding the refusal of the ISSS to recognize the coalition of the STISSS and SIMETRISSS for the purpose of reviewing the arbitration award;*

– *any decision by the Attorney-General's office concerning the alleged eviction of the union from its premises; and*

(ii) to carry out an independent investigation into the alleged conversion of permanent contracts to short-term contracts to the detriment of trade union members, and to keep it informed of developments in this respect.

The Committee's recommendations

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

(a) The Committee requests the Government:

(i) to keep it informed of:

– ***any court decision regarding the refusal of the ISSS to recognize the coalition of the STISSS and SIMETRISSS for the purpose of reviewing the arbitration award;***

– ***any decision by the Attorney-General's office concerning the alleged eviction of the union from its premises; and***

(ii) to carry out an independent investigation into the alleged conversion of permanent contracts to short-term contracts to the detriment of trade union members, and to keep it informed of developments in this respect.

(b) The Committee indicates to the complainant organizations that it will not continue with the examination of the issues relative to the alleged search of SIMETRISSS trade unionists and vehicles if the requested information has not been sent by its next meeting.

CASE NO. 2203

INTERIM REPORT

Complaint against the Government of Guatemala presented by the Trade Union of Workers of Guatemala (UNSITRAGUA)

Allegations: Assaults, death threats and acts of intimidation against trade unionists in various enterprises and public institutions; destruction of trade union headquarters at the General Property Registry; raiding and ransacking of, and burning of documents at, union headquarters at ACRILASA; surveillance of UNSITRAGUA headquarters; anti-union dismissals, violation of the collective agreement on working conditions, refusal to bargain collectively, pressure on workers to resign from their union; employers' refusal to comply with judicial orders for the reinstatement of trade union members; the enterprises and institutions concerned are: Industrial Santa Cecilia, ACRICASA, Municipality of El Tumbador, Finca La Torre, Ministry of Public Health, Chevron-Texaco and the Supreme Electoral Tribunal

405. The Committee examined this case at its March 2003 meeting and submitted an interim report [see 330th Report, paras. 793-823, approved by the Governing Body at its 286th Session (March 2003)].

406. The Government sent new observations in communications dated 29 August 2003, and 9 January, 29 April, 4 November and 2 December 2004.

407. In addition, the complainant organization UNSITRAGUA sent new allegations in communications dated 16 October 2003, 14 November 2004 and 14 January 2005.

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

A. Previous examination of the case

409. In its previous examination of the case in March 2003, the Committee made the following recommendations [see 330th Report, paras. 805-823]:

(a) Expressing its serious concern over the acts of violence against union members, the Committee urges the Government to take measures to order an urgent investigation into the allegations relating to assaults, death threats and intimidation against union members, as well as the attacks on union headquarters. It also requests the Government to refer

these cases to the Special Attorney for Offences against Union Members and to keep it informed in this respect.

(b) The Committee requests the Government to take the necessary measures to remedy the breaches confirmed by the Labour Inspectorate in the General Property Registry (dismissal of union officer Mr. Gustavo Santisteban and acts of employer interference in union elections) and to keep it informed in this respect.

(c) The Committee requests the Government to inform it of the final ruling in the judicial process relating to the dismissals of 43 members of the union operating at Agrícola Industrial Santa Cecilia S.A.

(d) With regard to the allegations relating to ACRILASA (non-compliance with the collective agreement, dismissal of nine union members and the majority of members of the union's executive board, non-compliance with judicial reinstatement orders and pressure on union leaders and members to resign from their posts or from the union) the Committee urges the Government to take the necessary measures to ensure that the legislation is respected in the company in question, including through sanctions appropriate to the seriousness of the offence committed, and to make amends for the anti-union acts confirmed. The Committee requests the Government to keep it informed in this respect, as well as in respect of the result of the judicial processes under way.

(e) With regard to the allegations relating to the El Tumbador Municipality (refusal to comply with the judicial order to reinstate workers who had been dismissed, pressure on union members to resign from their union and on union leaders to cease promoting the reinstatement of those dismissed), the Committee requests the Government to carry out an investigation into the allegations and to inform it of the results of the judicial processes under way.

(f) With regard to the allegations relating to Finca La Torre (employer's refusal to comply with judicial orders to reinstate dismissed workers), observing that the Government refers to a different problem (suspension of individual contracts), the Committee requests the Government to take measures to ensure effective compliance with the judicial reinstatement orders.

(g) With regard to the allegation relating to the dismissal of union officer Mr. Fletcher Alburez from the Ministry of Public Health in April 2001 and the slowness of the proceedings due to delaying tactics, the Committee deplores the authorities' delay and requests the Government to take measures to ensure that a ruling is given urgently on the dismissal in question.

(h) With regard to the allegations relating to Chevron-Texaco (unilateral imposition of a code of ethics without consultation adding new causes for dismissal, refusal to negotiate on the part of the company), the Committee notes that, according to the Government, the company stated that it was willing, if a complaint had been submitted, to comply with the workers' requests. The Committee requests the Government to meet with the parties to find a solution to the problems mentioned and keep it informed in this respect.

(i) The Committee regrets that the Government has not responded to the allegations relating to the Supreme Electoral Tribunal (unilateral imposition of an organization manual dealing with matters related to employees' functions, posts and salary grades and acts of discrimination in the application of the said manual, as well as the Tribunal's refusal to meet with officers and negotiate a draft collective agreement). The Committee requests the Government to send its observations in this respect, and to meet with the parties to find a solution to the problems.

(j) The Committee observes in a general manner that, as far as can be gathered from this and other complaints, not only are judicial orders for the reinstatement of dismissed union members frequently not complied with, but also the number of judicial bodies that can successively deal with an anti-union dismissal (three or four) means that procedures frequently take years. The Committee requests the Government to revise the process of protecting union rights provided for in legislation in order to bring it into line with the principles given in the general conclusions to the present case.

(k) The Committee invites the Government to consider requesting the technical assistance of the Office in order to improve the implementation of Conventions Nos. 87 and 98.

B. New allegations

410. In its communications dated 16 October 2003, 14 November 2004 and 14 January 2005, the Trade Union of Workers of Guatemala (UNSITRAGUA) alleges that:

– no information is available to date on whether the legal proceedings concerning trade union leader Gustavo Santiesteban had a favourable outcome;

– with regard to the Agrícola Santa Cecilia enterprise, the Labour Appeals Court revoked the order to reinstate the Agrícola Santa Cecilia employees issued by the first-level judicial authority, leaving these workers in a totally unprotected position;

– as regards the Industrias Acrílicas de Centroamérica enterprise, the employer's organization appealed against the reinstatement orders. Further to this appeal, eight dismissals were resolved in favour of the employer, based on the argument that there was no need to give workers prior notification of their dismissal. The remaining dismissals concerning union leaders and other first-level members have not been resolved more than a year after the start of the judicial proceedings;

– with respect to the Municipality of El Tumbador, UNSITRAGUA states that after union leader Byron Clodomiro Gramajo had been dismissed, he took legal action to be reinstated, the reinstatement was approved but implementation thereof was then suspended. Prior to this, he applied to the Labour Tribunal of Malacatán for the part-payment of wages and benefits which had been unpaid because of the dismissal and this request was accepted. On 1 April 2004, Mr. Gramajo was actually reinstated in his post but despite this, when payday arrived, he did not receive his wages. Furthermore, the mayor refused to pay the wages and benefits which had been unpaid owing to the dismissal, whereupon the worker filed a suit for contempt of court before the competent authorities since the issue of wage payments was still not settled. In view of the situation, Mr. Gramajo asked the labour inspectorate to intervene but the latter, despite holding meetings with both parties, has so far been biased in its conduct. After this meeting with the labour inspectorate, the mayor dismissed another six union officials: Cesar Augusto León Reyes, José Marcos Cabrera, Víctor Hugo López Martínez, Cornelio Cipriano Salic Orozco, Romeo Rafael Bartolón Martínez and Cesar Adolfo Castillo Barrios;

– with regard to Finca La Torre, the refusal to implement the reinstatements ordered by the first-level labour tribunal of the department of Quetzaltenango reportedly resulted in the crushing of the workers' resistance and the breaking up of the trade union;

– the situation of union leader Dick Fletcher Alburez, who is still dismissed and has not been reinstated in his post, has not yet been resolved; nor has he been paid the wages or benefits which were unpaid as a result of the dismissal;

– the Chevron-Texaco company closed and the union was broken up;

– the Supreme Electoral Tribunal has stepped up anti-union reprisals, dismissing workers and obstructing their right to collective bargaining.

C. The Government's reply

411. In its communications dated 29 August 2003, 9 January 2004, 29 April 2004, 4 November 2004 and 2 December 2004, the Government states that, with respect to the legal proceedings concerning union leader Gustavo Santiesteban, the latter was reinstated on 5 August 2001, the official reinstatement order being issued on 7 August 2001. The

respondent appealed to the Office of the Attorney-General but the reinstatement was confirmed on 21 January 2002. On 10 April 2002, the Executive Minister reinstated Gustavo Santiesteban, who has been working since that date.

412. As regards Agrícola Santa Cecilia, the Government states that the labour inspectors placed on record the declaration by a group of 43 workers that they had been dismissed indirectly. The competent authority therefore delivered an official letter to the employer via the office manager, who refused to take receipt of it and sign it, but this still constituted official notification of the employer by the inspectors. The employer alleges that the workers were dismissed as from 31 January 2001, and this is being examined by the judicial authority, but the workers argue that since 24 January 2001 they appeared at their workplace as usual but were not assigned any work, and so they have received neither wages nor benefits, though they continue to occupy their housing. The case is currently before a labour tribunal.

413. With respect to Industrias Acrílicas de Centroamérica, the Government indicates that the case is before the Fourth Labour Tribunal and that in September 2000 the judge amended the proceedings on account of the fact that the union members were not seeking a social and economic conflict but the denunciation or violation of an existing collective agreement on working conditions. Consequently, the case was transferred to the First Chamber of the Labour Appeals Court.

414. With regard to the Municipality of El Tumbador, the Government states that union leader Mr. Gramajo was the recipient of a judicial order for reinstatement and for the payment of outstanding wages but the municipality is opposing the said payment.

415. With respect to Finca La Torre, the Government notes that there had been dismissals of unionized workers, bans on the entry of workers' vehicles to the plantation, and reports had been received from workers to the effect that the enterprise had contracted other people to harvest and clean the coffee crop. With regard to this matter, the labour inspectors were denied entry by the employer.

416. As regards the situation of union leader Dick Fletcher Alburez, the Government explains that ordinary proceedings began in the Third Labour Court in July 2002. On 17 October 2002, the first hearing was due to be held but the State submitted a conflict of jurisdiction, and so the first hearing was held on 21 April 2003, including a deposition by the complainant. A ruling on the case is pending.

D. The Committee's conclusions

417. *The Committee observes that the allegations refer to the following matters: acts of violence and intimidation against trade unionists, dismissal of union leaders, employers' refusal to comply with reinstatement orders, undue delay of current proceedings relating to dismissed workers, and other acts of interference by employers in the activities of unions established by workers.*

418. *As regards the allegations concerning acts of violence and intimidation against trade unionists, the Committee recalls that the complainant organization has made the following allegations [see 330th Report, paras. 812-813, approved by the Governing Body at its 286th Session (March 2003)]:*

– *destruction of the headquarters of the union operating in the General Property Registry;*

– *death threats against Mr. Baudilio Reyes, officer of the union operating at Agrícola Industrial Santa Cecilia S.A.;*

– *death threats against the general secretary of the union operating in the El Tumbador Municipality;*

– *death threats against the general secretary and the head of finance of the union operating at ACRILASA, as well as against union officers Ms. Castillo and Ms. Alcántara and against union members; acts of intimidation against the general secretary; assaults on two members of the executive board and on union members; raiding with force of the union's headquarters and sacking or burning of property and/or documents (the union has brought a criminal action in this matter);*

– *death threats against officers of the union operating at Finca La Torre;*

– *intimidation of union member Ms. Nora Luz Echeverría Nowel at the El Tumbador Municipality, in the form of blackmail with a criminal trial if she did not convince the union leaders to abandon the matter of reinstatement of persons dismissed;*

– *intimidatory surveillance of UNSITRAGUA headquarters and pursuit of union leader Mr. Carlos Enrique Cos by three individuals and death threats against officers of the organization (according to the Government, this point has been referred to the Attorney).*

419. *In its previous examination of the case, the Committee urged the Government to take measures to order urgent investigations into these allegations, to refer these cases to the Office of the Special Prosecutor for offences against trade unionists, and to keep it informed in this respect. The Committee underlines the gravity of these allegations, deeply regrets that the Government has not sent its observations on these matters and therefore reiterates its conclusions from its previous examination of the case. The Committee once again urges the Government to refer these cases urgently to the Office of the Special Prosecutor for offences against trade unionists.*

420. *As regards the dismissal of union official Gustavo Santiesteban, the Committee notes with interest that Mr. Santiesteban was actually reinstated upon decision of the judicial authority. Furthermore, in view of the lack of information from the Government, the Committee reiterates its previous request to the Government to take the necessary measures to remedy the violations observed by the labour inspectorate at the General Property Registry (acts of interference by the employer in union elections) and to keep it informed in this respect.*

421. *As regards the dismissal of 43 members of the union at Agrícola Santa Cecilia, the Committee observes that UNSITRAGUA indicates that the first-level judicial authority issued a reinstatement order but that the second-level judicial authority handed down a ruling revoking it. The Committee requests the Government to send information in this respect and in particular the text of the second-level ruling.*

422. *With respect to Industrias Acrílicas de Centroamérica (failure to comply with the collective agreement, dismissal of nine union members and of most members of the executive committee, failure to comply with judicial reinstatement orders and pressure on union officials and members to relinquish their posts or their membership), the Committee urged the Government to take the necessary measures to ensure that the law is observed in the company in question, including through sanctions which reflect the gravity of the offences committed, and to make amends for the anti-union acts confirmed. The Committee requested the Government to keep it informed in this respect and with regard to the outcome of the judicial proceedings under way. The Committee notes the statement by*

UNSITRAGUA that eight dismissals were resolved in favour of the enterprise and that the judicial authority has not ruled on the remaining dismissals of union members. The Committee notes that the Government does not refer to the dismissals but only to the violation of a collective agreement in force concerning working conditions, a matter which will be examined by the judicial authority. The Committee requests the Government to send without delay the text of any ruling issued on the dismissals of union members or on the violation of the collective agreement, as well as observations on the allegations of pressure on union officials and members to relinquish their posts or their membership.

423. *As regards the case of the Municipality of El Tumbador, the Committee observes that UNSITRAGUA initially alleged that pressure had been put on union members to relinquish their membership and on union officials to abandon procedures for the reinstatement of dismissed workers ordered by the judicial authority. The Government replied that the labour inspectorate did not have any record of complaints from trade unionists, that the union had brought the case directly before the judicial authority, which was in the process of examining it. The Committee previously requested the Government to carry out an investigation into the allegations and also to provide information on the judicial proceedings under way. In its new allegations, UNSITRAGUA indicates that, after the dismissal of union official Byron Clodomiro Gramajo on 15 February 2000, it lodged a request for his reinstatement with the judicial authority and this was approved. However, outstanding wages for the periods before and after his dismissal were not paid, in contempt of the orders of the judicial authority. UNSITRAGUA alleges that the mayor of the Municipality of El Tumbador dismissed six other union officials: Cesar Augusto León Reyes, José Marcos Cabrera, Víctor Hugo López Martínez, Cornelio Cipriano Salic Orozco, Romeo Rafael Bartolón Martínez and Cesar Adolfo Castillo Barrios. In this respect, the Government replies that Mr. Gramajo has already been reinstated but says nothing concerning the payment of wages or the subsequent dismissals of six union leaders. The Committee urges the Government to take measures to ensure that all wages owed to union leader Mr. Gramajo are paid without delay and to send comments on the dismissal of the six union leaders mentioned above.*

424. *With respect to Finca La Torre (employer's refusal to comply with judicial orders to reinstate workers), the Committee had requested the Government to take measures to ensure effective compliance with the judicial reinstatement orders. UNSITRAGUA alleges that the employer refused to carry out the reinstatements and that the breaking up of the union ensued. The Government refers to dismissals of union leaders. The Committee expresses its concern at this situation and urges the Government to take the necessary measures to ensure that the judicial orders for the reinstatement of workers are implemented without delay.*

425. *As regards the allegation concerning the dismissal of union leader Mr. Fletcher Alburez by the Ministry of Public Health in April 2001, and the slowness of the proceedings due to delaying tactics, the Committee deplored the authorities' delay and requested the Government to take steps to ensure that a ruling was issued urgently on the dismissal in question. UNSITRAGUA alleges that Mr. Fletcher's situation has not been resolved and that he has still not been reinstated. The Government states that proceedings concerning him are still under way and a ruling is pending. The Committee underlines the extended duration of the proceedings relating to the dismissal of this union leader and urges the Government to communicate any ruling which is issued.*

426. *With regard to Chevron-Texaco (unilateral imposition of a code of ethics without consultation adding new causes for dismissal, refusal to negotiate on the part of the company), the Committee requests the Government and the complainant organization to send information on whether the parties reached an agreement before the closure of the company and on the current situation of the workers.*

427. *As regards the Supreme Electoral Tribunal (unilateral imposition of an organization manual dealing with matters related to employees' duties, posts and salary grades and acts of anti-union discrimination in the application of the said manual, as well as the Tribunal's refusal to meet union leaders and negotiate a draft collective agreement), the Committee previously requested the Government to send its observations in this respect, and to meet the parties in order to find a solution to the problems. In its new allegations UNSITRAGUA reiterates that the Supreme Tribunal is continuing to apply the said manual unilaterally and obstruct collective bargaining. Given that the Government has not sent any observations in this respect, the Committee once again requests the Government to send without delay its observations on this case and meet the parties in order to find a solution to the problems, including those referred to by UNSITRAGUA in the new allegations (anti-union dismissal of workers and denying them the right to collective bargaining).*

428. *The Committee observes in general that, as far as can be gathered from this and other complaints, not only are judicial orders for the reinstatement of dismissed trade unionists frequently not complied with, but also the number of judicial bodies that can deal in succession with an anti-union dismissal (three or four) means that procedures frequently take years. The Committee recalls that cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 749]. The Committee urges the Government to revise the procedure for the protection of union rights provided for in law in order to bring it into line with the principles set forth in the general conclusions to the present case.*

429. *The Committee has been informed that a direct contacts mission took place in Guatemala at the request of the Conference Committee on the Application of Standards in relation to the application of Conventions Nos. 87 and 98. The Committee trusts that the Government will implement the conclusions of the mission and that significant progress will be observed in the near future.*

The Committee's recommendations

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

(a) The Committee requests the Government to take the necessary measures to order urgent investigations into the allegations concerning assaults, death threats and intimidation of trade union members, and the attacks on trade union headquarters. The Committee underlines the gravity of these allegations and urges the Government to refer these cases urgently to the Office of the Special Prosecutor for offences against trade unionists and to keep it informed in this respect.

(b) The Committee reiterates its previous request to the Government to take the necessary measures to remedy the violations observed by the labour inspectorate at the General Property Registry (acts of employer interference in union elections) and requests the Government to keep it informed in this respect.

(c) With regard to the proceedings relating to the dismissal of 43 members of Agrícola Santa Cecilia, the Committee observes that UNSITRAGUA points out that the first-level judicial authority ordered the reinstatement but that the second-level judicial authority issued a ruling revoking the reinstatement order. The Committee requests the Government to send information in this respect and particularly the text of the second-level ruling.

(d) The Committee requests the Government to send without delay the text of any ruling issued with respect to the dismissals of trade unionists at Industrias Acrílicas de Centroamérica and the violation of the collective agreement in force.

(e) The Committee requests the Government to send observations on the allegations concerning the Municipality of El Tumbador: pressure on union members to resign from their union and on union leaders not to continue with procedures for the reinstatement of dismissed workers ordered by the judicial authority, and dismissal of union officials Cesar Augusto León Reyes, José Marcos Cabrera, Víctor Hugo López Martínez, Cornelio Cipriano Salic Orozco, Romeo Rafael Bartolón Martínez and Cesar Adolfo Castillo Barrios. The Committee urges the Government to take measures to ensure that all wages owed to union leader Mr. Gramajo are paid without delay and to send its comments on the dismissal of the six union leaders mentioned above.

(f) The Committee requests the Government to take the necessary measures to ensure compliance with the judicial orders for the reinstatement of workers at Finca La Torre.

(g) The Committee urges the Government to communicate any ruling issued with respect to the dismissal of union leader Mr. Fletcher Alburez by the Ministry of Public Health in April 2001.

(h) With regard to Chevron-Texaco (unilateral imposition of a code of ethics without consultation adding new causes for dismissal, refusal to negotiate on the part of the company), the Committee requests the Government and the complainant organization to send information on whether the parties reached an agreement before the closure of the company and on the current situation of the workers.

(i) The Committee once again requests the Government to send without delay its observations on the allegations concerning the Supreme Electoral Tribunal: unilateral imposition of an organization manual dealing with matters related to employees' duties, posts and salary grades and acts of anti-union discrimination in the application of the said manual, as well as the Tribunal's refusal to meet union leaders and negotiate a draft collective agreement. It also requests the Government to meet the parties in order to find a solution to the problems, including those referred to by UNSITRAGUA in the new allegations (anti-union dismissal of workers and denying them the right to collective bargaining).

(j) The Committee urges the Government to revise the procedure for the protection of union rights provided for in law in order to bring it into line

with the principles set forth in the general conclusions to the present case on account of the fact that the Committee observes in general that, as far as can be gathered from this and other complaints, not only are judicial orders for the reinstatement of dismissed union members frequently not complied with, but also the number of judicial bodies that can deal in succession with an anti-union dismissal (three or four) means that procedures often take years.

(k) The Committee has been informed that a direct contacts mission took place in Guatemala at the request of the Conference Committee on the Application of Standards in relation to the application of Conventions Nos. 87 and 98. The Committee trusts that the Government will implement the conclusions of the mission and that significant progress will be observed in the near future.

CASE NO. 2259

INTERIM REPORT

Complaint against the Government of Guatemala presented by
— the Trade Union of Workers of Guatemala (UNSITRAGUA)
— 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)

Allegations: The complainants allege that the free exercise 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 various enterprises and institutions

431. The Committee last examined this case at its meeting in June 2004 (see 334th Report, paras. 527-579). In its communications of 20, 22 May and 20 July 2004, the Trade Union of Workers of Guatemala (UNSITRAGUA) sent new allegations, and in a communication of 26 July 2004 sent information and comments on the Government's observations. In a communication dated 27 July 2004, the General Confederation of Workers of Guatemala (CGTG) sent supplementary information. The Government sent its observations in communications dated 29 April (received 1 June) and 4 November 2004 and 19 January 2005.

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

A. Previous examination of the case

433. At its meeting in June 2004, the Committee made the following interim recommendations regarding the allegations presented by the complainant [see 334th Report, para. 579]:

(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.

B. New allegations

434. In its communication of 5 April 2004, the General Confederation of Workers of Guatemala (CGTG) alleges that workers were dismissed in the municipalities of Chiquimulilla, Santa Rosa Department; Puerto Barrios, Izabal Department; and Pueblo Nuevo Viñas, Santa Rosa Department. As regards the municipality of Chiquimulilla, where workers are organized in a CGTG-affiliated organization, the CGTG indicates that from the end of 2003 onwards, as a result of the constant violations of their labour rights, the workers decided to summon the municipal authority before the competent Labour and Social Security Court with a view to negotiating a set of claims including one regarding stability of employment. The current administration of the municipality has made repeated and blatant threats against the trade union and made its intention to destroy the union quite clear. For example, starting on 29 January 2004, the mayor began a series of selective and unjustified dismissals, despite the fact that the municipal authority had been summoned (a situation in which any dismissal requires special court authorization). Although the municipality was later forced to reinstate all the workers, they were reinstated in different posts under unfavourable conditions. The mayor continued to threaten and harass them to force them to leave their jobs and their union. When a conciliation board was held under the auspices of the competent court of first instance to resolve the collective dispute, the workers' delegates and the mayor signed a collective agreement on conditions of work, article 9 of which provides for the stability of employment of municipal workers, who cannot be dismissed unless they commit an offence under the terms of the Municipal Service Act. Following the voluntary abandonment of the summons action against the municipal authority, the mayor, in contravention of the collective agreement, dismissed most of the workers belonging to the trade union, including two members of the union's executive committee (violating the immunity from dismissal provided for in the Labour Code during their periods in office and for a period of one year after leaving union office).

435. As regards the municipality of Puerto Barrios, where workers are organized in a union affiliated to the CGTG and to the National Federation of Public Servants (FENASEP), the CGTG alleges that from February 2003, as a result of constant problems relating to the withholding of wages and threats of dismissal, the workers obtained a summons against the municipal authority to attend the competent labour and social security court to negotiate a set of claims, including stability of employment for municipal workers. Despite the summons, the mayor, who had already stated his intention to break up the union, dismissed six female members of the union in connection with reorganization. This led to a meeting between FENASEP, the CGTG and the mayor, in the presence of the labour inspector, to resolve the dispute through conciliation, but the meeting was unsuccessful. Furthermore, following an application to the Izabal Labour, Social Security and Family Court to reinstate the six workers, the Court decided to suspend the summons proceedings against

the municipal authority on the grounds that, since a collective agreement had recently been negotiated, it was not legally possible for an ad hoc committee to maintain such a summons against the municipal authority. An appeal against this ruling was lodged with the appropriate appeals court, within the established time limit, and is still pending. Further dismissals took place subsequently, and at the time this complaint was presented, more than 20 illegal dismissals had not been resolved because the principal legal action (relating to the collective dispute) was still pending. In the meantime, reprisals, harassment and other measures by the authority intended to disrupt the union continue to be everyday occurrences, and the authority refuses any attempt to resolve the problems through dialogue.

436. As regards the municipality of Pueblo Nuevo Viñas, the CGTG states that the municipal workers formed a trade union on 26 December 2003. They lodged a complaint with the Labour, Social Security and Family Court concerning a collective socio-economic dispute with the municipal authority; this included a set of claims on matters including a pay increase and stability of employment. The municipal authority then initiated proceedings against all the workers, in particular the trade union officers. A conciliation board was set up under the auspices of the Santa Rosa Labour Court, and a collective agreement was concluded with provisions on, among other things, stability of employment. Despite this, the mayor dismissed ten workers after the agreement had been signed, including the general secretary of the trade union and two members of the consultative council. A court order was sought for the reinstatement of the dismissed workers, given that they all enjoyed protection by virtue of their involvement in the foundation of a trade union, but orders were obtained for the reinstatement only of the general secretary and the two members of the consultative council. This led to an application to quash the decision, an application that is still pending. In addition, when the executive minister visited the municipality in order to ensure that the reinstatement order was carried out, the mayor agreed to reinstate only the general secretary, whom he demoted the following day. This was reported to the court and the matter is still pending.

437. In its communication of 19 April 2004, UNSITRAGUA states that on 9 March 2004, the women workers of the Secretariat of Public Works of the First Lady of the Republic of Guatemala presented a set of claims to the General Labour Inspectorate, along with the other items required by law with a view to negotiating a number of improvements in working conditions. The Labour Inspectorate deliberately delayed forwarding the set of claims to the Secretariat (more than 25 days elapsed between presentation of the set of claims and the employer being notified), and thus allowed the dismissal of about 40 workers. UNSITRAGUA indicates that under the terms of the Act respecting union membership and strike action for state employees and its amendments, workers can seek judicial protection by declaring a collective dispute only once the direct channels have been exhausted and after a period of 30 days from the time the set of claims is transmitted to the employer (in this case, the State). The delay in transmitting the set of claims severely affected the right of collective bargaining. UNSITRAGUA also alleges that the trade union of the Secretariat of Public Works of the First Lady of the Republic of Guatemala has been the target of a series of repressive anti-union measures by that institution. Specifically, it states that when the new executive committee was elected, the authorities demanded the union's complete file, including the list of members, which has been used by the authorities for anti-union purposes such as harassing members to make them leave the union. The authorities have also launched a smear campaign against the union leadership. In its communication of 30 April 2004, also in relation to the Secretariat of Public Works, UNSITRAGUA alleges that on the same day, Dilia Josefina Cobox Ramón, who had been the union's social relations secretary, was dismissed without just cause. The dismissal violated her trade union immunity, and no union representatives were admitted to the meeting at which she was given notice of dismissal. Attempts were made subsequently to force her to sign a number of papers without her knowing the contents. In its

communication of 20 May 2004, UNSITRAGUA alleges that on 15 May 2004, also in the Office, Edna Violeta Díaz Reyes was also dismissed without just cause. She had been the union's inter-union relations secretary. The organization maintains that this violated trade union immunity and was an attempt to make her liable for a demonstration carried out by a group of skilled workers who were owed four months' wages.

438. In its communication of 22 May 2004, UNSITRAGUA states with regard to its previous allegation concerning the 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 of the port enterprise Santo Tomás de Castilla, that the workers were reinstated in their posts on 11 February 2004. The organization alleges, however, that since their reinstatement, the workers have been the target of a range of anti-union discriminatory measures, including the following: (a) they have been denied the safety equipment needed for their work, despite the fact that they had requested it several times and lodged a complaint with the Izabal department Labour Inspectorate; (b) they were constantly assigned to the most exhausting and arduous tasks involving constant exposure to the sun; (c) although they had without limit of time contracts, they were classified according to their pay slips as workers hired for specified tasks only; and (d) they are paid less than the other workers at the enterprise.

439. In its communication of 20 July 2004, UNSITRAGUA alleges that over the last two years, the Office of the Attorney-General of the Nation has initiated a number of measures intended to weaken and break up the trade union of workers of the Office of the Attorney-General. These included illegal dismissals, disciplinary proceedings, unjustified dismissals in connection with reorganization, and transfers of workers to force them to leave. The following trade union members were among the workers dismissed: Alcira Noemí Salguero Noguera, Rafael Fransisco Urrutia, Myrian Estela Godoy Bonilla de Rodríguez, Ramón Estuardo Monzón Sagui, Andrés Muñoz Quevedo, Juan Ignacio Miguel Ortiga Aparicio and Sara Cajas. These dismissals violated the principles of legality, in citing reasons not provided for under law, and violated the administrative disciplinary procedures established under the collective agreement. As regards the trade union members dismissed in connection with reorganization, UNSITRAGUA names the following: Eliseo Ismael Rivera Castro, Laura Lili Alvarez Muralles de Pineda, Yuri Zumeta, Robinson Arnoldo Chevez Martínez, José Antonio López Mendoza, Livi Deisse Ramírez Ramírez, Héctor Humberto Barrios Mazariegos, Dense Juan Fransisco Alonzo Mazariegos, and Andrés Muñoz Quevedo. These dismissals violated article 13 of the collective agreement, which expressly prohibits dismissal in connection with reorganization and, in addition, the Office of the Attorney-General refused to submit the decision to the bipartite Joint Panel for review, as required by the collective agreement. As regards the transfers to other workplaces, also in contravention of the collective agreement, UNSITRAGUA states that the following trade union members were affected: Myrian Estela de Rodríguez, Roberto De Léon, Anabella Ortiz Mijangos, Julia Leticia Martínez Chavarría, Mirna Irecema Rodríguez Rivera, María del Rosario Pérez y Pérez, Olga Marina Chang López, Adelso Pojoy Silva, Annecke Jannette Vásquez Ramírez, Enma Araceli Soto Romero, Silvia Hortensia Castillo Avila and Alcira Noemí Salguero Noguera. Workers were not informed of or consulted on these transfers and, in contravention of article 14 of the collective agreement, the Office of the Attorney-General refused in every case to submit the decision to the Joint Panel for review, as required by the collective agreement.

440. In its communication of 26 July 2004, in response to the Committee's recommendation in which it requested new information on the dismissal of Félix Alexander Gonzáles from the Office of the Attorney-General of the Nation, UNSITRAGUA states that the Office interfered in that worker's personal affairs and used a problem unrelated to work as a pretext for dismissing him. It also accused him of something which in law is not deemed to constitute grounds for dismissal, and thus violated the principle of legality.

441. As regards the dismissal of Rosa María Trujillo de Cordón, Xiomara Eugenia Paredes Peña de Galdamez and Zoila Jacqueline Sánchez de García, all members of the trade union of workers of the Secretariat of Public Works of the First Lady of the Republic of Guatemala, in response to the Committee's recommendation in which it had requested new information showing the anti-union nature of the dismissals, UNSITRAGUA reiterates the information already sent to the Committee, and states that the anti-union nature is reflected in the fact that the union's ordinary members were severely affected.

C. The Government's new reply

442. In its communication of 29 April 2004, with regard to the dismissal of Félix Alexander Gonzáles of the Office of the Attorney-General, the Government states that the Second Chamber of the Labour and Social Security Appeals Court ruled that the worker's application for reinstatement was unfounded. The worker did not lodge any further appeal and the Court declared the case closed.

443. As regards the delay in dealing with the application for reinstatement of Luis Rolando Velásquez at the National Hospital for Orthopaedics and Rehabilitation, the Government states that the case was dealt with by the Third Chamber of the Labour and Social Security Appeals Court (file No. 301-2003), and that according to the file the ruling was implemented on 8 October 2003.

444. As regards the alleged dismissal of the trade union executive committee at the port enterprise Santo Tomás de Castilla, the Government states that the Labour and Social Security Court of Izabal Department ordered the reinstatement of the workers concerned, but does not know whether they have actually been reinstated.

445. With regard to the allegations regarding the municipality of Puerto Barrios presented by the CGTG, the Government states that in January 2004, representatives of the Trade Union of Workers of the Municipality of Puerto Barrios presented a complaint concerning the unjustified dismissal of 11 workers at a time when the municipality had already been summoned to court. The Labour Inspectorate asked the mayor to reinstate the dismissed workers, and when he refused to do so, gave him five days to explain his reasons. The mayor alleged that the summons to which the union referred was applicable only during the discussion of the collective agreement, which had already been negotiated and approved by the Labour Inspectorate the previous year, and for that reason reinstatement was not legally possible. At the workers' request, the administrative procedure was declared to be exhausted. The administrative file is currently before the Sanctions Department of the Ministry of Labour with a view to appropriate penalties being applied. The workers applied to the Labour, Social Security and Family Court, and the case is currently before the Appeals Chamber.

446. With regard to the alleged mass and selective dismissals in the municipality of Chiquimulilla, also presented by the CGTG, the Government states that on 30 January 2004, Rodolfo García Rivas and his colleagues complained to the Labour Inspectorate that they had been dismissed. Although they were reinstated, they were subsequently dismissed again. On 5 March 2004, the Labour Inspectorate visited the municipality following a complaint by the trade union's executive committee, according to which the employer had withheld 15 days' wages. The same situation was repeated on 14 April of the same year.

447. As regards the allegations regarding the municipality of Pueblo Nuevo Viña, the Government states that, on 12 February 2004, a group of workers complained to the Labour Inspectorate that they had been dismissed. Some of the workers have already received suitable compensation, but the case with regard to the others is still pending. The Government states that on 1 March 2004, a group of dismissed workers sought the

intervention of the Labour Inspectorate to obtain their reinstatement at work. The employer offered to pay them appropriate compensation but this was rejected by the workers.

448. In its communications of 4 November 2004 and 19 January 2005, the Government states with regard to the allegations concerning the Secretariat of Public Works of the First Lady of the Republic of Guatemala that on 9 March 2004, it received notice from Lesbia Amparo Velásquez Gómez, Lilian Leticia Franco and Silvia Victoria Guzmán Muralles, regarding the establishment of the Ad Hoc Committee of Workers of the Secretariat of Public Works of the First Lady of the Republic, together with a set of claims to be passed on to the Secretariat. The Labour Inspectorate dealt with this in the normal way and asked the Labour Registration Department of the General Labour Directorate whether there was already a legally constituted trade union at the Secretariat in question; this was confirmed to be the case. On 19 March 2004, the Inspectorate issued Decision No. 904-004, ordering that the existing trade union be informed of the content of the notice of establishment of the Ad Hoc Committee and of the claims, setting a deadline of three days for the trade union's response. When this period elapsed without any response from the union, the Inspectorate stated that it deemed the notice to have been duly received and closed the proceedings. As regards the allegation that the General Labour Inspectorate deliberately delayed forwarding the set of claims to the Secretariat, which then dismissed 40 workers as a result of the 25-day delay, the Government categorically denies that the normal processing of the file was a delaying tactic, and points out that under the terms of section 375 of the Labour Code, the only obligation when non-unionized workers establish an ad hoc committee is to notify the Labour Inspectorate. With regard to the set of claims, the Inspectorate is required to ascertain whether there is already a legally constituted trade union in order to inform it of the establishment of an ad hoc committee and the presentation of a set of claims, given that in practice some ad hoc committees are supported by employers in order to conclude collective agreements that sideline existing unions. With regard to the dismissal of 40 workers from the Secretariat, the Government states that, for workers employed by a state body to acquire immunity from dismissal, the set of claims must be presented to a labour and social security court which then issues an order to the effect that any termination of employment must be authorized by the judge examining the dispute. This procedure was not followed by the new Ad Hoc Committee, and workers were therefore not protected by the requirement that dismissal must be authorized by a court. The Government maintains that it is wrong to claim, as UNSITRAGUA has done, that workers acquire immunity from dismissal merely by giving notice of the establishment of an ad hoc committee and presenting a set of claims. Notification of the employer is intended only to comply with the procedure established under the Act respecting union membership and strike action for state employees, according to which the direct channels of redress must first be exhausted (30 days following notification of the employer) before any collective labour dispute is declared or any lists of demands presented by an ad hoc committee. In practice, in order to prevent dismissals, trade unions or ad hoc committees first declare a collective dispute before labour courts in order to obtain immunity from dismissal through a court decision. This would have been the appropriate procedure, but was not followed by the Ad Hoc Committee. The Secretariat in question states that in early 2004, some 29 persons were dismissed as a result of reorganization in accordance with Order No. 2004-DJ-663 of 3 March 2004 by the National Civil Service Authority, which ruled in favour of the Secretariat's administrative reorganization. The Secretariat emphasizes that of the 29 dismissals (not 40, as UNSITRAGUA maintains), only seven concerned trade union members. The Secretariat also denies the allegations of harassment of union members and attempts to smear union officers, and says it has documentary evidence that Dilia Josefina Cobox Ramón was consistently negligent in her duties. It also maintains that it did not know at the time of the dismissals that Edna Violeta Díaz Reyes was inter-union relations secretary or that Dilia Josefina Cobox Ramón was social affairs secretary. With regard to the case of Edna Violeta Díaz de Reyes, the secretariat states that the case is at the

administrative stage before the National Civil Service Authority, where she appealed against the dismissal and applied for reinstatement and payment of wage arrears.

449. As regards the allegations concerning pressure on members of the trade union of workers of the enterprise Bocadelli S.A., the Government states that on 5 August 2003, an application (No. 440-2003) against the enterprise was filed on behalf of 24 workers at the enterprise by Manuel Natividad Lemus Zavala. On 21 May 2004, notice of voluntary withdrawal of the action was lodged with the court, with the certified signatures of all but four of the workers (those four being: Damacio Salguero López, Edgar Giovanni Lara García, Julio César Rodas Maldonado and Miguel Angel Morataya Arévalo). Three days later, a ruling was given that the original case would continue with regard to the four workers who did not sign. Lastly, a summons was issued to attend an oral hearing on 6 October 2004. According to the Bocadelli de Guatemala S.A. enterprise, documentary evidence given to the Ministry of Labour and Social Security showed the allegations regarding illegal wage reductions to be false and therefore malicious and without foundation. Nevertheless, the Government sends a resolution of the General Labour Inspectorate which sanctions the enterprise for not having refunded the illegal wage reductions.

450. The Government sends a ruling handed down on appeal in relation to the Eskimo enterprise, as requested by the Committee. The ruling declares null and void the reinstatement of the dismissed workers based on the conclusion that their dismissals were due to the expiration of the period laid down in the employment contracts of 15 workers.

D. The Committee's conclusions

451. *The Committee recalls that the present case concerns allegations of violations of freedom of association in the form of supervision and interference by the State in the management of trade union funds. UNSITRAGUA further alleges numerous anti-union acts and dismissals in contravention of the law and the collective agreement in force at the following enterprises and institutions: the Office of the Attorney-General of the Nation; Supreme Electoral Tribunal; Ministry of Public Health and Social Aid; Secretariat of Public Works of the First Lady of the Republic of Guatemala; Industrial Agriculture Cecilia S.A.; Finca Eskimo S.A, taken over by the Agropecuaria Omagua S.A.; the San Carlos of Guatemala University; the port enterprise Santo Tomás de Castilla; and Bocadelli de Guatemala S.A. The CGTG alleges unjustified dismissals in the municipalities of Chiquimulilla, Puerto Barrios and Pueblo Nuevo Viñas.*

Municipality of Chiquimulilla

452. *As regards the allegations concerning dismissals in the municipality of Chiquimulilla in Santa Rosa Department, the Committee notes that according to the CGTG, the trade union and the mayor signed a collective agreement, article 9 of which provides for stability of employment for municipal employees, who can be dismissed only if they commit an offence within the meaning of the Act respecting municipal services. Despite this, and in violation of the agreement according to the CGTG, the mayor subsequently dismissed most of the workers who belonged to the union, including two members of the executive committee (which also violated the principle of immunity from dismissal under the Labour Code during their terms in office and for a period of one year after leaving union office). The Committee notes the Government's statements with regard to these allegations, to the effect that, on 30 January 2004, Rodolfo García Rivas and his colleagues complained to the Labour Inspectorate that they had been dismissed and that, although they were reinstated, they were subsequently dismissed again. The Committee regrets that the general information provided by the Government does not respond to the CGTG*

allegations, and requests the Government to send specific observations on this matter without delay. The Committee also requests the CGTG to communicate the number and names of workers dismissed, and to indicate whether the dismissals affected only trade union members or other municipality workers as well.

Municipality of Puerto Barrios

453. *The Committee notes that the allegations made by the CGTG concerning the municipality of Puerto Barrios, which was under a court summons from February 2003 onwards in order to negotiate a set of claims, concern the dismissal of six female members of the trade union, who lodged an application for reinstatement with the Labour, Social Security and Family Court of Izabal. The CGTG alleges that further dismissals took place subsequently, and more than 20 illegal dismissals in total have yet to be resolved, given that the principal case (collective dispute) is still pending. Lastly, the CGTG alleges that measures by the municipality aimed at breaking up the union continue to be an everyday occurrence. The Committee notes the Government's information with regard to these allegations that in January 2004 representatives of the Trade Union of Workers of the Municipality of Puerto Barrios lodged a complaint with the Labour Inspectorate in connection with the unjustified dismissal of 11 workers, despite the fact that the municipality was under a court summons. The Government maintains that although the Labour Inspectorate asked the mayor to reinstate the dismissed workers, the mayor refused to do so on the grounds that the court summons was limited to the period of discussions on the collective agreement that had already been negotiated and approved by the Labour Inspectorate the year before, which meant that reinstatement would not be legally possible. The Government states that the administrative file is currently being examined by the Department of Sanctions of the Ministry of Labour with a view to appropriate penalties. The case is also being examined from the legal point of view by the Appeals Chamber. The Committee requests the Government to forward a copy of the ruling as soon as it is handed down.*

Municipality of Pueblo Nuevo Viñas

454. *With regard to the Municipality of Pueblo Nuevo Viñas, the Committee notes the CGTG's statement to the effect that, in December 2003, the Trade Union of Workers of the Municipality of Pueblo Nuevo Viñas was established and that from that time onwards, the municipal authorities began adopting measures against all the workers and especially against trade union officers. For example, despite the conclusion of a collective agreement which included a provision guaranteeing stability of employment, the mayor dismissed ten workers including the union's general secretary and two members of the consultative council. An application was made to the courts to order reinstatement of the dismissed workers, but it was only possible to obtain an order to reinstate the general secretary and the two members of the consultative council. An appeal was filed and is still pending. The CGTG also alleges that when the executive minister visited the municipality in order to ensure that the reinstatement order was carried out, the mayor agreed only to reinstate the general secretary, who was demoted the following day. A complaint was then made to the court, and the case is still pending. The Committee notes that, according to the Government, on 12 February 2004 a group of workers in the municipality complained to the Labour Inspectorate that they had been dismissed, and that some of the workers concerned have received appropriate compensation but that the case of the others is still pending. The Government states in this regard that on 1 March 2004 a group of dismissed workers asked the Labour Inspectorate to intervene in order to obtain their reinstatement. The employer offered appropriate compensation but this was rejected by the workers. The Committee notes that the Government has not denied the allegations concerning the dismissal of the general secretary of the union and two members of the consultative council, and requests the Government to take the necessary measures to ensure that the*

order to reinstate these three union officers is carried out and that they are actually reinstated in their posts without loss of wages, and to keep it informed in this regard. The Committee requests the Government to inform it of any administrative or judicial rulings concerning the remaining allegations. It also requests the CGTG to communicate the names of the workers concerned.

Office of the Attorney-General of the Nation

455. *The Committee notes that, with regard to the Office of the Attorney-General of the Nation, UNSITRAGUA alleges that in the last two years, there have been illegal dismissals, disciplinary proceedings, dismissals without just cause in connection with reorganization, and transfers intended to force workers belonging to the trade union representing employees of the Office to resign. The dismissed workers include the following: Alcira Noemí Salguero Noguera, Rafael Fransisco Urrutia, Myrian Estela Godoy Bonilla de Rodríguez, Ramón Estuardo Monzón Sagui, Andrés Muñoz Quevedo, Juan Ignacio Miguel Ortiga Aparicio and Sara Cajas. According to UNSITRAGUA, these dismissals violate the principles of legality and the administrative disciplinary procedures established under the collective agreement. Those dismissed in connection with reorganization are as follows: Eliseo Ismael Rivera Castro, Laura Lili Alvarez Muralles de Pineda, Yuri Zumeta, Robinson Arnoldo Chevez Martínez, José Antonio López Mendoza, Livi Deisse Ramírez Ramírez, Héctor Humberto Barrios Mazariegos, Dense Juan Fransisco Alonzo Mazariegos, and Andrés Muñoz Quevedo. These dismissals violated article 13 of the collective agreement, which expressly prohibits dismissal in connection with reorganization and, furthermore, the Attorney-General's Office refused to submit the decision to the bipartite Joint Panel for review, as required by the collective agreement. The following workers were transferred: Myrian Estela de Rodríguez, Roberto de Léon, Anabella Ortiz Mijangos, Julia Leticia Martínez Chavarría, Mirna Irecema Rodríguez Rivera, María del Rosario Pérez y Pérez, Olga Marina Chang López, Adelso Pojoy Silva, Annecke Jannette Vásquez Ramírez, Enma Araceli Soto Romero, Silvia Hortensia Castillo Avila and Alcira Noemí Salguero Noguera. Workers were not informed or consulted in advance with regard to these transfers, and, in contravention of article 14 of the collective agreement, the Office of the Attorney-General refused in every case to submit the decision to the Joint Panel for review, as required by the collective agreement. The Committee notes that the Government has not sent its observations on these allegations, and requests it to send its comments without delay, with details of the administrative or judicial rulings handed down on this matter.*

456. *The Committee notes that, in response to its recommendation in which it requested further information on the dismissal of Félix Alexander Gonzáles of the Office of the Attorney-General, UNSITRAGUA states that the Office used a problem unconnected with work as a pretext for the dismissal, accusing the worker of something not regarded as a reason for dismissal and thus violating the principle of legality. The Government states that the Second Chamber of the Labour and Social Security Appeals Court rejected the worker's application for reinstatement and, in view of the fact that the worker did not appeal, declared the case closed. The Committee once again requests the Government to transmit a copy of the ruling given by the Second Chamber in this case.*

National Hospital for Orthopaedics and Rehabilitation

457. *The Committee notes the Government's information regarding the delay in dealing with the application for reinstatement of Luis Rolando Velásquez at the National Hospital for Orthopaedics and Rehabilitation, to the effect that the case was examined by the Third Chamber of the Labour and Social Security Appeals Court under file No. 301-2003*

and that, according to the file, the ruling was implemented on 8 October 2003. The Committee takes note of this information.

Port enterprise Santo Tomás de Castilla

458. *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 of the port enterprise Santo Tomás de Castilla, the Committee notes the allegation by UNSITRAGUA that although the dismissed workers were reinstated on 11 February 2004, they have since then been subjected to a series of acts of anti-union discrimination including the following: (a) failure to provide the safety equipment required for their work; (b) permanent assignment to the most exhausting and arduous duties; (c) classification on wage slips as being employed for specified tasks only, despite the fact that their contracts are without limit of time; and (d) payment of lower wages than other workers at the enterprise. The Committee notes that the Government confines itself to stating that that the Labour and Social Security Court of Izabal department ordered the reinstatement of the dismissed workers, and does not reply to the new allegations sent by UNSITRAGUA. The Committee requests the Government to send its comments in this regard without delay.*

Secretariat of Public Works of the First Lady of the Republic of Guatemala

459. *With regard to the allegation by UNSITRAGUA, that on 9 March 2004 the female workers of the Secretariat of Public Works of the First Lady of the Republic of Guatemala presented a set of claims to the Labour Inspectorate with a view to negotiating a number of improvements in working conditions, but that the inspectorate deliberately delayed forwarding the list to the secretariat (more than 25 days passed between presentation of the claims and notification of the employer) and thereby made it possible to dismiss about 40 workers (because, under the terms of the Act respecting union membership and strike action for state employees and its amendments, workers may seek judicial protection by declaring a collective dispute only after the direct means of redress have been exhausted after a period of 30 days from the presentation of the claims to the employer), the Committee notes the Government's information to the effect that: (a) on the date in question, notification was received of the establishment of the Ad Hoc Committee of Workers of the Secretariat of Public Works of the First Lady of the Republic, together with a set of claims for forwarding to the secretariat; (b) the Labour Inspectorate dealt with this in the normal way, and asked the Department of Labour Registration whether there was already a legally constituted trade union; it was confirmed that this was the case; (c) on 19 March 2004, the inspectorate issued Decision No. 904-004 ordering that the Trade Union of the Secretariat of Public Works of the First Lady of the Republic be informed of the content of the notice of establishment of the Ad Hoc Committee and the claims; the union did not reply after three days, and the Labour Inspectorate therefore deemed the notice and the claims to have been duly received and closed the case. The Committee notes the Government's categorical denial that the normal process of examining the case was a delaying tactic, and states that the Labour Inspectorate is obliged to ascertain whether there is already a legally constituted trade union so that it can inform the union of the establishment of an ad hoc committee and of any claims, given that in practice some ad hoc committees are supported by employers with a view to concluding collective agreements that sideline existing unions. The Committee takes note of this information.*

460. *As regards the alleged dismissal of about 40 workers, the Committee notes that according to the Secretariat of Public Works of the First Lady of the Republic of Guatemala, some 29 people were dismissed in early 2004 in connection with reorganization, under the terms*

of Decision 2004-DJ-663 issued on 3 March 2004 by the National Civil Service Authority. The secretariat emphasizes that of the 29 dismissed workers (not 40, as UNSITRAGUA claims), only seven were trade union members. The Committee also notes that the complainant has not sent any new information on this aspect of the case. In these conditions, the Committee does not have information allowing it to appreciate the anti-union nature of the dismissals. It will therefore not pursue its examination of this allegation, unless the complainant produces evidence showing that the dismissals were anti-union in nature.

461. *The Committee notes that UNSITRAGUA also alleges that the Trade Union of Workers of the Secretariat of Public Works of the First Lady of the Republic was subjected to a number of anti-union measures by the authorities of the institution, in particular, the use of the union's membership list to harass workers into leaving the union and a smear campaign against the union leadership. The Committee notes further UNSITRAGUA's allegation concerning the unjustified dismissal, in contravention of trade union immunity, of Dilia Josefina Cobox Ramón, the union's social relations secretary (30 April 2004), and of Edna Violeta Díaz Reyes, the inter-union relations secretary (15 May 2004). The Committee notes that the secretariat denies that anti-union acts took place, maintains that it has documentary proof that Dilia Josefina Cobox Ramón constantly neglected her duties, and claims that it did not know at the time of the dismissals that these workers held union office. With regard to the case of Edna Violeta Díaz de Reyes, the secretariat states that this is at the administrative stage before the National Civil Service Authority. Under these circumstances, the Committee requests the Government to carry out an independent inquiry without delay into the alleged anti-union acts directed against members of the union, and to keep it informed in this regard. The Committee also requests the Government to indicate whether Dilia Josefina Cobox Ramón and Edna Violeta Díaz Reyes have taken any legal action, and if they have, to keep it informed of developments.*

462. *As regards the dismissal of Rosa María Trujillo de Cordón, Xiomara Eugenia Paredes Peña de Galdamez and Zoila Jacqueline Sánchez De García, all members of the trade union of the Secretariat of Public Works of the First Lady of the Republic, the Committee recalls that in its previous examination of the case, it decided that it would not proceed with examining these allegations unless the complainant sent new information showing the anti-union nature of the dismissals. The Committee notes that the information sent by UNSITRAGUA contains no such evidence, and therefore concludes that it will not continue its examination of this allegation.*

Bocadelli S.A.

463. *As regards the allegations concerning pressure directed at the members of the Trade Union of Workers of the Bocadelli S.A. enterprise, the Committee notes that according to the Government, on 5 August 2003, an application against the enterprise (No. 440-2003) was filed on behalf of 24 workers in Manuel Natividad Lemus Zavala. On 21 May 2004, notice of voluntary abandonment of the action was presented, with the signatures of all those workers except four (Damacio Salguero López, Edgar Giovanni Lara García, Julio César Rodas Maldonado, and Miguel Angel Morataya Arévalo), and three days later, it was decided that the action would continue with regard to the workers who had not signed. The Government also states that the parties had been summoned to attend an oral hearing on 6 October 2004. The Committee notes in this regard that, according to the information provided by the Bocadelli S.A. enterprise, the statements concerning alleged illegal wage deductions were shown to be false with the aid of documentary evidence before the Ministry of Labour and Social Security; nevertheless, the Government sends a resolution of the General Labour Inspectorate which sanctions the enterprise for not having refunded the illegal wage reductions. The Committee observes however that the enterprise does not refer to the alleged acts of anti-union discrimination. The Committee requests the*

Government to keep it informed of developments in the judicial proceedings under way concerning the four union members.

Eskimo enterprise

464. *The Committee takes note of the ruling handed down on appeal which declared null and void the reinstatement of 15 workers as the period laid down in their employment contracts had expired.*

The Committee's recommendations

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

(a) As regards the allegations concerning dismissals in the municipality of Chiquimulilla in the Santa Rosa Department, the Committee requests the Government to reply without delay and in specific terms to these allegations and asks the CGTG to communicate the exact number and names of workers dismissed and to indicate whether the dismissals affected only trade union members or other municipality workers as well.

(b) As regards the allegations concerning the municipality of Puerto Barrios (refusal to reinstate workers dismissed despite having trade union immunity), the Committee requests the Government to forward a copy of the Appeal Court ruling as soon as it is handed down.

(c) As regards the allegations concerning the municipality of Pueblo Nuevo Viñas, the Committee requests the Government to take the necessary measures to ensure that the union's general secretary and the two consultative council members are reinstated in their posts without loss of wages and to keep it informed in this regard. The Committee requests the Government to inform it of any administrative or judicial decisions regarding the other dismissals, and requests the CGTG to communicate the names of the workers concerned.

(d) As regards the new allegations concerning the Office of the Attorney-General of the Nation (illegal dismissals, disciplinary proceedings, dismissals without just cause in connection with reorganization, and transfers intended to force union members to resign), the Committee requests the Government to send its comments without delay, with details of the administrative or judicial rulings handed down on this matter.

(e) As regards the dismissal of Félix Alexander Gonzáles from the Office of the Attorney-General of the Nation, the Committee once again requests the Government to send a copy of the ruling handed down by the Second Chamber of the Appeals Court on this case.

(f) As regards the new allegations concerning the port enterprise Santo Tomás de Castilla (acts of anti-union discrimination against reinstated members of the executive committee), the Committee requests the Government to send its observations in this respect without delay.

(g) In relation to the alleged acts of anti-union discrimination directed against the Trade Union of Workers of the Secretariat of Public Works of the First Lady of the Republic, the Committee requests the Government to carry out an independent inquiry without delay into the alleged anti-union acts and to keep it informed in this regard. As regards the dismissal of two trade union officials, the Committee requests the Government to indicate whether Dilia Josefina Cobox Ramón and Edna Violeta Díaz Reyes have taken legal action and, if so, to keep it informed of developments.

(h) As regards the alleged pressure applied to members of the Trade Union of Workers of Bocadelli S.A., the Committee requests the Government to keep it informed of developments in the judicial proceedings under way concerning the four union members in question.

(i) As regards the alleged supervision and interference by the State in the management of trade union funds, the Committee notes that the Government has not sent any information in this respect, and requests it once again to ensure that the functions of the Superintendent for Tax Administration are brought into line with the principles of the financial autonomy of trade union organizations and, in consultation with trade union confederations, to modify the legislation as necessary in this direction, and to keep it informed of measures taken in this respect.

(j) The Committee once again notes with regret that the Government has not sent its observations regarding the allegation concerning the state of indirect dismissal reported at the Industrial Agriculture Cecilia S.A. by 34 workers belonging to the trade union there, resulting from failure to pay salaries, assign tasks, etc., and requests the Government to send its comments in this respect without delay.

(k) The Committee notes that the Government has not sent any information regarding the measures adopted to bring about a peaceful settlement, through dialogue between the parties, in the dispute between the Union of Independent Traders of the Central Campus of the University of San Carlos of Guatemala (SINTRACOMUSAC) and the University, and begin appropriate investigations into the allegations of violence; the Committee once again requests the Government to keep it informed in this regard.

(l) As regards the failure to implement the order to reinstate Byron Saúl Lemus Lucero in the Supreme Electoral Tribunal, in relation to which the Committee had requested the Government to take the measures at its disposal to rectify promptly the situation, the Committee once again requests the Government to keep it informed in this regard.

(m) 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, which have not yet communicated any information.

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 trade union members 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, the Trade Unions' and People's Action Unit (UASP); anti-union dismissals; and delays in registering a trade union organization

466. The Committee last examined this case at its June 2004 meeting [see 334th Report, paras. 581-599]. UNSITRAGUA sent new allegations in communications dated 15 and 26 April 2004. In a communication dated 26 July 2004, the complainant organization sent comments and information on the observations sent by the Government and new allegations in communications dated 28 July 2004 and 24 January 2005. The Government sent its observations in communications dated 4 November 2004 and 19 January 2005.

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

A. Previous examination of the case

468. In its June 2004 meeting, the Committee formulated the following provisional recommendations relative to the allegations presented by the complainant organization [see 334th Report, para. 599]:

(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 communications dated 15 and 26 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.

B. The complainant's new allegations

469. In its communication dated 15 April 2004, the complainant refers to its allegation relating to the illegitimate nature of the constitution of the Tripartite Committee on International Labour Affairs, in that the not-for-profit civil organization known as the Trade Unions' and People's Action Unit (UASP), founded in February 2002, was recognized as having trade union representative status and allowed to participate in the Committee's work. The complainant also states that UNSITRAGUA was excluded from the aforementioned Committee because, although it complies with the requirements of legitimacy (in the form of its affiliated organizations and 19 years of constant struggle) and representativity, it does not fulfil the requirement of legality because it is not registered as a trade union organization. The complainant adds that, as it has already pointed out to the ILO, it has not been able to register as a trade union organization because Guatemalan legislation imposes a vertical structure which does not make allowance, either in qualitative or quantitative terms, for the horizontal structure through which UNSITRAGUA carries out its activities. The complainant states that article 3 of Governmental Agreement No. 27-2004, published in the *Diario Oficial* on 13 January 2004, replaces the principles of legitimacy and representativity with that of legality, thus making it impossible for organizations which do not fulfil the criteria of legality (even though they are legitimate and representative) to participate in the work of the aforementioned Committee, despite the fact that, in the past, no such limit had been set on freedom of association. The provision is even more restrictive, in that it means that only legally registered active trade union federations may apply to participate in the Committee's work. UNSITRAGUA also alleges that, when adopting this provision, which is contrary both to the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), and Convention No. 87, the Government did not take into account the objections put forward, or the proposal submitted by UNSITRAGUA to the Ministry of Labour and Social Security. The complainant states that the Government ignored the proposed alternative draft decree.

470. In its communication dated 26 April 2004, the complainant organization alleges non-compliance with judicial orders for the reinstatement of 29 workers belonging to the Workers' Trade Union of Golan S.A. company. The complainant organization states that Golan Group S.A. company is a private security firm, constituted in accordance with Guatemalan law. Twenty-nine workers who participated in the formation of the trade union (including the members of the executive committee and the interim consultative council) were immediately dismissed when the firm found out about the formation of the trade union. The workers took their case for reinstatement to court, with the courts finding in their favour, both in the first instance and in the case of the subsequent appeals lodged by the employer (appeal to the Second Chamber of the Court of Appeals for Labour and Social Security; application for *amparo* (enforcement of constitutional rights) to the Supreme Court of Justice; appeal to the Constitutional Court which confirmed that the *amparo* application made by the employer was not justified). Finally, on 14 January and 12 February 2003 (27 and 28 months after the dismissals had taken place, respectively), the workers, accompanied by public servants of the court, went to the firm's premises in order to ensure that the workers who had been dismissed were reinstated. However, the employer refused to comply with the judicial orders. The complainant organization states

that non-compliance with judicial orders is made possible by the lack of a substantial sanction under law in particular, as well as by the fact that, in such cases, the employer faces no more than a small fine. Finally, the complainant organization stresses the fact that, at the time that the complaint was sent, the workers had already waited for over 40 months without being reinstated in their posts, despite the existing judicial order to this effect and recalls that, as has been repeatedly pointed out by the Committee on Freedom of Association, justice delayed is justice denied.

471. In its communication dated 28 July 2004, the complainant organization alleges that Governmental Agreement No. 121-2004, modifying the model of contract applying to 13,000 teaching staff at pre-primary and primary level, had a direct effect on the future existence of the Teachers' Trade Union of Guatemala (SITRAMAGUA), which was in the process of being formed. Rather than being referred to as "permanent staff" (budget line 011), the teaching staff concerned were hired as "supernumerary staff", with annually renewable contracts. Although the trade union being formed had over 3,000 members, it was not even possible to elect a definitive executive committee, such was the extent of the disruption to the formation process caused by workers' fears of dismissal, or of their contracts not being renewed.

C. The Government's reply

472. In its communication dated 4 November 2004, the Government states that the new Tripartite Committee on International Labour Affairs was established through Governmental Agreement No. 285-2004 of 16 September 2004 which was approved by tripartite consensus. The Government states that, as a part of the constitution process, it invited all trade union federations (25 in total) to nominate candidates for appointment to the new Committee as representatives. Appointments were carried out on the basis of tripartite consultation in accordance with Convention No. 144, taking into account the criterion of most representative organizations based on the records of the General Directorate of Labour. The Government also states that, on 18 October 2004, the aforementioned Committee was constituted for the period of October 2004 to October 2006, with the following individuals acting as representatives of the workers' sector: (1) incumbents: Rigoberto Dueñas Morales (the General Confederation of Workers of Guatemala – CGTG), Reynaldo Federico Gonzáles (the Federation of Bank and Insurance Employees – FESEBS), Néstor Estuardo de León Mazariegos (the Trade Union Federation of Public Employees of Guatemala – FENASTEG), Angélico Sofoifa Barrios (the Trade Unions' and People's Action Unit – UASP); and (2) deputies: Everildo Revolorio Torres (the Unified Trade Union Confederation of Guatemala – CUSG), Manuel Mejía Juárez (the Trade Union Federation of Food, Agro-Industry and Related Workers – FESTRAS) and Carlos Enrique Díaz López (UNSITRAGUA).

473. In its communication of 15 January 2005, the Government sends information from the Carrocerías Rosmo S.A. company in which it is indicated that, due to the difficult economic situation of the company and in order to avoid its closure, it was decided to reduce the number of employees. An agreement was reached through negotiations with the workers to pay the wage plus labour benefits as recorded in the agreement. Trade union membership was not taken into consideration. As for the allegations concerning the Palo Gordo Agricultural, Industrial and Refining Company S.A., the latter indicates that it stopped recruiting casual workers because there was no need for their services and that this recruitment takes place at the beginning of each harvest season in the enterprise except for the executive staff (very small). All workers are trade union members.

D. The Committee's conclusions

474. *As to the allegation relating to the illegitimate nature of the constitution of the Tripartite Committee on International Labour Affairs which included the not-for-profit civil organization known as the Trade Unions' and People's Action Unit (UASP) as an organization representing the workers, with UNSITRAGUA being excluded for not fulfilling the requirement of legality (given that it has not been legally registered), the Committee notes the adoption on 16 September 2004 of governmental Agreement No. 285-2004, repealing governmental Agreement No. 27-2004, which was challenged by the complainant organization and which retains the criterion of most representative organization with regard to selection for participation in the aforementioned Committee. Likewise, the Committee notes that the Government states that it invited all the trade union federations (25 in total) to nominate candidates for the constitution of the aforementioned Committee and that the appointment of representatives was carried out on the basis of tripartite consultation in accordance with Convention No. 144, taking into account the criterion of the most representative organization, based on the records of the General Labour Directorate. The Government also states that, on 18 October 2004, the Committee was constituted for the period of October 2004 to October 2006 and that, of the representatives of the workers' sector, Mr. Angélico Sofoifa Barrios (the Trade Unions' and People's Action Unit – UASP) is incumbent in the position of worker representative and Mr. Carlos Enrique Díaz López (UNSITRAGUA) holds the position of deputy representative. The Committee notes with interest that UNSITRAGUA was able to present candidates for the Tripartite Committee on International Labour Affairs and has not been excluded from the said Committee and requests the Government to send documentation on the UASP which will make it possible to determine whether it is a trade union organization or not (statutes, affiliated organizations, representativity, activities, etc.).*

475. *With regard to the alleged dismissal without cause of 47 workers from the Carrocerías Rosmo S.A. company, the Committee takes note of the agreement signed with the workers who accepted their dismissal and the payment of labour benefits in fractions because of the economic difficulties of the company. It also notes that according to the company, trade union membership was not taken into account.*

476. *With regard to the allegations pending concerning the Palo Gordo Agricultural, Industrial and Refining Company S.A. (dismissal of 50 workers), the Committee notes that according to the enterprise: (1) it stopped recruiting casual workers because there was no need for their services and that this recruitment takes place at the beginning of each harvest season; and (2) except for the executive staff (very small), all workers of the enterprise are trade union members. The Committee requests the Government to communicate any decision handed down on this matter. The Committee observes that the Government has not sent its observations regarding the allegations concerning the dismissal of four workers at the Quetzal Harbour Company, the non-compliance with judicial orders for the reinstatement of 29 workers belonging to the Workers' Trade Union of Golan S.A. company and the process of forming the Teachers' Trade Union of Guatemala (SITRAMAGUA). The Committee requests the Government to communicate its observations without delay.*

477. *As regards the statement made by the complainant organization that the non-compliance with judicial orders is made possible by the fact that, in such cases, the employer faces no more than a small fine, the Committee underlines that the existence of legislative provisions prohibiting acts of anti-union discrimination is insufficient if they are not accompanied by efficient procedures to ensure their implementation in practice [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 742]. The Committee requests the Government to keep it informed on the legislation and the practice in this regard.*

The Committee's recommendations

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

(a) As to the alleged illegitimate nature of the constitution of the Tripartite Committee on International Labour Affairs, the Committee requests the Government to send documentation on the UASP which will make it possible to determine whether it is a trade union organization or not (statutes, affiliated organizations, representativity, activities, etc.).

(b) The Committee requests the Government to send without delay its observations on the allegations related to the Quetzal Harbour Company (dismissal of four workers), the non-compliance with judicial orders for the reinstatement of 29 workers belonging to the Workers' Trade Union of Golan S.A. company and the process of formation of the Teachers' Trade Union of Guatemala (SITRAMAGUA).

(c) The Committee requests the Government to communicate any decision handed down with regard to the alleged dismissal of 50 workers in the Palo Gordo Agricultural, Industrial and Refining Company S.A.

(d) The Committee requests the Government to send its observations on the communication of UNSITRAGUA dated 24 January 2005.

(e) As regards the statement made by the complainant organization that the non-compliance with judicial orders is made possible by the fact that, in such cases, the employer faces no more than a small fine, the Committee underlines that the existence of legislative provisions prohibiting acts of anti-union discrimination is insufficient if they are not accompanied by efficient procedures to ensure their implementation in practice. The Committee requests the Government to keep it informed on the legislation and the practice in this regard.

(f) The Committee requests the Government to solicit information from the employers' organizations concerned, with a view to having at its disposal their views on the questions at issue, as well as those of the enterprises which have not yet communicated information.

CASE NO. 2321

INTERIM REPORT

Complaints against the Government of Haiti presented by — the Haitian Trade Union Coordination (CSH) and — the International Confederation of Free Trade Unions (ICFTU)

Allegations: The complainant organizations allege that a search was carried out at the headquarters of a trade union confederation without a judicial warrant, that trade union members were arbitrarily detained and ill-treated and that threats were made against trade union leaders and members

479. The complaint is contained in communications from the Haitian Trade Union Coordination (CSH), dated 28 January 2004, and from the International Confederation of Free Trade Unions (ICFTU), dated 31 January 2004. The ICFTU provided additional information in a communication dated 1 March 2004.

480. Despite that, in paragraph 9 of its 335th Report, the Committee has drawn the attention of the Government 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 could present a report on the substance of the case, even if the Government's observations or information had not been received in due time, it has yet to receive any observations from the Government.

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

A. The complainant organizations' allegations

482. In their communications of 28 and 31 January 2004 respectively, the CSH and the ICFTU bring a complaint alleging that numerous violations of Conventions Nos. 87 and 98 have been committed in Haiti.

Incident of 24 January 2004

483. In their communications of 28 and 31 January 2004 respectively, the CSH and the ICFTU allege that, around 2 p.m. on 24 January 2004, a group of armed, uniformed police officers burst into the CSH premises, where a trade union meeting was in progress, without a search warrant. The police officers then proceeded to search the premises, claiming that they were looking for weapons and for the Secretary-General of the CSH, Mr. Charles Fritz. They also threatened to kill all those present, as well as the Secretary-General, who was absent. Failing to find what they wanted, the police then arrested ten men and one woman, including several trade union members, and took them to Port-au-Prince police station, where they were detained without seeing a judge or being charged with any offence. The ICFTU also alleges that the 11 detainees were seriously attacked during their

detention at Port-au-Prince police station and that they were not allowed any outside contact, even with lawyers or fellow trade unionists.

484. According to the ICFTU, the names of the 11 individuals arrested by the police are: David Dorme, Ludy Lapointe, Ernst Toncheau, Riginal Saint-Jean, Eloi Weche, Roselere Louis, Cédieu Dorvil, Jean Douleau Joseph, Stephen Guerrier, André Saurel and Norval Fleurant. The ICFTU states that only Mr. Norval Fleurant had been freed by 31 January 2004.

485. The ICFTU claims that, on 28 January 2004, the ten remaining detainees were transferred to the national penitentiary, which normally holds common criminals after they are sentenced, still without having been taken before a judge or charged with any crime. Allegedly, the police had only made verbal accusations against the ten detainees of "plotting to destabilize national security". The ten detainees appeared before a tribunal on 30 January 2004.

486. In its communication of 1 March 2004, the ICFTU states that the ten remaining detainees, who had been held since 24 January 2004, were freed on 29 February 2004, after more than a month of arbitrary detention.

Incident of 27 January 2004

487. In its communication of 31 January 2004, the ICFTU states that two trade unionists (Mr. Timothée Faduel, Secretary-General of the youth section of the Autonomous Confederation of Haitian Workers (CATH) and Mr. Jean-Luc Toussaint, a CATH member), were arrested by police officers from the General Security Unit of the *Palais national* and detained without charge after a peaceful demonstration in Port-au-Prince on 27 January 2004, which had been carried off without incident. The ICFTU claims that these two trade unionists were severely beaten by the police during their detention. The two trade unionists had been released by 31 January 2004.

Threats against trade union members

488. In its communication of 28 January 2004, the CSH states that, besides the threats made by the police officers during the incident of 24 January 2004 at the CSH headquarters, Mr. Charles Fritz, Secretary-General of the CSH, has suffered serious intimidation from violent groups close to the Government, which has forced him to remain in hiding since November 2003. The CSH states, moreover, that although it has reported this intimidation many times, no steps have been taken to protect Mr. Fritz's person or to bring the guilty parties to justice.

489. In its communication of 1 March 2004, the ICFTU also states that, even before the incident of 24 January 2004, threats had already been made against the 11 individuals arrested on that occasion and their families, as well as against other union leaders. The ICFTU claims that several Haitian trade unionists chose to go into hiding on 29 February 2004 for fear of reprisals by the "Chimères" and other armed "criminal" elements.

B. The Committee's conclusions

490. *The Committee regrets that, despite the time which has passed since the presentation of the complaint, to date the Government has not responded to the allegations made by the complainant organizations, although the Committee has urged it to send its observations or information on the case on several occasions, including through an urgent appeal launched at the Committee's June 2004 meeting. Under these circumstances, in*

accordance with the procedure established in paragraph 17 of its 127th Report as approved by the Governing Body, the Committee stated that it would present a report on the substance of this case at its next session, even if the observations or information requested had not been received in due time.

491. *The Committee reminds the Government, firstly, that the aim of all the procedures established by the International Labour Organization in relation to the examination of allegations related to violations of freedom of association is to ensure that the rights of workers' and employers' organizations are respected, in fact and in law; the Committee thus believes that though this procedure protects governments from unfounded accusations, those same governments should in turn recognize the importance of providing detailed and precise responses concerning the substance of the alleged facts for objective examination [see First Report, para. 31].*

492. *The Committee observes that the complainant organizations' allegations in this case concern various violations of the fundamental principles of freedom of association laid down in Conventions Nos. 87 and 98. The Committee considers that these violations can be grouped into four main types.*

493. *First, the Committee notes the allegation of the complainant organizations that, at the incident of 24 January 2004, the group of police officers who carried out the search of the CSH premises had no judicial warrant. In this regard, the Committee recalls that the entry by police or military forces into trade union premises without a judicial warrant constitutes a serious and unjustifiable interference in trade union activities [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 176]. The Committee therefore requests the Government to take the necessary steps to ensure that, in the future, searches carried out on trade union premises do not take place without the provision of an appropriate judicial warrant, and that they are restricted to the purposes which are the reason for the provision of the warrant.*

494. *Secondly, the Committee notes the complainant organizations' claim that, during both the incident of 24 January 2004 and that of 27 January 2004, the police arbitrarily arrested and detained several trade unionists, without bringing them before a judge or charging them with any offence. In regard to this, the Committee is compelled to recall that measures that deprive trade union leaders and members of their freedom entail a serious risk of interference in trade union activities and, when such measures are taken on trade union grounds, they constitute an infringement of the principles of freedom of association [see **Digest**, op. cit., para. 74]. While noting that all of the trade unionists involved in this complaint have now been freed, the Committee requests the Government to take all necessary measures to ensure that, in future, no trade unionists are arrested or detained without benefiting from normal judicial proceedings and having the right to due process, and in particular, the right to be informed of the charges brought against them, to communicate freely with counsel of their own choosing, and to a prompt trial by an impartial and independent judicial authority.*

495. *Thirdly, the Committee notes the allegation of the ICFTU that, during their detention, the trade unionists involved in the incidents of 24 and 27 January 2004 were victims of ill-treatment including physical attack. The Committee is compelled to recall in this respect that, as regards allegations of the physical ill-treatment of trade unionists, governments should give the necessary instructions so as to ensure that no detainee is subjected to ill-treatment and apply effective sanctions where cases of such treatment are found. It has also emphasized the importance that should be attached to the principle laid down in the International Covenant on Civil and Political Rights according to which all persons deprived of their liberty must be treated with humanity and with respect of the inherent dignity of the human person [see **Digest**, op. cit., para. 59]. Consequently, the*

Committee requests the Government to specify the measures it intends to take to identify and punish those responsible for the ill-treatment which, according to the allegations of the ICFTU, has been inflicted on several trade unionists during their detention by the police force.

496. *Lastly, the Committee notes the complainant organizations' claim that many trade unionists are the victims of constant threats and intimidation from certain violent groups, and that this has led some of them to go into hiding for fear that these groups might carry out their threats. In this regard, the Committee recalls 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 or members of these organizations, and it is for governments to ensure that this principle is respected [see* ***Digest****, op. cit., para. 47]. The Committee therefore requests the Government to indicate the measures it intends to take to ensure that leaders and members of workers' organizations are able to carry out their activities freely, without facing violence, pressure or threats of any kind.*

The Committee's recommendations

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

(a) The Committee deplores that, despite the time which has lapsed since the presentation of the complaint, the Government has not replied to the allegations made by the complainant organizations.

(b) The Committee requests the Government to take the necessary steps to ensure that, in the future, searches carried out on trade union premises do not take place without the provision of an appropriate judicial warrant, and that they are restricted to the purposes which are the reason for the provision of the warrant.

(c) The Committee requests the Government to take all necessary measures to ensure that, in future, no trade unionists are arrested or detained without benefiting from normal judicial proceedings and having the right to due process, and in particular, the right to be informed of the charges brought against them, to communicate freely with counsel of their own choosing, and to a prompt trial by an impartial and independent judicial authority.

(d) The Committee requests the Government to specify the measures it intends to take to identify and punish those responsible for the ill-treatment which, according to the allegations of the ICFTU, has been inflicted on several trade unionists during their detention by the police force.

(e) The Committee requests the Government to indicate the measures it intends to take to ensure that leaders and members of workers' organizations are able to carry out their activities freely, without facing violence, pressure or threats of any kind.

CASE NO. 2336

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

Complaint against the Government of Indonesia presented by the Confederation of Indonesian Prosperity Trade Union (K-SBSI)

Allegations: The complainant organization alleges several freedom of association violations at the Jaya Bersama Company such as its refusal to recognize the union, the anti-union dismissals of trade union members and officials, and acts of intimidation against employees. The complainant organization further denounces the lack of efficiency of the government authorities' measures taken so far

498. The complaint is contained in a communication from the Confederation of Indonesian Prosperity Trade Union (K-SBSI) dated 11 March 2004. Additional information was provided in a communication from the Federation of Construction, Informal and General Workers (F-KUI) dated 4 June 2004.

499. The Government sent its observations in communications dated 25 May, 31 August and 2 November 2004.

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

A. The complainant organization's allegations

501. In its communication dated 11 March 2004, the complainant organization detailed allegations of anti-union practices at Jaya Bersama Company (hereinafter "the company"), a company that sells the saliva of swallow birds. The work of the company largely involves cleaning swallow nests, with the cleanest nests being the most valuable. The complainant organization alleged in this communication that the company employs 68 women and two men.

502. In June 2003, 17 workers of the company came to the office of the F-KUI, an affiliate of the K-SBSI and expressed their will to join the union. On 15 July 2003, 47 workers of the company established the F-KUI plant-level union, and elected five members to the plant-level board of the F-KUI at the company: Ms. Siti Suyatmi (chairperson), Ms. Jasmini (vice-chairperson), Ms. Elly (secretary-general), Ms. Siti Purwati (vice-secretary-general) and Ms. Tatik (treasurer). The F-KUI plant-level board was registered, at the end of July 2003, as a union at the Manpower Department, North Jakarta, with registration No. 502/III/P/VII/2003.

503. On 26 August 2003, the F-KUI sent the registration letter, to inform the company that the plant-level board of the F-KUI had been registered. The complainant organization alleged,

however, that the company rejected the letter and did not acknowledge the union; it then started to frighten its workers to "avoid that they join the activities of the union".

504. On 26 August 2003, Mr. Aguan, the owner of the company, asked Ms. Siti Suyatmi, chairperson of the F-KUI plant-level board, for information regarding the membership of the union and suggested that if she did not want to continue to work, she could resign and receive Rp.2,000,000 (US$250). Ms. Suyatmi allegedly replied that she had already joined the union and that she did not want to change her decision.

505. On 28 August 2003, at 8 a.m., the company supervisor on the fourth floor said, in front of all workers, that the K-SBSI was a terrorist organization, and hence illegal. She asked the workers not to join the union and "intimidated several workers directly".

506. On 29 August 2003, at 8 a.m., Ms. Elly (the third floor supervisor), said in front of all the workers that a lawyer had been hired to face the union and joining the K-SBSI was useless. At 12 noon, Ms. Elly announced a change in the company's payment practice from daily payment to a contract system, linking wages to "completed nests". Ms. Atun, the supervisor on the fourth floor, announced the same change. The change in policy was not discussed with the union.

507. Later on 29 August, at 1.30 p.m., Ms. Elly and Ms. Yani called Ms. Jasmini, Ms. Tatik, Ms. Siti Sulastri, Ms. Elly and Ms. Siti Purwati to the first floor, where Yani asked them not to join the union and not to influence other workers to join the union. At 4 p.m., the company driver was sent by the supervisor to force workers on the fourth floor to sign a letter that was covered, but "presumably being a letter of agreement to the new payment practice". The complainant organization alleged that the board of the F-KUI and some members refused to sign it, and were then physically forced to do so by Ms. Elly and Saddai. While some resisted and refused to sign, two workers, Ms. Sugiarti and Ms. Siti Aminah, were forced physically by Saddai to sign the letter. Out of 39 workers on the fourth floor, nine workers did not wish to sign (Ms. Jasmini, Ms. Tatik, Ms. Siti Sulastri, Ms. Emi, Ms. Nurhayati, Ms. Elly, Ms. Rohaeni, Ms. Ningsih and Ms. Karni). At 4.30 p.m. on the same day, Ms. Elly forced 29 workers on the third floor, including Ms. Siti Purwati and Ms. Siti Suyatmi, to sign the letter.

508. At 8 a.m. on 30 August 2003, the F-KUI board protested to the supervisor because some members of the union had been discriminated against in the production process through being allotted the worst quality nests, so that they would get fewer results and consequently lower incomes.

509. Between 2 p.m. and 3 p.m. on 30 August, Ms. Elly gave the workers one by one their salary. At this time, she told 11 members of the F-KUI, including all five members of the plant-level board, that the company would dismiss them, and gave them each a receipt setting out the amount of severance pay. The 11 workers concerned rejected the dismissal and severance pay, given the anti-union character of the acts. The 11 workers thus dismissed were Ms. Siti Suyatmi (chairperson), Ms. Ellyana (secretary-general), Ms. Jasmini (vice-chairperson), Ms. Karni (member), Ms. Tatik (treasurer), Ms. Rohaeni (member), Ms. Siti Sulastri (member), Ms. Suryaningsih (member), Ms. Siti Purwati (vice-secretary general), Ms. Emi Susilawati (member), and Ms. Nurhayati (member). All 11 workers were young women aged between 14 and 23 years and had been employed for the following lengths of time: Ms. Siti Suyatmi and Ms. Ellyana – five years; Ms. Jasmini and Ms. Karni – three years; Ms. Tatik – two years; Ms. Rohaeni, Ms. Siti Sulastri and Ms. Suryaningsih – one year; and Ms. Siti Purwati, Ms. Emi Susilawati and Ms. Nurhayati – for between three months and one year.

510. The complainant organization stated that the company denied the 11 workers entry to the building when they attempted to attend work the next day. When the central board of the F-KUI came to the company at 2 p.m. that day, the management "rejected" the union and refused them leave to enter the company. After two-and-a-half hours, the employer's lawyer talked with the union, but the company declined any form of negotiation.

511. On 5 September 2003, the 11 dismissed workers gave authority for legal action to be initiated, and the F-KUI attempted to commence bipartite negotiations. While the owner of the company refused to meet with the F-KUI, the union met once with Mr. Kris Kaban, allegedly the company's lawyer. (The complainant organization suggested that according to "other internal sources", however, Mr. Kaban was "just an employee of that company".)

512. As there was no response from the company, the F-KUI reported the case to the North Jakarta Manpower Department on 8 September 2003. The Manpower Department invited the owner of the company and the union to a tripartite meeting about the case on 23 September 2003, which the owner did not attend. The Manpower Department sent a letter proposing a second meeting on 2 October 2003, but again the owner of the company did not attend. When the Manpower Department attempted to deliver a letter directly to the company, the supervisor refused to receive the letter and would not give the officer access to the building. The third tripartite meeting organized for 9 October 2004 was also not attended by the company.

513. The complainant organization explained that following their dismissal, the 11 workers suffered financially and Ms. Jasmini, one of the 11 workers, has since died. The remainder of the employees at the company have become afraid to be actively involved in the union activities and do not want to continue their demands to the company for better work conditions and wages. Nevertheless, it seems that they have continued to be members of the union.

514. The complainant organization has requested the Committee to guarantee the reinstatement of the trade unionists and officials dismissed at the company, ensure the recognition of the union, make possible dialogue between the organized workers and the company, and end the anti-union acts in the company.

515. In its second communication, dated 4 June 2004, the complainant disputed the information provided by the Government in its communication of 25 May. In particular, the complainant stated that the Indonesian Government's investigation was flawed because it investigated the company after the events, and that neither collective bargaining nor the dismissal of the trade union board were addressed.

B. The Government's observations

516. In its communication dated 25 May 2004, the Government indicated that on 12 May 2004, three labour inspectors went to the company on a fact-finding visit. As the owner of the company was not available, the inspectors questioned staff and employees. The inspection report noted that the company employed 80 workers, of which 17 were daily workers paid a fixed daily rate, 61 were paid according to the number of nests processed, and two administrative and general staff were paid monthly. The report noted that there was no trade union within the company.

517. Further, on 12 May 2004, the Ministry of Manpower and Transmigration (MOMT) arranged a tripartite meeting between the owner of the company, the union and the head of the Manpower Office, but the owner of the company did not attend. The Government also indicated that the Director of Norms Supervision, Directorate General of Labour Inspection Development, following up the labour inspection, invited the employer to a

meeting to obtain further information but due to a business trip he was unable to attend and was represented by "one of his friends", Mr. Kris, who is not a lawyer.

518. In its communication dated 31 August 2004, the Government provided further information, and confirmed the existence of the plant-level union at the company, clarifying that it had previously stated that there was no trade union set up in the company because the workers could not provide receipt of its registration when the labour inspectors visited the company.

519. Further, the Government indicated that as the Manpower and Transmigration Municipal Office had arranged three meetings with the employer and workers, which the employer did not attend, the Manpower and Transmigration Municipal Office mediator had accepted the workers' evidence in the absence of any evidence from the company, and concluded that "the company cannot or does not agree with the establishment of the trade union …, so that the company terminated eleven (11) workers, including five (5) out of them who are administrators of the said trade union; and termination … is unreasonable, so it cannot considerably be applied. Consequently, they have to be re-employed". On 29 January 2004, the mediator sent the issue to the "P4P" (the Central Committee for Labour Dispute Settlement) to get a binding legal decision. The Government further indicated that a team of representatives of the central MOMT, the Manpower and Transmigration Provincial Office and the Manpower and Transmigration Municipal Office had been established.

520. In its latest communication, dated 2 November 2004, the Government enclosed a copy of the decision of the Central Committee for Labour Dispute Settlement concerning the case and indicated that the Manpower Office of North Jakarta has been taking efforts to implement the verdict. In that decision, the Central Committee considered the evidence of both parties given at a hearing on 12 August 2004.

521. The evidence of the company recorded by the Central Committee was that "the volume of job orders was uncertain and subject to season" and that the number of employees fluctuated so that when there were a lot of orders, the number of employees may increase to 80, but when there were few orders, the number of employees would reduce to "around 60". The company stated that workers were employed under the contract system and wages were paid on the basis of work results. The company stated that it offers sums of "discretionary money whose amount varies" to workers who no longer wish to work for the company. It is further recorded as stating that it "never discouraged the existence of a trade union in the … company by making things difficult or unpleasant". Rather, the reason for the termination of the 11 employees was because the job orders received were few, and that while "the workers linked the termination of their employment to their plan to establish a trade union … this was not true, and hence, now that this incident has taken place, the entrepreneur is not willing to consider the workers for re-employment".

522. The Central Committee recorded that the workers stated that the case was based on their desire to set up a trade union in the company and because of that, the company terminated their employment by requiring them to sign a draft letter that was covered, but later turned out to contain the change in the system of work from the daily system to the contract system. The Central Committee recorded that the workers who were no longer willing to work for the company under the contract system were subjected to termination of employment with discretionary money. The workers requested the Central Committee either to require the company to re-employ the workers in their former positions, or to pay severance pay amounting to three times the amount provided under article 156(3).

523. The Central Committee noted that the company did not deny the accounts given by the workers that the company had required them to sign a letter, the contents of which were covered, that turned out to concern a change from the daily system of employment to the

contract system. It further noted that the company had admitted to having terminated the workers' employment on the grounds that orders were so few that there was not enough work available to keep the workforce at work, implying that the workers had not committed any wrongdoing to justify the termination of employment. The Central Committee noted the company's reiterated stance that it was unwilling to re-employ the workers and that the workers acknowledged that the nature of the job is such that the availability of work may fluctuate.

524. The Central Committee held that the company was not entitled to grant compensation pay in its discretion but, pursuant to article 164(3) of Act No. 13 of 2003, in a termination such as this, performed for reasons associated with a reduction in the workforce or for efficiency reasons, the workers were entitled to severance pay of twice the amount provided for under article 156(2). The Central Committee made the appropriate calculations and ordered payments accordingly.

C. The Committee's conclusions

525. *The Committee notes that this case concerns allegations of anti-union dismissals by the company of 11 members, including all the officials, of the plant-level F-KUI, as well as a lack of recognition of the union by the company. The Committee notes that the events with which this case is concerned occurred shortly after the establishment and registration of the plant-level F-KUI trade union, in which 47 of the employees of the company joined. The Committee further notes that the Central Committee for Labour Dispute Settlement has recently issued a decision in relation to this matter.*

526. *Concerning the allegations that the union was not recognized by the company, the Committee notes the complainant organization's allegations that statements negative to the union were made on the day that the registration document was forwarded to the company, and that it alleges that in the following four days until the board and members of the union were dismissed, other negative statements were made. It further notes the complainant organization's statements that the union was not consulted upon the change in payment practices at the company and that, following the dismissals, the company would not meet with the representatives of the central F-KUI.*

527. *The Committee also notes the Government's information that the Ministry of Manpower and Transmigration (MOMT) labour inspectors had initially concluded that no union existed at the company because when the inspection was carried out, the remaining employees were unable to provide any information about the union and, further, that the MOMT labour mediator had concluded that the company did not "agree with the establishment of the trade union". The Committee also notes the company's evidence set out in the decision of the Central Committee that it "has never discouraged the existence of a trade union in the ... company by making things difficult or unpleasant". The Committee is obliged to observe, however, that there are no specific refutations in relation to each of the complainant organization's very specific allegations.*

528. *Recalling that measures should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th (Revised) edition, 1996, para. 781], the Committee requests the Government to take the necessary steps to ensure that the company does not interfere in the exercise of the workers' right to organize and bargain collectively and, in particular, that the company recognizes the trade union so as to enable it to participate with the employer in good faith collective bargaining in relation to the terms and conditions of employment of the workers. The Committee requests to be*

kept informed in this regard, including details of any negotiations undertaken in the company.

529. *Concerning the allegations that the dismissals of the 11 workers were motivated by anti-union discrimination, the Committee recalls that it was alleged that only those who were members of the union were dismissed, including all five members of the board. The Committee notes the company's contention, set out in the Central Committee's decision, that the dismissals were due to a usual seasonal fluctuation in work orders.*

530. *The Committee notes a number of factors in this regard. First, the Committee notes the information that the nature of the company's work results in a seasonal fluctuation of work orders. For this reason, the company states, the number of employees varies between 80, at its highest, and around 60, at its lowest. The Committee notes that the complainant organization seems to indicate that in September 2003 the company employed 70 workers and that in May 2004, at the time of their visit, the MOMT labour inspectors recorded that the company employed 80 workers. This suggests that the workers dismissed were replaced by new workers and that the company did not wish to re-engage the 11 workers who had been dismissed.*

531. *Second, the Committee notes that not only is there no evidence that a notice period was given to the workers, such as might be considered normal in a situation where a reduction in work requires redundancies, but that the dismissals allegedly occurred in the context of a series of anti-union statements made by the workers' immediate supervisors and which are not refuted in any detail.*

532. *Third, the Committee notes that the length of time that the workers who were dismissed had been employed varied greatly so that while six workers had been employed for one year or less, three workers had been employed for two or three years and two workers (the union chairperson and secretary-general) had been employed by the company for five years. The Committee observes that this suggests that, despite the seasonal variations in work described by the company as the reason for the 11 dismissals in this case, some workers had experienced great security of employment with the company before this incident.*

533. *Finally, in relation to the decision of the Central Committee, the Committee notes that this decision approached the case in relation to the general law relating to dismissals, rather than primarily as a matter concerning anti-union discrimination. The Committee notes that the Central Committee found that the dismissals were not due to any fault of the workers, but were caused by the fluctuations in work, and in this respect increased the severance pay of each of the dismissed workers. The Central Committee considered that the workers only asked for reinstatement in the alternative and therefore severance pay in accordance with the law ought to be ordered.*

534. *The Committee considers that the combination of these factors suggests that the issue of trade union discrimination was not fully reviewed by the Central Committee for Labour Dispute Settlement in its recent decision in relation to this case and, moreover, observes that no procedure against the company has been commenced in relation to articles 28 and 43 of Act No. 21/2000 concerning trade union/labour union, despite the clear conclusion of the Manpower and Transmigration Municipal Office mediator that the company did not agree with the establishment of the trade union and as a result terminated the 11 workers' employment.*

535. *The Committee once again recalls Case No. 2236 [see 331st Report, paras. 473-515 and 335th Report, paras. 909-971], in which it considered that the prohibition against anti-union discrimination in Act No. 21/2000 is insufficient and noted that while the Act*

*contains a general prohibition in article 28 accompanied by dissuasive sanctions in article 43, it does not provide any procedure by which workers can seek redress [see 335th Report, op. cit., para. 968]. In this regard, the Committee recalls that the dismissal of workers on grounds of membership of an organization or trade union activities violates the principles of freedom of association and that the necessary measures should be taken so that trade unionists who have been dismissed for activities related to the establishment of a union are reinstated in their functions, if they so wish [see **Digest**, op. cit., paras. 702-703]. The Committee further recalls that the existence of legislative provisions prohibiting acts of anti-union discrimination is insufficient if they are not accompanied by efficient procedures to ensure their implementation in practice [see **Digest**, op. cit., para. 742] and that it is necessary to ensure sufficient dissuasive sanctions exist in relation to anti-union discrimination. Finally, 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 [see **Digest**, op. cit., para. 707].*

536. *Taking into account the above considerations, the Committee is obliged to reiterate that workers in Indonesia are insufficiently protected against acts of anti-union discrimination and to request the Government to take the necessary steps to amend the legislation and to ensure that allegations of anti-union discrimination are examined in the framework of national procedures which are prompt, impartial and considered as such by the parties concerned [see **Digest**, op. cit., para. 738], as required by Convention No. 98. The Committee requests the Government to keep it informed in this regard, including by forwarding copies of any decisions taken in this matter in relation to the allegations of anti-union discrimination against the 11 workers dismissed by the company.*

537. *Further, the Committee notes that the Central Committee's decision recorded the company's view that "the workers linked the termination of their employment to their plan to establish a trade union and this was not true, and hence, now that this incident has taken place, the entrepreneur is not willing to consider the workers for re-employment". In this regard, the Committee stresses that workers should not be disadvantaged on the basis of bringing a complaint of anti-union discrimination in good faith and, accordingly, such a complaint cannot validly justify the refusal of future employment to the workers concerned. The Committee expects that if the allegations of anti-union discrimination are found to be justified within the framework of national procedures, the 11 workers will be reinstated in their functions without loss of pay. If the court were to decide that, although the allegations of anti-union discrimination were justified, reinstatement was not possible, the Committee expects the court to order appropriate redress, taking into account both the damage incurred by the 11 workers and the need to prevent the repetition of such situations in the future, through the imposition of adequate compensation. The Committee requests to be kept informed in this respect.*

538. *Finally, the Committee once again notes the indication given by Case No. 2236 that the dismissal of trade union officials in Indonesia requires the express authorization of the labour authorities, pursuant to Act No. 22/1957 concerning labour disputes settlement and Act No. 12/1964 concerning termination of employment at private companies, and notes that in the instant case no such authorization was either sought or obtained. In this regard, the Committee observes that these two Acts were "declared as no more applicable" by article 125 of Act No. 2/2004 concerning industrial relations dispute settlement which was promulgated on 14 January 2004. Recalling that the principle that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment 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**, op. cit., para. 724], the Committee accordingly requests the Government to provide clarification of the procedure relating to the dismissal of trade union officials in Indonesia.*

D. The Committee's recommendations

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

(a) The Committee requests the Government to take the necessary steps to ensure that the company recognizes the F-KUI plant-level trade union and engages in collective bargaining concerning the terms and conditions of employment of the workers in good faith, and to keep it informed in this regard, including by providing details of any negotiations undertaken in the company.

(b) The Committee requests the Government to amend the legislation and to take the necessary steps to ensure that allegations of anti-union discrimination are examined in the framework of national procedures which are prompt, impartial and considered as such by the parties concerned, and to keep it informed in this regard, including by forwarding copies of any decisions taken in relation to this particular matter.

(c) Noting the repeal of Act No. 22/1957 and Act No. 12/1964, by Act No. 2/2004, the Committee requests the Government to provide clarification of the procedure relating to the dismissal of trade union officials in Indonesia.

(d) The Committee expects that if the allegations of anti-union discrimination are found to be justified within the framework of national procedures, the 11 workers will be reinstated in their functions without loss of pay. If the court were to decide that, although the allegations of anti-union discrimination were justified, reinstatement was not possible, the Committee expects the Court to order appropriate redress, taking into account both the damage incurred by the 11 workers and the need to prevent the repetition of such situations in the future, through the imposition of adequate compensation. The Committee requests to be kept informed in this respect.

CASE NO. 2315

DEFINITIVE REPORT

Complaint against the Government of Japan presented by the Aichi School Community Union (ASCU)

Allegations: The complainant organization alleges that it is denied the right to bargain collectively on the ground that it is not registered with the Personnel Commission of the local authority in Higashiura-cho

540. The complaint is contained in a communication from the Aichi School Community Union (ASCU) dated 3 January 2004.

541. The Government replied in communications dated 29 October 2004 and 21 January 2005.

542. Japan 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

543. In its communication dated 3 January 2004 the complainant indicates that ASCU is a trade union organized by teachers of elementary, junior high and high schools in Aichi Prefecture. It was formed in March 1989 and registered in April of the same year as a trade union at the Personnel Commission of Aichi Prefecture, in accordance with the provisions of article 53 of the Local Public Service Law. ASCU is not an affiliate of a national trade union.

544. The complainant alleges that local boards of education and school principals deny it the right to collective bargaining on the ground that it is not registered with the local authority of Higashiura-cho in the Aichi Prefecture. In particular, the complainant states that in April 1997, Itsuo Suzuoki, the present Chairman of ASCU, took his post as teacher at Seibu Junior High School, in the town of Higashiura-cho in Chita-gun, Aichi Prefecture. He joined the ASCU in March 1998. In April 1998, ASCU made a request to the principal of Seibu Junior High School for collective bargaining pursuant to article 55 (Negotiations) of the Local Public Service Law, in order to negotiate on matters pertaining to the working conditions of employees. The principal refused to enter into collective bargaining, on the ground that ASCU was not a trade union registered at the Personnel Commission of the local authority in Higashiura-cho. As of August 2003, ASCU has made some 20 requests for collective bargaining which have been refused by the principal of the Seibu Junior High School on the same grounds. In the meantime, the Board of Education of Higashiura-cho and the Board of Education of Aichi both refused to direct the principal to engage in collective bargaining with ASCU, on the ground that ASCU was not a trade union registered at the Personnel Commission of the local authority in Higashiura-cho. In August 2000, ASCU filed a lawsuit against the Higashiura-cho local governing body, as superintendent of the principal of the school. In July 2001, the Nagoya District Court rejected the plaintiff's claim on the ground that the principal was under no obligation to engage in collective bargaining because ASCU was not a trade union registered at the Personnel Commission of the local authority in Higashiura-cho. An appeal to the Nagoya

High Court was similarly dismissed. In May 2003, ASCU appealed to the Supreme Court where the case is still pending.

545. The complainant considers that the decision of the Nagoya High Court violates Article 2 of Convention No. 87 because it makes a distinction between registered and unregistered trade unions with regard to local government employees' right to collective bargaining.

B. The Government's reply

546. In its communications dated 29 October 2004 and 21 January 2005, the Government indicates the facts of the case as follows. The complainant is an employees' organization formed by teachers at elementary, junior high and senior high schools in Aichi Prefecture and has been registered with the Personnel Commission of Aichi Prefecture. When the complainant proposed collective negotiations to the principal of Nishibe Junior High School at Higashiura-cho in Aichi Prefecture, the principal refused because ASCU is not an employees' organization registered with the Equity Commission of the local authority in Higashiura-cho. The ASCU expressed dissatisfaction with this and decided to bring action for damages against the local governing body of Higashiura-cho before the Nagoya District Court. The lawsuit was dismissed in July 2001. The ASCU then appealed against the ruling to the Nagoya High Court but the appeal was dismissed in February 2003. The complainant then appealed the matter to the Supreme Court, which dismissed the appeal in a final ruling of 28 September 2004.

547. The Government further indicates that registration is aimed to verify that an organization is democratic, and the provisions of the Local Public Service Law provide that the local authorities shall be obliged to affirmatively respond to a proposal for negotiations made by an employees' organization which has been registered with the Personnel Commission or Equity Commission. On the contrary, the local authority is not obliged to accept a proposal for negotiations made by an employees' organization which has not been registered, even if the said employees' organization is registered with the Personnel Commission or the Equity Commission of another local government. Whether a local authority accepts a proposal for negotiations made by a non-registered employees' organization is a matter of discretion and not a legal obligation. Nevertheless, local authorities should, generally speaking, make every effort to respond to a request for negotiation. The Local Pubic Service Law does not prevent non-registered employees' organizations from negotiating with local authorities, as the provisions concerning negotiation procedures do not exclude non-registered organizations. Moreover, all employees' organizations have capacity to negotiate with the authorities, whether they are registered or not.

548. The Government adds that although the specific claimant in this case is the sole member of the ASCU (the complainant) who belongs to the Higashiura-cho office and cannot by himself form an employees' organization in the Higashiura-cho office, under the provisions of the Local Public Service Law, a local public employee can request administrative measures to improve employees' working conditions, such as working hours, to the Equity Commission. The Government finally notes that the principal and vice-principal of Seibu Junior High School have been regularly discussing with the complainant (for example, more than 30 times between April 1999 and March 2000). The Board of Education of Higashiura-cho also met with the complainant on 25 August 2000.

C. The Committee's conclusions

549. *The Committee notes that this case relates to allegations that the complainant is denied the right to bargain collectively on the ground that it is not registered with the Personnel Commission of the local authority in Higashiura-cho.*

550. *The Committee notes that the facts of this case are as follows. Since April 1998 the principal of Nishibe Junior High School at the Higashiura-cho municipality in Aichi Prefecture has been refusing repeated calls by the complainant to engage in collective negotiations on the ground that the complainant is not an employees' organization registered with the Personnel Commission of the local authority in Higashiura-cho although it is registered with the Personnel Commission of the Aichi Prefecture. The Boards of Education of Higashiura-cho and Aichi both refused to direct the principal to engage in collective bargaining with the complainant on the abovementioned grounds. Nevertheless, meetings were held according to the Government between the complainant and the school administration as well as the Board of Education of Higashiura-cho. The complainant initiated court action against the Higashiura-cho local governing body but its lawsuit and a subsequent appeal were dismissed by the Nagoya District Court and the Nagoya High Court respectively. The complainant then appealed the matter to the Supreme Court, which rejected the appeal in a final ruling of 28 September 2004.*

551. *The Committee notes that according to the complainant the decision of the Nagoya High Court (prior to the Supreme Court's final ruling) violated Article 2 of Convention No. 87 because it made a distinction between registered and unregistered trade unions with regard to local government employees' right to collective bargaining.*

552. *The Committee notes that according to the Government, registration, which is a system to verify that an employees' organization is democratic, must take place with the Personnel Commission or the Equity Commission of the local authority in which such employees' organization seeks to engage in collective bargaining. Under the Local Public Service Law the local authorities are obliged to affirmatively respond to a proposal for negotiations made by an employees' organization which has been registered. On the contrary, the Local Pubic Service Law does not prevent non-registered employees' organizations from negotiating with local authorities. Nevertheless, local authorities should make every effort to respond to a request for negotiation. The complainant has only one member in the Higashiura-cho locality and thus cannot form an employees' organization in the Higashiura-cho office. Under the provisions of the Local Public Service Law, a local public employee can individually request administrative measures to improve employees' working conditions, such as working hours, to the Equity Commission.*

553. *The Committee understands from the above that the present chairman of the complainant who is a teacher at Seibu Junior High School, is the sole member of the complainant in the Higashiura-cho locality. Thus, he cannot register an employees' organization by himself in the Higashiura-cho office. As a result, the employer (i.e. the principal of Nishibe Junior High School) has discretion to decide whether to accept the complainant's invitation to negotiate and in any case, the refusal to do so cannot be considered as unreasonable. In light of the above, the Committee considers that this case does not call for further examination.*

The Committee's recommendation

554. ***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. 2381

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

Complaint against the Government of Lithuania presented by the Lithuanian Trade Union "Solidarumas"

Allegations: The complainant alleges that the Government interferes in its activities by preparing a law which would nationalize most of the Lithuanian trade unions' property

555. The complaint is contained in a communication dated 12 August 2004 from the Lithuanian Trade Union "Solidarumas".

556. The Government forwarded its observations in a communication dated 25 October 2004.

557. Lithuania 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

558. In its communication dated 12 August 2004, the Lithuanian Trade Union "Solidarumas" alleges that following the decision of the Constitutional Court, the Government prepares a legislation, which would nationalize most of the property of the trade unions of Lithuania. The complainant contends that in so doing, the Government interferes in its activities.

559. As background to the complaint, the complainant states that after regaining independence, the Supreme Soviet of the Republic of Lithuania stated that the part of the real estate that belonged to former Soviet trade unions should be granted to newly established independent trade unions. In 1993, the Parliament of Lithuania passed the Law on the property of former state trade unions of the Lithuanian SSR, which identified the property to be given to the most representative trade unions. On the basis of this Law, the Special Fund for support of the functioning trade unions and those in the process of establishing was created. This Fund regulated distribution of trade union property. The complainant states that the following properties were given to trade unions: enterprise "Autoūkis" (Vilnius), part ownership of a hotel in Vilnius, one building in Vilnius, management building of the health resort which used to belong to trade unions of Lithuanian SSR, garages in Vilnius, part ownership of trade unions' convalescence homes and resorts, Vilnius Chamber of Culture, Vilnius Palace of Concerts and Sport, Vilnius Palace of Ice and part ownership of Kaunas City Labour and Culture Chamber. These properties were granted to the Special Fund, which was controlled by national trade unions centres. The properties were distributed among national trade union centres – Lithuanian Trade Union Unification, Lithuanian Trade Union Centre (later merged to Lithuanian Trade Union Confederation), Lithuanian trade union "Solidarity" and Lithuanian Labour Federation.

560. In September 2003, the Constitutional Court of the Republic of Lithuania ruled that the "Law on the property of former state trade unions of the Lithuanian SSR" did not comply with the Lithuanian Constitution, which meant that the transfer of the property to the Special Fund was unlawful and therefore the biggest part of the trade union property must

be transferred back to the State. In its decision, the Court stated that trade unions of the Lithuanian SSR were a part of a Party-controlled machinery through which the Government used to implement its social policy. In these circumstances, Soviet trade unions were governmental organizations. The Court stated that the properties transferred to trade unions were state-owned and could have been granted to trade unions only if they had been fulfilling social interests. However, the Parliament of Lithuania was not able to transfer the properties of commercial nature (such as convalescence homes and health resorts) to trade unions. The complainant submits that the reasoning of the Court is false as during the Soviet regime, trade union property was always separate from the State or the Communist Party.

561. The complainant further alleges that the Government is preparing a legislation, which is going to nationalize most of the properties of the Lithuanian trade unions. The complainant submits that such legislation would be contrary to the principle according to which the assets of the dissolved organization should be distributed among its former members or handed over to the organizations that succeed it, meaning the organization or organizations which pursue the aims of which the dissolved union was established and which pursue the same spirit. The complainant states that the premises granted by the Lithuanian Parliament were built by the Lithuanian SSR trade unions and financed through membership dues. After regaining independence, the party-controlled government collapsed but trade unions remained and they, as well as newly established trade unions, pursued the same aims and spirit as previous trade unions. Trade unions perform not only protection of social rights functions but also provide their members with some social service. Therefore, workers' recreation and sanatorium treatments are included in trade unions activities.

B. The Government's reply

562. In its communication of 25 October 2004, the Government states that on 30 September 2003, the Constitutional Court of Lithuania adopted a Ruling on the compliance of the legal acts by which questions of the property formally possessed by trade unions which used to function in Lithuania prior to the restoration of the independent State of Lithuania with the Constitution of the Republic of Lithuania. In this decision the Court decided that certain provisions of the Law on the property of former state trade unions of the Lithuanian SSR, the Law on the establishment of the property of the sanatorium-resort establishments and rest-hotels which used to be possessed by former trade unions of the Lithuanian SSR, the Law on the distribution of property of trade unions of the Republic of Lithuania, the 1 July 1993 resolution on the implementation of the Republic of Lithuania law on the property of former state trade unions of the LSSR, the 17 February 1994 resolution on the approval of the regulations of the Special Fund for support of the functioning trade unions and those in the process of establishment are in conflict with articles 5 (paragraph 2), 7 (paragraph 2), 23 (paragraph 2), 50 (paragraph 1) and 128 (paragraph 2) of the Constitution of the Republic of Lithuania and the constitutional principle of rule of law.

563. As for the status of the trade unions which functioned prior to the restoration of the independence, the Government indicates that their status was set forth in the 30 July 1990 resolution of the Supreme Council on the support to newly established trade unions and on the property of former state trade union organizations. In this resolution, it is emphasized that "trade unions, which functioned in the Lithuanian SSR while imposing membership fees by force, […] represented the interests of the system based on the State party rule and not those of the Lithuanian people. Such trade unions were state organizations and not public organizations". Therefore, the conclusion of the resolution was that "trade unions which functioned in Lithuania before the restoration of its independence were a part of a system of the USSR trade unions, which themselves were a part of the state mechanism by which the State carried out social and other functions".

564. Referring to the Constitutional Court Ruling, the Government clarifies the status of the properties transferred to the trade unions. The Government states that in the abovementioned resolution, it was decided that on the day of the adoption of the resolution, all state enterprises, establishments and organizations which were previously allocated to trade unions were a property of the State of Lithuania (Constitutional Court Ruling of 27 May 2002). The resolution stated that "from the funds accumulated in the name of these trade unions and state subsidies, convalescent homes and sanatoriums were built as well as other properties were created. It cannot be properties of only one group of people or association, since they belongs to all the people of Lithuania. A part of these properties is to be transferred to trade unions which are in the process of establishment or newly established ones". Thus, at the same time, an intention was expressed to support the independent trade unions by giving them part of the state-owned properties accumulated by former trade unions of Lithuanian SSR. This intention was implemented by laws and other legal acts adopted by Seimas (Parliament), including the laws which were disputed before the Constitutional Court. The Government points out that the Constitutional Court in its ruling stated that:

> […] as it follows from other provisions of the Constitution, the State was permitted to support trade unions in the process of establishment, or those already established, by giving them only such state property (premises, etc.) which was necessary for the trade unions to establish themselves and start their activities. The State, while supporting trade unions in the process of establishment, cannot absolutely freely transfer to them any property. State institutions, which have powers to adopt decisions on the possession, use and disposal of the property belonging to the State […] are bound by the Constitution.

565. The Government therefore underlines that the property necessary for the trade unions to establish themselves and to start their activities could be transferred to support trade unions. The reason is expressed in the ruling of the Court:

> […] the State is an organization of the entire society. The property that belongs to it by right of ownership has to be possessed in such a way that it would serve the common welfare of the nation and the general interest of the whole society. The state-owned property is one of the means for guaranteeing the public interest and social harmony. It needs to be noted that institutions of state authority and other institutions, which are empowered to adopt decisions concerning the possession, use and disposal of the property which belongs to the State by right of ownership, must observe the norms and principles of the Constitution. Under the Constitution, the property of the State may not be possessed, used and disposed of in such a manner that it would satisfy the interests and needs of only one social group or separate persons, and does not comply with the public interest and needs of the society.

566. Finally, the Government indicates that the Law on the property of former state trade unions of the Lithuanian SSR, the Law on the establishment of the property of the sanatorium-resort establishments and rest-hotels which used to be possessed by former trade unions of the LSSR, the Law on the distribution of property of trade unions of the Republic of Lithuania, the 1 July 1993 resolution on the implementation of the Republic of Lithuania law on the property of former state trade unions of the LSSR, the 17 February 1994 resolution on the approval of the regulations of the Special Fund for support of the functioning trade unions and those in the process of establishment provided for the transfer to trade unions of state-owned property which was not necessary for their establishment or exercise of their activities. It further stressed that under the Constitution, trade unions in order to be able to exercise their functions can possess various property, but trade unions are not economic organizations, they are not established for economic activities or public administration, therefore the state institutions cannot transfer to them state enterprises, establishments and organizations.

C. The Committee's conclusions

567. *The Committee notes that this case concerns the issue of the devolution of assets acquired by Lithuanian trade unions during the occupation by the Soviet Union.*

568. *Following the declaration of independence, the Parliament of Lithuania passed, the "Law on the property of former state trade unions of the Lithuanian SSR, according to which the property used by the trade union of the Lithuanian SSR was transferred to the newly created most representative trade unions. This property included several building, hotel, health resorts and convalescence homes, Palaces of Culture and Sport. Other legislative acts were later adopted by Parliament and included the Law on the establishment of the property of the sanatorium-resort establishments and rest-houses which used to be possessed by former trade unions of the Lithuanian SSR, and the Republic of Lithuania Law on the distribution of property of trade unions which repealed the Law on the property of former state trade unions of the Lithuanian SSR.*

569. *The Committee notes that the complainant in this case alleges that following the ruling of the Constitutional Court, which found the abovementioned legislation unconstitutional, the Government intends to draft a legislation, which would nationalize most of the properties of the Lithuanian trade unions. The Committee notes that the observations of the Government are based on the ruling of the Constitutional Court. No information was provided by the Government in respect of the alleged new legislation.*

570. *The Committee notes the ruling of the Constitutional Court, which may be summarized as follows:*

- *The Constitutional Court was requested to determine whether the provisions of item 8 of article 2 of the Republic of Lithuania Law on the establishment of the property of the sanatorium-resort establishments and rest-houses which used to be possessed by former trade unions of the Lithuanian SSR and paragraph 5 of article 3 of the Republic of Lithuania Law on the distribution of property of trade unions, which transferred the ownership of the Anykščiai rehabilitation centre (former rest-house "Šilelis"), including the administrative building, to trade unions, are not in conflict with article 23 of the Constitution. The petition before the Court originated in the administrative case brought by a person who is the heir of the former owner of the administrative building. Before the occupation by the Soviet Union, the administrative building in question used to be a residential house owned by the mother of the claimant in the administrative case. It was nationalized in 1940s, as all private property in the country.*
- *The Court considered the status of properties possessed by trade unions of the Lithuanian SSR. It held that until the restoration of the independent State of Lithuania, trade unions were a part of the system of the USSR trade unions, and as such, they were virtually a part of the state mechanism of the USSR through which the State carried out its social and other functions. The Court referred to the 30 July 1990 Supreme Council resolution on the support to newly established trade unions and on the property of former state trade union organizations" where it was emphasized that "trade unions which functioned in the Lithuanian SSR, while imposing membership fees by force, […] represented the interests of the system based on the state party rule, and not those of the Lithuanian people. Such trade unions were state organizations and not public organizations". The Court further referred to the 13 March 1990 Supreme Council resolution on the status of the enterprises, establishments and organizations which are under the union or the union-republic jurisdiction" which declared that on the day of the adoption of the said resolution, all state enterprises, establishments and organisations acquired by the trade unions of the Lithuanian SSR should be considered to be the properties of the Republic of Lithuania.*
- *The Court recalled that at the time when the issue of the properties possessed by the state trade unions of Lithuanian SSR was being decided, the process of restitution of the property that had been nationalized or otherwise unlawfully seized was taking place as*

well. On 15 November 1990, the Supreme Council, recognizing the continuity and restoration of the rights of ownership, adopted the following principles: the continuity of the rights of ownership of citizens of Lithuania should be incontestably recognized; citizens of Lithuania have the right, within the limits and procedure defined by the law, to retrieve in kind the property which belonged to them; in the absence of such a possibility, to receive a compensation. The Court stated that no right could appear on the grounds of unlawfulness. The nationalized property or otherwise unlawfully seized by the occupation government did not become state-owned property and could merely be considered as property which was possessed by the State de facto. In these circumstances, the state trade unions, which functioned in Lithuania before the restoration of the independence, possessed not only the property belonging to the State, but also some properties, which had been nationalized or otherwise unlawfully seized by the occupation government. This property could not therefore be considered as property of the former state trade unions.

- *The Court further examined the legislative acts concerning the issue of trade union property. It concluded that the legislation regulating the property possessed by state trade unions of the Lithuanian SSR before the restoration of independence was "inconsistent, self-contradictory and ambivalent. The provisions of laws and other legal acts adopted by the Seimas frequently den[ied]each other, the formulations [were] used in a legally incorrect manner".*

- *The Court also examined constitutional provisions concerning the ownership rights and obligation of the State in respect of the property in its possession. It held that under the Constitution, the property of the State may not be possessed, used and disposed of in such a manner so as to satisfy the interests or needs of only one social group or separate persons, without taking into account public interest and needs of the society. However, "the fact that under the Constitution the state-owned property must be treasured and not wasted does not mean that it may not be transferred as ownership to other subjects […]. The transfer of property as ownership (also including its privatization), which belongs to the State by right of ownership, to other subjects may be constitutionally justifiable only if it renders more benefit to society, when by this transfer significant, constitutionally grounded needs/interests of society are sought to be satisfied. Such transfer, both repayable and gratuitous, would be constitutionally unjustifiable if it caused evident harm to the society, and violated the rights of other persons." The Court noted that the situations may occur when the State for certain reasons temporarily possesses and uses the property which does not belong to it as in the case when the property was illegally nationalized or seized in other unlawful ways by the occupation government and in regard of which the rights of ownership may be restored according to law. In such a case, such property must also be possessed and used observing the same constitutional requirements.*

- *The Court considered article 50 of the Constitution concerning trade unions in the context of the Government's efforts to create, through the legislation, necessary preconditions for the establishment and functioning of independent trade unions by rendering them material support at the initial stage of their establishment and activities. The Court held that "the status and principles of activities of trade unions established in the Constitution, together with the striving for an open, just and harmonious civil society and State under the rule of law and the democratic character of the State of Lithuania established in the Constitution, imply the principle of autonomy of trade unions with regard to the State and its institutions". The Court considered that the provision of paragraph 1 of article 50 of the Constitution, according to which trade unions shall establish themselves freely and function independently, draws the limits of the interaction between the State and trade unions. Without violating the provisions of the Constitution and considering paragraph 2 of article 50, according to which all trade unions shall have equal rights at the initial stage of the establishment and activities of free trade unions, the State could render material (as well as financial) support to the trade unions so that they might start their activities and independently exercise their functions. This state support cannot be permanent. At this initial stage, the state support rendered to trade unions is to be linked not with the [functions of trade unions] which, according to the Constitution, act independently, but with the establishment and beginning of activities of trade unions as one of the elements of civil society. Under the*

Constitution, no legal regulation is permitted under which the State would render such support to trade unions, or that it would render it in such a way that legal preconditions might be created to violate the independence of activities of trade unions and to make them dependent on the State and thus to restrict the opportunities of trade unions to defend the professional, economic, and social rights and interests of employees. Also, it is not permitted to establish any such legal regulation under which the State would render such support to trade unions, or that it would render it in such ways that the equality of trade unions could be violated. The Court therefore concluded that "the State was permitted to support the trade unions which were in the process of establishment or which were established at that time only [by giving them] such property (premises, etc.) […], which was necessary for the trade unions to establish themselves and start their activities". However, the Court once again stressed that "it is not permitted to establish legal regulation according to which the property that belongs to the State by right of ownership would be transferred as ownership to other subjects in order to satisfy the interests or needs of only one social group or individual persons, if this does not comply with the need of society, the public interest, or does not serve the welfare of the nation". The Court also pointed out that while it was permitted to transfer some property to trade unions at the initial stage of their establishment in order to create conditions for the free exercise of their activities, this initial stage is now over. Finally, the Court stated that under the Constitution, in order to carry out their functions, trade unions could possess various property. "However, this does not mean that the state institutions can transfer as ownership enterprises establishments and organizations belonging to the State by right of ownership to trade unions: trade unions are not economic organizations; they establish themselves not for economic activities or public administration."

- *The Court therefore concluded that article 2 of the Law on the establishment of the property of the sanatorium-resort establishments and rest-houses which used to be possessed by former trade unions of the Lithuanian SSR, which provided that "the following objects and the property and funds registered in their balance shall be recognized as properties of trade unions of Lithuania and transferred to the Special Fund […]: (1) rest-house "Trakai"; (2) Lampėdžiai rest house; (3) state enterprise "Neringos kopos" (former rest-house "Neringa"); (4) auto-transport vehicles, spare parts and inventory of the car park of the resort establishments of Druskininkai; (5) Druskininkai sanatorium "Nemunas"; (6) Palanga sanatorium "Jūratė" (save the hostels recorded in its balance); (7) Palanga healthcare chamber; (8) Anykščiai rehabilitation centre (former rest house "Šilelis"); and (9) Druskininkai centre for therapeutic physical culture and ambulatory treatment" established the legal regulation under which the property of the State or which was only temporarily possessed by it following unlawful nationalization or seizure in other unlawful ways by the occupation government and which, under the law, may be restored to the original owner, was recognized as property of the trade unions of Lithuania and transferred to the trade unions. According to the Court, this article provided for the transfer to the trade unions of property "which was not necessary for the trade unions […] to establish themselves and begin their activities". The Court therefore found the provision of the abovementioned Law unconstitutional.*
- *As concerns paragraph 5 of article 3 of the Republic of Lithuania Law on the distribution of property of trade unions", which provided that "the Anykščiai rehabilitation centre […] and the rest-house "Neringos kopos" […] shall be transferred, in equal portions, as commonly shared ownership of the Labour Federation of Lithuania, the Lithuanian Trade Unions Centre, the Workers' Union of Lithuania and the Alliance of Trade Unions of Lithuania, the Court referring to its finding concerning article 2 of the Law on the establishment of the property of the sanatorium-resort establishments and rest-houses which used to be possessed by former trade unions of the Lithuanian SSR, held that this provision was contrary to the Constitution.*

571. *The Committee notes that the complainant submits that after regaining independence, the party-controlled government collapsed but trade unions remained and they, as well as newly established trade unions, pursued the same aims and spirit as previous trade unions. According to the complainant, trade unions perform not only functions of protection of social rights but also provide their members with some social service. Therefore, workers'*

recreation and sanatorium treatments are included in trade union activities. The Committee understand that under the communist regime, the assets accumulated by the trade unions were very large because the functions exercised by the trade unions went well beyond the traditional activities carried out by workers' organizations in the defence of the interests of their members. It appears to the Committee that the complainant's concerns are mostly about the rest houses, resorts and sanatoriums, which were obtained by the Lithuanian SSR trade unions from the State. The Committee understands from the Government's reply and from the ruling of the Constitutional Court that there is no intention to nationalize all the properties that were transferred to the new trade unions after the declaration of the independence by Lithuania. Indeed, the Government agrees that a property which was necessary for the trade unions to establish themselves and to start their activities could be transferred to trade unions.

572. *In examining this case, the Committee is fully aware of the great complexity of the matters raised. This complexity is due to several factors: the diversity and origin of the resources held by the former Lithuanian trade unions (state subsidies and contributions from their members), the nature of the functions assigned to them, and emergence of trade union pluralism. The Committee is also aware that the democratization process, along with the process of restitution of private property, which was nationalized or unlawfully seized during the communist regime in the country, and the new trade union situation, requires the introduction of measures by the Government. It is, in particular, indispensable that the question of the devolution of trade union assets accumulated by the former Lithuanian trade unions is solved without delay, on the one hand, because part of the functions which were previously assigned to trade unions would, within the framework of democratization, be restored to the State and, on the other hand, because some of the assets which were transferred to the trade unions after independence were claimed by their original owners. In these circumstances, state intervention in the question of the devolution of trade union assets may not, in the opinion of the Committee, be considered in itself as incompatible with the principles of freedom of association. Nevertheless, the Committee considers that this question can only be solved by an agreement between the Government and the trade unions concerned.*

573. *In these circumstances, the Committee invites the Government to engage in consultations with the trade union organizations concerned in order to settle the question of the assignment of property covered by the relevant laws so that while some of the assets could be recovered by the Government or their original owners, affected trade union organizations are guaranteed the possibility of effectively exercising their activities in a fully independent manner. It requests the Government to provide information on the development of the situation and, in particular, on any agreement, which may be reached in this respect.*

574. *The Committee further considers that if there is in fact a draft legislation on nationalization of trade union assets being prepared, consultations should be held prior to its introduction with all appropriate trade unions [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 930]. The Committee requests the Government to provide a copy of any such new legislation.*

The Committee's recommendations

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

(a) The Committee invites the Government to engage in consultations with the trade union organizations concerned in order to settle the question of the

assignment of property covered by the relevant laws so that while some of the assets could be recovered by the Government or their original owners, affected trade union organizations are guaranteed the possibility of effectively exercising their activities in a fully independent manner. It requests the Government to provide information on the development of the situation and, in particular, on any agreement, which may be reached in this respect.

(b) The Committee further considers that if there is in fact a draft legislation on nationalization of trade union assets being prepared, consultations should be held prior to its introduction with all appropriate trade unions. The Committee requests the Government to provide a copy of any such new legislation.

CASE NO. 2338

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

Complaint against the Government of Mexico presented by the Progressive Trade Union of Mexican In-Bond Industry Workers (SPTIMRM)

Allegations: Violation of the right to strike since January 2002, after the employer applied to the judicial authority for a declaration of insolvency with respect to the enterprise CONFITALIA S.A. de C.V. and other enterprises; in August 2003, a group consisting of persons unrelated to CONFITALIA and former workers entered the enterprise premises so that representatives of the authorities could "verify" that there was no strike. This represents a persistent flouting of the standards which order any ruling on, or attachment of, property in the context of collective disputes to be suspended. The enterprises were declared bankrupt in 2004

576. The complaint is contained in a communication from the Progressive Trade Union of Mexican In-Bond Industry Workers (SPTIMRM) dated 19 April 2004. The complainant organization sent further information in a communication dated 23 August 2004. The Government sent its observations in a communication dated 3 November 2004.

577. Mexico has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); it has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

578. In its communication of 19 April 2004, the SPTIMRM states that since 19 July 2001 it has been signatory to the collective labour agreement applicable in the textile enterprise CONFITALIA S.A. de C.V., a subsidiary of GRUPO COVARRA S.A. de C.V. The complainant organization adds that on 18 December 2001, 6 December 2002 and 17 January 2003, it sent communications to the Local Conciliation and Arbitration Board (JLCA) of the State of Morelos and forwarded to the aforementioned enterprises a file of claims with notice of strike in order to secure observance of the collective labour agreement and the legal provisions on profit-sharing. According to the complainant, on account of a lack of proposals and the refusal of the enterprises to offer a solution to the dispute, the trade union declared a strike on 22 January 2003 and 4 February 2003; the JLCA declared the strike existent in law.

579. The complainant organization indicates that on 26 December 2001 GRUPO COVARRA S.A. applied to the judicial authority for a declaration of insolvency with respect to the enterprises of the group, including CONFITALIA.

580. The complainant organization alleges that on 11 August 2003 a group of persons unrelated to CONFITALIA S.A. de C.V., accompanied by various unidentified former workers, entered the premises of the enterprise, thereby claiming to break the strike prevailing at the workplace. At 9 p.m. on the same day, the president and General Secretary of the JLCA entered the premises of CONFITALIA S.A. de C.V., supposedly at the request of an anonymous group of workers who requested their presence by telephone, in order to verify and record that there was no strike at the workplace. Despite the fact that no work was done either on this day or subsequently at the workplace, the aforementioned officials proceeded to draft an official document in which they claimed that a group of workers from CONFITALIA S.A. de C.V. had been working normally and voluntarily in all their areas of work, with the instruments and tools necessary for performing their work, thereby showing the strike to be at an end.

581. The complainant organization indicates that in view of the flagrant violation committed by the aforementioned officials, it lodged an application dated 26 August 2003 for protection of their constitutional rights *(amparo)*, which came before the Third District Court through the duty rota. The court granted the trade union constitutional and judicial protection by means of a judgement handed down in Case No. 1002/03, ordering the strike situation prevailing in CONFITALIA S.A. de C.V. to be observed.

582. The complainant organization states that on a number of recent occasions, Mr. Carlos Ribera Noverola appeared at the premises of the striking enterprise. He reportedly said that he was the administrator (receiver) for the bankruptcy pronounced by the Fourth District Judge in the State of Morelos, that he had information to the effect that the strike was not in operation, and that he was going to enter the premises and remove the strike signs. The complainant adds that there has been no formal notification of the claims made by Mr. Ribera. Nevertheless, irrespective of whether or not the bankruptcy has been pronounced or whether or not Mr. Carlos Ribera Noverola is the receiver, it is clear that: (1) a strike has been in operation since 22 January 2003, which has been declared existent in law, and this situation has been confirmed through a judgement handed down by the Third District Judge in constitutional protection *(amparo)* Case No. 1002/03; (2) in accordance with the provisions of the Federal Labour Act:

- lodging of the file of claims shall have the effect of making the employer, for the whole of the period in question, the depositary of the enterprise or establishment affected by the strike, with the duties and responsibilities inherent in the position (section 921);

- from the date of lodging of the file of claims with the notice of strike, the execution of any ruling shall be suspended, any attachment, embargo, proceeding or dispossession versus the enterprise or establishment shall be prohibited, and no property may be seized from the premises where it is installed (section 924);

- workers are not obliged to engage in proceedings relating to insolvency, bankruptcy, suspension of pay or succession. The Conciliation and Arbitration Board shall proceed with the attachment and sale by auction of the property required for the payment of wages and benefits (section 114);

- all the authorities shall be obliged to provide assistance to striking workers (sections 4, 447 and 449).

583. The complainant organization emphasizes that the standards in force give preferential rights to workers to receive the payment of their wages and benefits and that the strike was declared one year before the legal declaration of bankruptcy of the enterprise. According to the complainant, it is clear that the aim of the actions of the Government of Mexico, the Government of the State of Morelos via the JLCA and the Fourth District Court of the State was to damage and violate the rights of the striking workers.

584. The complainant organization requests the Committee to make the necessary recommendations to the Government of Mexico, the Government of the State of Morelos and the Fourth District Court of the State of Morelos to reconsider their position, bring their conduct into line with fundamental standards and ensure respect for the freedom of association of the workers of CONFITALIA S.A. de C.V. Account must be taken of the fact that there has been a strike, declared existent in law in labour Case No. 02/580/01, since 22 January 2003 (one year before the legal declaration of bankruptcy), and the existence in law of the strike was confirmed by the Third District Court of the State of Morelos in *(amparo)* Case No. 1002/03. It also requests the Committee to make the necessary recommendations to the Government of Mexico, the Government of the State of Morelos and the Fourth District Court of the State of Morelos to ensure that they refrain from handing down decisions which affect rights that are legally established and enshrined in the Constitution, in ratified ILO Conventions and in the Federal Labour Act in favour of striking workers, standards which take precedence over the Bankruptcy Act.

585. In its communication of 23 August 2004, the complainant organization states that on 21 August 2004, 60 individuals from the Federal Investigation Agency and the police, following orders from the Fourth District Court of the State of Morelos in the context of the insolvency proceedings, arrived at the premises of the CONFITALIA enterprise at 5 o'clock in the morning, surprising the workers who were acting as "strike guards", removed the strike banners (signs), broke the padlocks and entered the workplace. The complainant indicates that the workers were assaulted and the strike was broken and points out that a strike declared existent in law by the judicial authority prior to the bankruptcy proceedings cannot be lifted by a judge for commercial matters. In the present case, the Conciliation and Arbitration Board refrained from undertaking proceedings for determining whether the strike is the fault of the employer and whether the latter is obliged to pay all wages and benefits to the workers.

B. The Government's reply

586. In its communication dated 3 November 2004, the Government notes that section 4(II)(a) of the Federal Labour Act states that the rights of the community are violated when, once a strike has been declared according to the relevant terms, strikers are replaced in the work they perform without the dispute which has given rise to the strike being settled.

587. In addition, section 929 of the Federal Labour Act states that within the 72 hours following the start of the strike, the employer may request that the strike be declared non-existent because of failure to meet procedural requirements or the objectives laid down by section 459 of the Federal Labour Act, i.e. when the work stoppage is undertaken by fewer workers than the number specified in section 451(II); when the purpose of the strike is not one of those specified by section 450; or when the terms of section 452 are not fulfilled. In the abovementioned cases, the employer is free of liability and the workers are given 24 hours in which to return to work, with the caution that should they fail to respect that provision, their employment relationship will be terminated.

588. With regard to the statement by the complainant trade union that there were a number of visits to the premises of the striking enterprise by Mr. Carlos Ribera Noverola, who said that he was the bankruptcy administrator (receiver), that he had information that the strike was not in operation, and that he was going to enter the premises and remove the strike signs, the Government states that it is important to note that, under section 60 of the Bankruptcy Act, if the SPTIMRM in its capacity as creditor of the CONFITALIA S.A. de C.V. enterprise considers that the receiver was responsible for acts or omissions which are in breach of that Act, it may denounce him to the judge presiding over the bankruptcy proceedings and the latter will take the legal measures he deems suitable and, if appropriate, may apply to the Federal Institute of Bankruptcy Specialists in order to avoid damage to the insolvent merchant's estate, i.e. the portion of his assets consisting of non-excluded property and rights.

589. Under section 127 of the Bankruptcy Act, when in diverse proceedings there has been an enforceable judgement, labour award, final administrative decision or arbitral award prior to the date of retrospective annulment (the 270th day immediately preceding the date of the court ruling concerning the declaration of insolvency, in accordance with section 112 of the same Act), whereby the existence of a right to collection of a debt versus the merchant is declared, the creditor concerned must present to the judge a certified copy of the said decision, and the judge must recognize the debt according to such a decision by including it in the ruling concerning acknowledgement, marshalling and priority of debts.

590. Under section 172 of the Bankruptcy Act, the receiver must notify the creditors of his appointment and indicate a legal address, within the jurisdiction of the judge presiding over the bankruptcy proceedings, in order to fulfil the obligations imposed by the aforementioned Act.

591. It is important to emphasize that, under section 180 of the Bankruptcy Act, the receiver must initiate measures concerning seizure from the time of his appointment. He must take possession of the property and premises in the possession of the merchant and initiate administration thereof, and therefore the judge must take the relevant measures and issue the necessary decisions for the immediate seizure of books, papers, documents, electronic data storage and processing media and all property in the possession of the merchant.

592. In addition, section 183 of the Bankruptcy Act states that when the receiver takes possession of the property constituting the enterprise, he shall immediately take the necessary measures to safeguard and preserve it.

593. Furthermore, section 191 of the Bankruptcy Act lays down that the inventory shall be drawn up by listing and describing all movable or immovable property, bonds and securities of all categories, trading commodities and entitlements in favour of the merchant; that the receiver shall take possession of the property and rights constituting the estate, shall draw up or verify the inventory thereof and to this end he shall have the capacity of sequestrator.

594. As regards the priority of debts, section 221 of the Bankruptcy Act states that labour-related debts other than those indicated in section 221(I) (those referred to in article 123(XXIII)(A) of the Political Constitution of the United States of Mexico and its regulatory provisions setting wages at the level corresponding to the two years prior to the declaration of insolvency) shall be paid after specially privileged debts (those which under the Code of Commerce or relevant legislation are subject to special privilege or a right of attachment) and debts with real security (mortgage or collateral) have been settled, but with priority given to specially privileged debts (the merchant's burial expenses, should the insolvency ruling be issued after his death, and expenses relating to the sickness leading to the death of the merchant, should the insolvency ruling be issued after his death).

595. Also in relation to the priority of debts, section 113 of the Federal Labour Act stipulates that wages accrued in the last year and benefits owed to the workers take preference over any other debt, including those which are covered by real security, fiscal debts and those owed to the Mexican Social Security Institute, on all the employer's assets.

596. Section 924(I) of the Federal Labour Act states that from the date of lodging of the files of claims with the notice of strike, the execution of any ruling shall be suspended; any attachment, embargo, proceeding or dispossession versus the enterprise or establishment shall be prohibited; and no property may be seized from the premises where it is installed, except where, before a strike is broken, the securing of workers' rights is concerned, especially benefits, wages, pensions and other allowances accrued, constituting up to two years' wages.

597. Finally, it is important to point out that under section 114 of the Federal Labour Act, workers are not obliged to engage in proceedings relating to insolvency, bankruptcy, suspension of pay or succession, as the Conciliation and Arbitration Board shall proceed with the attachment and sale by auction of the property required for the payment of wages and benefits.

C. The Committee's conclusions

598. *The Committee observes that the allegations in the present case refer to a strike at the CONFITALIA S.A. de C.V. enterprise, which took place from 22 January 2003 (and was confirmed by the competent authority on 4 February 2003) with the purpose of obtaining observance of the collective agreement and the legal provisions on profit-sharing. The file of claims with the notice of strike was submitted on 18 December 2001, 6 December 2002 and 17 January 2003. The complainant organization states that on 26 December 2001 the group to which the aforementioned enterprise belongs applied to the judicial authority for a declaration of insolvency in respect of the enterprises in the group. The complainant organization alleges that on 11 August 2003 representatives of the Local Conciliation and Arbitration Board adopted an official document in which, disregarding the reality, they declared the strike to be over, a document which was subsequently declared null and void by the judicial authority further to an appeal by the trade union. Nevertheless, in January 2004 the legal declaration of bankruptcy was issued. According to the complainant organization, a person claiming to be the administrator (receiver) for the bankruptcy pronounced by the judicial authority asserted shortly before the present complaint (April 2004) that the strike was not in operation. The complainant organization requests the Committee to recommend to the Government and the judge presiding over the bankruptcy proceedings to refrain from issuing decisions which affect the rights of the striking workers.*

599. *The Committee notes the Government's statements, particularly to the effect that: (1) the complainant trade union in its capacity of creditor may denounce to the judge presiding over the insolvency proceedings any actions or omissions by the receiver which do not*

comply with the Act, so that the latter may take the attachment measures which he deems appropriate; (2) section 114 of the Federal Labour Act states that wages accrued in the last year and benefits owed to the workers take preference over any other debt, including those which are covered by real security, fiscal debts and those owed to the Mexican Social Security Institute, on all the employer's assets, and also under section 113 of the Federal Labour Act, workers are not obliged to engage in proceedings relating to insolvency, bankruptcy, suspension of pay or succession, as the Conciliation and Arbitration Board shall proceed with the attachment and sale by auction of the property required for the payment of wages and benefits.

600. *The Committee observes, moreover, that the Government states that section 924(I) of the Federal Labour Act states that from the date of lodging of the files of claims with the notice of strike, the execution of any ruling shall be suspended; any attachment, embargo, proceeding or dispossession versus the enterprise or establishment shall be prohibited; and no property may be seized from the premises where it is installed, except where, before a strike is broken, the securing of workers' rights is concerned, especially benefits, wages, pensions and other allowances accrued, constituting up to two years' wages.*

601. *The Committee understands that the purpose of the strike, at least from a certain time, was to preserve the rights and entitlements of the workers in relation to the enterprise's request to the judicial authority that insolvency and foreseeable bankruptcy be declared, particularly in view of the fact that the legislation provides in the context of strikes for suspension of the execution of any ruling and prohibits the seizure of property except in order to secure workers' rights and entitlements (benefits, wages, pensions, etc.). The Committee notes that the complainant and the Government agree that, in the event of bankruptcy, the law gives preference to debts owed to workers over any other debts. The Committee notes that the Government emphasizes that if any illegal action is committed by the receiver, an appeal can be made to the judge presiding over the insolvency and bankruptcy proceedings. The Committee also observes that the document drawn up by the representatives of the Local Conciliation and Arbitration Board declaring the non-existence of the strike was declared null and void by the judicial authority further to an appeal from the complainant trade union.*

602. *Hence the Committee concludes that the complainant trade union has been able to exercise its trade union rights and has legal remedies available for defending the interests of its members during the bankruptcy proceedings.*

603. *As regards the additional information from the complainant organization regarding assaults against workers acting as "strike guards", the Committee observes that the allegations show that the entry of the police and other officials into the CONFITALIA premises was carried out by judicial order. The Committee observes that the Government has not replied to these allegations and requests it to carry out an investigation into these allegations of assault. The Committee also requests the Government to indicate why the Conciliation and Arbitration Board did not conduct the proceedings to determine the circumstances of the strike. The Committee requests the Government to keep it informed on these two matters.*

The Committee's recommendations

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

(a) The Committee requests the Government to carry out an investigation into the allegations of assaults against the workers acting as "strike guards" at

the CONFITALIA S.A. de C.V. enterprise and indicate why the Conciliation and Arbitration Board did not conduct the proceedings to determine the circumstances of the strike.

(b) The Committee requests the Government to keep it informed on these two matters.

CASE NO. 2347

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

Complaint against the Government of Mexico presented by the Trade Union of Associated Football Players of Mexico (FAM)

Allegations: Refusal of the authorities to register the complainant organization and to recognize its executive committee

605. The complaint is contained in a communication from the Trade Union of Associated Football Players of Mexico (FAM), dated 18 May 2004. The Government sent its observations in a communication dated 22 September 2004.

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

A. The complainant's allegations

607. In its communication dated 18 May 2004, the FAM alleges that, on 16 April 2001, in accordance with Mexican law and all applicable international agreements, a meeting was held in the federal district of Mexico approving the Statutes of the trade union known as the Trade Union of Associated Football Players of Mexico (FAM) which was established as a trade union from that moment, having met all the necessary requirements. According to its Statutes, the FAM brings together individuals who work, or who have in the past, worked as professional football players and covers all those carrying out, or having carried out, such activities in a part of, or throughout, the Republic of Mexico, and is therefore a national organization. The FAM was formed by 118 active workers having decided, in accordance with article 359 of the Federal Labour Law, which allows trade unions to freely elect their representatives, to nominate four former football players to be members of the executive committee, making for a total of 122 founding trade union members. The FAM was founded in order to collectively put an end to repeated violations of football players' rights perpetrated by their employers, the football clubs.

608. In September 2001, the executive committee of the FAM contacted the Mexican Secretariat of Labour and Social Security requesting that it be registered as a trade union, in the belief that the latter was the competent authority in such matters, based on an interpretation of the law and previous cases of registration of other trade unions of a similar type. The FAM submitted all the documents required by law for the process. However, in a decision handed down on 4 October 2001, the Secretariat of Labour and Social Security stated that it was not the competent authority in relation to the registration of the FAM.

609. Through its representatives, the FAM lodged an appeal for review with the Secretariat of Labour and Social Security, which reiterated that it was not the competent authority in the matter. The FAM then filed an indirect *amparo* (enforcement of constitutional rights) application in response to the Secretariat of Labour and Social Security's confirmation of its decision. The indirect *amparo* was received by the federal district's First District Judge for Labour Matters, who granted the *amparo* to the FAM on the grounds that the Secretariat of Labour and Social Security was the competent authority in the matter of registration.

610. Despite this, the case concerning competence regarding the registration of the FAM was then brought before the Supreme Court of Justice of the Nation, due to the fact that the Secretariat of Labour and Social Security had lodged an appeal for revision which was finally dealt with by the said Supreme Court.

611. On 15 November 2002, in an unprecedented move, the plenary of the Second Chamber of the Supreme Court of Justice of the Nation ruled that, in the case of the registration of a trade union with members and a presence throughout the Republic of Mexico, the local authority should be competent, a ruling that contravenes all precedents in the field of the registration of national trade unions in Mexico (national trade unions fulfilling registration requirements had previously been registered by the Secretariat of Labour and Social Security).

612. Although it had not yet been registered, the FAM continued to carry out various internal activities related to its continued existence and running. On 15 January 2003, 35 of the FAM's founding members requested that 214 new active workers be accepted as members of the trade union. This request was granted and the total membership of the FAM rose to 336 on the aforementioned date.

613. On 10 March 2003, based on article 371, sub-heading VIII of the Federal Labour Law, 224 FAM members (66.67 per cent of the total membership) requested that the executive committee of the FAM call an assembly to study various pending issues, stating that should the assembly not be called within ten days, then the members themselves would call the assembly, based on the aforementioned Law.

614. Due to the fact that the executive committee of the FAM could not call a general assembly of the trade union within the time frame specified, on 31 March 2003, the aforementioned 224 trade union members called on all members of the trade union to attend a general assembly on 30 April 2003, based on article 371, sub-heading VIII of the Federal Labour Law.

615. During the general assembly, the founding executive committee submitted reports on its activities and the members present unanimously requested that the FAM should continue in its effort to be registered by the competent authority. So as not to leave the trade union in a defenceless state, new members of the national executive, the same council that is behind this complaint, were voted in unanimously to represent the trade union.

616. The complainant organization states that the ruling handed down by the Supreme Court of Justice of the Nation has no precedent, as the FAM's social domicile is in the federal district, in accordance with the trade union's Statutes, and it has many more than 20 founding members whose employers are domiciled in the federal district, where they (the trade union members) carry out their work; furthermore, due to the nature of the work carried out by the FAM's members, who travel to various parts of the country as part of their job as professional football players, all of them have, at one time or another, worked in Mexico City.

617. The FAM adds that, on 9 July 2003, it requested the Local Conciliation and Arbitration Board for the Federal District to register the trade union and to take note of the executive committee of the trade union as it stood at the time. Despite this, in a decision handed down on 11 August 2003, the same day on which the case was referred for processing and consideration, the Board turned down the request through a decision issued on the aforementioned date. The FAM filed an indirect *amparo* in response to the decision of 11 August 2003 on 1 October 2003. The complainant went before the First District Labour Court of the Federal District on 5 November 2003. This court granted the FAM the *amparo*, as well as the protection of the federal courts, in order that the Local Conciliation and Arbitration Board should issue a new decision with respect to the appeal for review lodged by the FAM, ordering the Board to do so, correcting all the errors that the Court had found in the decision handed down by the aforementioned Local Board on 11 August 2003 and which were enumerated by the Court.

618. However, on 23 January 2004, the Local Conciliation and Arbitration Board handed down a new decision, yet again refusing to register the FAM and its executive committee at the time.

619. The FAM stresses that the District Court which granted the *amparo* to the trade union stated, in a ruling handed down on 26 February 2004, that the decision of the Local Conciliation and Arbitration Board of the Federal District was not in accordance with the *amparo* granted to the FAM and therefore the aforementioned Board would have to issue a new decision.

620. However, on 16 April 2004, the aforementioned Board issued a new decision, yet again refusing to register the FAM and its executive committee, giving reasons which, according to the complainant, go against the national and international principles of freedom of association.

621. The complainant organization states that it filed a request with the corresponding district court, with the aim of having the aforementioned Board found to be in contravention of the corresponding *amparo* ruling and thus obliging it to comply with the ruling and grant registration.

622. The complainant organization adds that the decision, handed down by the Local Conciliation and Arbitration Board on 16 April 2004, states that the members of the FAM must prove that they have a working relationship with their clubs in order to request registration of a trade union (a requirement not laid down in law); this is an arbitrary requirement, all the more so given that many of the members' problems stem from the fact that their employers either do not give them contracts, or copies of their contracts, or they give them double contracts, one of which is false. The aforementioned decision justifies the refusal of registration by referring to the content of the Statutes, which is an element of freedom of association and not a legal reason for refusing to register a trade union.

623. Given all of this, the complainant organization believes that the competent authority has contravened Convention No. 87, ratified by Mexico.

B. The Government's reply

624. In its communication dated 22 September 2004, the Government sends the observations of the Local Conciliation and Arbitration Board of the Federal District, which are reproduced here:

(a) On 9 July 2003, José María Huerta Carrasco, José Alberto Mariscal Mendoza, Mario García Covalles and Mario Carrillo Rojo submitted a request for the registration of the

organization known as "the Trade Union of Associated Football Players of Mexico" to the Local Conciliation and Arbitration Board. The Board turned down the request for the registration of the aforementioned trade union in a decision issued on 11 August of the same year, falling as it did within the grounds for refusal envisaged in sub-headings I and III of article 366 of the Federal Labour Law.

(b) Furthermore, under the terms of constitutional article 123, the organization submitting the request for registration is not made up of the elements essential to the formation of a trade union based on an employer-worker relationship, that is to say, that those claiming to be members of the trade union at no time provided proof that they fulfilled the criteria set out in article 8 of the Federal Labour Law for classification as a worker. Article 8 states that "A worker is a physical person who carries out work for another physical or moral person under its direction …". This is confirmed by simply reading the Statutes of the trade union in question, which state that the members of the trade union may be founding members, active, retired or honorary members. Likewise, the Statutes establish that, in order to join the trade union, applicants must be active or retired football players, the latter being individuals whose profession consisted of playing football.

(c) It is important to note that the main posts within the trade union are held entirely by retired football players, a practice not in compliance with the terms of article 356 of the Federal Labour Law. Neither did the trade union ever prove that the remaining members, who are listed as being active football players, play for the clubs that they claim to play for, and, as a consequence of the aforementioned facts, the request for registration was denied.

(d) Having been notified of the decision above, on 1 October 2003, the instigators of the request filed an indirect *amparo* application against the aforementioned decision, established under No. 1726/03 of the index of the First District Labour Court of the Federal District which granted the complainant the *amparo* and the protection of the Federal Courts through a ruling dated 5 November of the same year, to the effect that the Local Conciliation and Arbitration Board for the Federal District should issue a new decision in which it would set out and justify its reasoning.

(e) Against this background, and in strict accordance with the aforementioned ruling, the Local Conciliation and Arbitration Board for the Federal District complied fully with the federal authority's ruling, issuing a new decision on 16 April 2004. Disagreeing as it did with the new decision, the trade union lodged an appeal based on nonconformity, with the result that the judicial power of the Federation is currently considering its verdict on the matter.

C. The Committee's conclusions

625. *The Committee observes that, in the case in question, the complainant organization, which is made up of football players, alleges that having been established on 16 April 2001, the competent authority (the Local Conciliation and Arbitration Board) refused to register the trade union and to take note of its executive committee at the time, in the trade union's opinion, ignoring rulings issued by the judicial authority regarding* amparo *applications. The complainant organization stresses the fact that the aforementioned Local Board issued three decisions denying registration and that the last decision to have been issued is currently being examined by the judicial authority.*

626. *The Committee takes note of the Local Conciliation and Arbitration Board for the Federal District's comments (submitted by the Government), stating that the refusal of the appeal is based on the following facts: (1) according to the trade union's statutes, its members may be active or retired football players; (2) the main posts within the trade union are entirely occupied by retired football players; (3) with respect to the remaining members who are listed as being active football players, it has never been proven that they play for the clubs that they claim to play for; and (4) at no time did the trade union organization, FAM, prove that its members were workers in the sense of the term set out in article 8 of the Federal Labour Law ("A worker is a physical person who carries out work for another*

physical or moral person under its direction …"); the aforementioned organization is not made up of the essential elements to form a trade union based on an "employer-worker" relationship.

627. *In this respect, the Committee wishes to point out that the right to decide if a trade union should be represented by retired workers or not, in the matter of the defence of its specific interests, is a question pertaining to the internal autonomy of all trade unions. In the case at hand, the complainant organization states that it represents 224 members who are active football players. The Committee is of the view that if the complainant organization's membership contains a number of football players equal to or more than the minimum number required in law for the formation of a trade union, then registration should be granted to the organization in question. Another issue raised by the Government is that of proof of members working as active football players (the burden of proof falling, in principle, on the trade union), as well as proof of a paid working relationship between the footballers and their clubs. However, the complainant organization points out that many of its members' problems stem from the fact that their employers either do not give them contracts, or copies of their contracts, or they give them double contracts, one of which is false. Consequently, the Committee requests the Government to take measures to ensure that the administrative labour authority – also acting within the framework of its function as inspector of compliance with labour legislation – determines whether the complainant organization has enough football players amongst its members to make up the minimum number required to form a trade union. Furthermore, the Committee requests the Government to ensure that retired persons have the same rights as other workers to join trade unions and to present themselves as candidates to union bodies and consequently to amend article 356 of the Federal Labour Law.*

628. *The Committee stresses the fact that the complainant organization requested to be registered over three years ago and recalls that, by virtue of Article 2 of Convention No. 87 "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". The Committee also brings to the Government's attention the principle that "By virtue of the principles of freedom of association, all workers – with the sole exception of members of the armed forces and police – should have the right to establish and to join organizations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example, in the case of agricultural workers, self-employed workers in general or those who practice liberal professions, who should nevertheless enjoy the right to organize" [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 235].*

629. *In these circumstances, the Committee expects that the decision of the judicial authority concerning the registration of the complainant organization will be issued as soon as possible and that it will fully take into account the principles cited and requests the Government to communicate any ruling or decision taken in relation to the registration of the complainant organization.*

The Committee's recommendations

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

(a) The Committee requests the Government to take measures to ensure that the administrative labour authority determines whether the complainant

organization has enough football players amongst its members to make up the minimum number required to form a trade union. Furthermore, the Committee requests the Government to ensure that retired persons have the same rights as other workers to join trade unions and to present themselves as candidates to union bodies and consequently to amend article 356 of the Federal Labour Law.

(b) The Committee expects that the decision of the judicial authority concerning the registration of the complainant organization will fully take into account the principles cited in the conclusions and requests the Government to communicate any ruling or decision taken in relation to the registration of the complainant organization.

CASE NO. 2340

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

Complaint against the Government of Nepal presented by
— the General Federation of Nepalese Trade Unions (GEFONT)
— the Nepal Trade Union Congress (NTUC)
— the Democratic Confederation of Nepalese Trade Unions (DECONT) and
— the International Textile, Garment and Leather Workers' Federation (ITGLWF)

Allegations: The complainants allege violations of their trade union rights through the recent notification of a broad list of essential services and government interference in peaceful workers' demonstrations culminating in the arrest of a large number of trade union leaders and members

631. The complaint in this case is contained in a communication from the General Federation of Nepalese Trade Unions (GEFONT), the Nepal Trade Union Congress (NTUC) and the Democratic Confederation of Nepalese Trade Unions (DECONT) dated 28 April 2004. The International Textile, Garment and Leather Workers' Federation (ITGLWF) has supported the complaint in a communication dated 15 June 2004. The Government sent its observations in respect of the complaint on 1 June 2004 and 7 September 2004.

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

A. The complainants' allegations

633. The complaint is brought in connection with the Essential Services Act, 1957. The complainants allege that the Government has curtailed the rights of workers by publishing a notification under the Act in the *Official Gazette* of 17 February 2004. The following 14 services are considered as essential in this notification: the postal service; all types of

broadcasting, print media and telecommunication services; transport including road, air and marine transport, work related to civil aviation and maintenance of aircraft and security, service on railway station and government storage; mint and government print service, manufacturing equipments of defence and allied services, electricity supply service, drinking water supply service; hotel, motel, restaurant, resort and tourism and other related similar kinds of services; import and distribution of petroleum goods; hospital, health centres and manufacturing establishment of medicines and distributive services; banking services; garbage collection, transfer and recycling services; by notifying these services as essential services under the Act. According to the complainants, all of these services cannot be regarded as essential.

634. According to the provisions of the Essential Services Act, 1957, a notification issued under the Act is applicable for six months. Therefore, the Government has repeatedly every six months been notifying some of these services as essential services under the Act with a view to prohibiting strikes in these services. This was the case for banking services on 17 August 2001, 14 February 2002, 17 August 2002, 18 August 2003 and 17 February 2004. A further notification after the earlier notification of 15 March 2001 in respect of hotel, motel, restaurant and tourist accommodation was issued on 18 September 2001 and then on 15 August 2003 and 17 February 2004. On 15 August 2003, the postal service, all types of broadcasting, print media and telecommunication service, transportation service including road, air and marine transport, work related to civil aviation and maintenance of aircraft and security, service on railway station and government storages, mint and government print service, manufacture of defence goods, electricity service, drinking water supply service, hotel, motel, restaurant, resort and tourist accommodation and other similar kinds of service, import and distribution of petroleum goods, hospital, health centres and manufacturing establishment of medicine and distribution, garbage collection, transfer and recycling services were notified as essential services under the Act. A similar notification was issued on 17 February 2004 with banking services being added to the list. The complainants allege that there is no alternative means of dispute settlement to resolve disputes in these services and that the Government has thus interfered with the collective bargaining rights of the workers in these sectors.

635. According to the complainants, the judiciary and the international community have frowned upon the misuse of the Act and a case against the imposition of the Act is pending before the Supreme Court of Nepal. The same issue also was brought up for the consideration of this Committee in Case No. 2120 and the Committee had requested the Government to take the necessary measures to repeal its notification in the *Official Gazette* of 15 March 2001 declaring hotel, motel, restaurant and tourist accommodation as falling within the scope of essential services and thus prohibiting strikes in these services by virtue of the Essential Services Act of 1957.

636. The complainants state that on 18 March 2004, they issued a letter requesting the Government to withdraw immediately the irrelevant imposition of the Act within a week. However, the Government ignored the request. The complainants also point out that the umbrella organization of the employers, the Federation of Nepalese Chamber of Commerce and Industries (FNCCI) had also opposed the government step through its press communiqué.

637. The complainants allege that the Government has also ignored the collective voice of the workers raised through peaceful demonstrations organized by the three recognized trade union centres in the country which are the complainants in the present case, on different occasions after 25 March 2004. Moreover, the Government resorted to violent action and also arrested senior union leaders and activists. The complainant has annexed three lists containing the names of 45 detainees related to DECONT, the names of 45 leaders and

activists of GEFONT arrested in April 2004 and the names of 42 arrested NTUC leaders including the chairpersons, vice-chairpersons and general secretaries of the organizations.

638. The complainants further allege that their various national affiliates then put up banners stating their demands. However, the Government mobilized security personnel to pick out such banners from the different enterprises where they were put up.

639. The complainants also allege that the Government has issued an unjustifiable order declaring the heart of the city of Kathmandu as a "riot-zone" and preventing five or more people from assembling there. The complainants allege that raising their concern and defying the order, hundreds of unionists took to the street. They have been physically assaulted by the police and have also been arrested many times.

B. The Government's reply

640. In its observations of 1 June 2004, the Government has pointed out the provisions of the Constitution, the Labour Act, 1991 and the Essential Services Act, 1957 that are relevant for the purpose of the present case. Section 76 of the Labour Act, 1991 provides that workers can strike when the management does not resolve their disputes through bilateral discussions within 15 days of their complaint to the management. According to section 3 of the Essential Services Act, 1957, the Government may prohibit strikes in any necessary service by issuing an order or notifying in the *Official Gazette*, any necessary services quoted/listed in the notice. The order or notification shall be applicable for a six-month period.

641. In its observations of 7 September 2004, the Government states that it is committed to ensuring that the international labour instruments ratified by it are observed and put into practice by all means. In respect of the Essential Services Act, the Government states that the Act is intended to ensure that the rights of the common people to basic amenities and services are protected and not to infringe on trade union rights. The Government further states that the addition of certain services mentioned in the complaint to the list of essential services should be viewed in the context of the larger political reality prevailing in the country. According to the Government, the notification of these services was a short-term temporary measure undertaken by the Government to defuse the immediate crisis brought about by the ongoing political agitation and as things have long been normalized, the Government has no intention of extending it. The Government also states it is thinking of working with the Ministry of Home Affairs to limit essential services to the very basic services and to improve the legal provisions so as to avoid discretionary practices.

642. The Government states that the arrests made were intended to prevent violent conflagration and maintain law and order in the city. The Government further states that it was a general measure and in no way targeted at union leaders and activists. The leaders detained in the afternoon were released in the early evening. The order that prohibited more than five persons from assembling in the riot zone was also a short-term emergency measure which has long been revoked.

643. The Government further states that it will always make efforts to protect the right to organize of workers and employers and their collective bargaining rights and that it is working with all social partners to forge greater understanding and cooperation in the future.

C. The Committee's conclusions

644. *The Committee notes that the issues involved in this complaint are: (a) the notification of a wide range of services as essential services under the Essential Services Act, 1957 and the consequent prohibition on the right of the workers engaged in the services so notified, to resort to industrial action; (b) the right of workers to stage peaceful demonstrations and to put up banners, and (c) the arrest and detention of trade unionists.*

645. *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 and that the right may be restricted or prohibited only in the case of public servants exercising authority in the name of the State or in the case of workers in essential services in the strict sense of the term, that is, services whose interruption could endanger the life, personal safety or health of the whole or part of the population or in the event of acute national emergency [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, paras. 475, 526 and 527]. The Committee further recalls that the principle regarding the prohibition of strikes in essential services might lose its meaning if a strike were declared illegal in one or more undertakings which were not performing an "essential service" in the strict sense of the term [see* ***Digest****, op. cit., para. 542].*

646. *The Committee therefore considers that the list of 14 services notified as essential is too broad and contains services which cannot be considered as essential in the strict sense of the term. The Committee recalls that it had in Case No. 2120 concerning Nepal requested the Government to take the necessary measures to repeal its notification in the* Official Gazette *of 15 March 2001 declaring hotel, motel, restaurant and tourist accommodation as falling within the scope of essential services and thus prohibiting strikes in these services by virtue of the Essential Services Act of 1957 [see Committee on Freedom of Association, 328th Report, Case No. 2120 (Nepal), para. 540]. The Committee expresses its deep concern at the action of the Government in ignoring its recommendation and instead issuing further notifications under the Act in respect of hotel, motel, restaurant and tourist accommodation on 18 September 2001, 15 August 2003 and 17 February 2004.*

647. *While noting the Government's indication that it now has no intention of extending the notification under the Act in respect of the services mentioned in the complaint and also noting that it appears from the date when the notification in respect of the aforesaid 14 services were issued that it is no longer in force, the Committee requests the Government to confirm whether or not the notification continues to remain in force and in the event that it continues to remain in force, requests the Government to immediately take the necessary measures to repeal the notification or limit it to essential services in the strict sense of the term, that is services whose interruption could endanger the life, personal safety or health of the whole or part of the population and to keep it informed of the measures taken in this regard.*

648. *The Committee also notes that the Government has now indicated that the Ministry of Labour and Transport Management plans to work with the Ministry of Home Affairs to limit "essential services" to the very basic services. The Committee requests the Government to expeditiously take the necessary measures to appropriately amend the Essential Services Act, 1957 by limiting the power under the Act to prohibit strikes only to essential services in the strict sense of the term and to keep it informed of any measures taken in this regard.*

649. *The Committee recalls that even where the right to strike is restricted or prohibited in essential services in the strict sense of the term, adequate protection should be given to the concerned workers to compensate for the limitation thereby placed on their freedom of*

*action with regard to disputes affecting such undertakings and services. As regards the nature of appropriate guarantees to safeguard the interests of the workers, the Committee recalls that restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation proceedings followed by arbitration proceedings in the event of failure of the conciliation proceedings, in which the parties concerned can take part at every stage and in which awards, once made, are fully and properly implemented [see **Digest**, op. cit., paras. 546, 547 and 551].*

650. *As regards the prohibition on the assembly of more than five persons in the heart of Kathmandu, the Committee takes note of the Government's statement that the relevant order has long been revoked. The Committee recalls, however, that workers should enjoy the right to peaceful demonstration to defend their occupational interests and that trade union rights include the right to organize public demonstrations. While the prohibition of demonstrations on a public highway or in the busiest parts of a city, when it is feared that disturbances might occur, does not constitute an infringement of trade union rights, the authorities should strive to reach agreement with the organizers of the demonstration to enable it to be held in some other place where there would be no fear of disturbances [see **Digest**, op. cit., paras. 131, 133 and 136].*

651. *In respect of the demonstrations that took place after 25 March 2004, according to the complainants, the demonstrations were peaceful but the Government had resorted to violent action and arrested senior union leaders and activists. The Government has not specifically responded to the allegation of violent action but has however indicated that the arrests were intended to maintain law and order in the city and prevent a violent conflagration and that the arrested persons had been released within a few hours. While noting that the arrested persons had been released within a few hours, the Committee recalls that the police authorities should be given precise instructions, in cases where public order is not seriously threatened, so that people are not arrested simply for having organized or participated in a demonstration. The Committee wishes to emphasize that the arrest, even if only briefly, of trade union leaders and trade unionists for exercising legitimate trade union activities constitutes a violation of the principles of freedom of association and 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**, op. cit., paras. 70, 71 and 147]. With regard to the use of force, the Committee recalls that the authorities should resort to the use of force only in situations where law and order is seriously threatened and such intervention should be in due proportion to the danger to law and order that the authorities are attempting to control and governments should take measures to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations which may result in a disturbance of the peace [see **Digest**, op. cit., para. 137]. The Committee requests the Government to take appropriate measures to ensure due respect for these principles in practice and to keep it informed of the measures taken in this regard.*

652. *The Committee further notes that according to the complainants, the Government mobilized security personnel to pick out the banners put by its affiliates mentioning their demands. The Committee also notes that the Government has not specifically responded to this allegation. In this context, the Committee wishes to recall that the full exercise of trade union rights calls for workers to enjoy the freedom of opinion and expression in the course of their trade union activities and that the prohibition on the placing of posters stating the point of view of a trade union organization is an unacceptable restriction on trade union activities [see **Digest**, op. cit., paras. 152 and 467]. The Committee requests the Government to therefore ensure that in practice, trade unions can enjoy the right to place banners stating their point of view.*

653. *The Committee reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.*

The Committee's recommendations

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

(a) The Committee requests the Government to expeditiously take the necessary measures to amend the Essential Services Act, 1957, in the light of its conclusions above and to confirm whether or not the notification of 17 February 2004 issued under the Essential Services Act, 1957 in respect of the 14 services mentioned in the Act continues to remain in force and, in the event that it continues to remain in force, requests the Government to immediately take the necessary measures to repeal the notification or limit it to essential services in the strict sense of the term, that is services whose interruption would affect the whole or part of the population and to keep it informed of the measures taken in this regard.

(b) The Committee requests the Government to take appropriate measures to ensure due respect in practice for the principles laid down by the Committee in respect of the right of workers' organizations to hold public demonstrations and to keep it informed of the measures taken in this regard.

(c) The Committee requests the Government to ensure that, in practice, workers' organizations enjoy the right to place banners stating their point of view.

(d) The Committee reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.

CASE NO. 2354

INTERIM REPORT

Complaint against the Government of Nicaragua presented by
— the General Confederation of Education Workers of Nicaragua (CGTEN-ANDEN) supported by
— the International Confederation of Free Trade Unions (ICFTU) and
— Education International (IE)

Allegations: The complainant organization alleges the violation of the right to collective bargaining, anti-union persecution of its officials, failure to comply with orders for the reinstatement of union leaders, discrimination in the provision of union premises, refusal to allow union leaders access to schools, etc.

655. The complaint is contained in a communication from the General Confederation of Education Workers of Nicaragua (CGTEN-ANDEN) dated May 2004. In communications

dated 3 and 8 June 2004, the International Confederation of Free Trade Unions (ICFTU) and Education International (EI) supported the complaint.

656. The Government sent its observations in communications dated 22 September and 14 October 2004.

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

A. The complainant's allegations

658. In its communication dated 20 May 2004, the General Confederation of Education Workers of Nicaragua (CGTEN-ANDEN) states that between June and July 2003, agreements were signed between the Ministry of Education, Culture and Sport (MECD) and the trade unions in the education sector. The agreements are the culmination of a long struggle by the teaching profession since early 2003.

659. Nevertheless, the complainant organization alleges the following violations of Conventions Nos. 87 and 98 by the Government:

(1) the Government, via the MECD, is trying to dismiss union leader Mr. Julio Jimmy Hernández Paisano, labour secretary of the Departmental Federation of Teaching Staff in Managua, and since April his salary has been withheld and his right to other benefits suspended;

(2) the management of the "Rubén Darío" educational establishment in the municipality of Tipitapa has tried to dismiss union leaders Mr. Norlan José Toruño Araúz, publicity and dissemination secretary of the Union of Teaching Workers of the municipality of Tipitapa, and Mr. Joel Ismael Rodríguez Soto, section head at the "Rubén Darío" educational establishment. An application was made to the departmental labour inspectorate requesting the termination of the contracts of both leaders in flagrant anti-union persecution, given that attempts had been made last year to terminate the contracts using the same arguments but the general labour inspectorate's decision had gone in favour of the union leaders;

(3) union leader Mr. Manuel Sebastián Mendieta Martínez, general secretary of the Departmental Federation of Teaching Staff of Carazo, has been the victim of anti-union persecution from the director of the "Diriángen" National Institute of the municipality of Diriamba, who assigned a person to monitor the union leader's movements;

(4) the Government refuses to comply with judicial rulings ordering the reinstatement of union leaders and the payment of outstanding salaries (the union leaders include Ms. Miriam Gutiérrez, Mr. Róger Benito Acevedo Jiménez, Ms. Miriam Olivas Ardón and Mr. José Antonio Zepeda);

(5) the Government, through the MECD, has repeatedly given preferential treatment to other trade unions in the sector, openly supporting them by guaranteeing them office facilities and other benefits such as use of the institution's telephones, provided that they are loyal servants of the institution and are willing to support the Government line, with the sole aim of obstructing the struggle of the teaching profession. The organizations which receive preferential treatment from the Government are: the National Confederation of Schoolteachers of Nicaragua (CNMN), the MECD "Josefa Toledo de Aguerri" Departmental Union of Workers and Teachers, the Trade Union

Federation of Schoolteachers (FESINMA), the Federation of Free Democratic Workers and Teachers of Managua, the "MECD 29 June" Federation of Workers and Teachers, the MECD Federation of Workers and Teachers and the MECD Headquarters Union of Workers;

(6) the Government has refused to grant paid trade union leave to CGTEN-ANDEN officials, while doing so freely to the other organizations mentioned above;

(7) the Government fails to recognize the legality of CGTEN-ANDEN and does not allow it to participate in the National Education Commission, notwithstanding section 8(3) of the Educational Careers Act, which reads as follows: "A National Education Commission shall be established, comprising one representative from each organization of teachers that is national in character and legally constituted";

(8) the Government is ordering educational establishments in writing to bar CGTEN-ANDEN leaders in the municipalities of San Isidro and Tipitapa from entering the "Rubén Darío", "Andrés Castro" and "Los Laureles" rural education centres (NERPE) and the "Divina Inmaculada" school;

(9) the MECD has suspended payments of performance-related pay provided for in clause 13 of the sectoral collective agreement to workers who have taken part in actions supporting trade union demands; the complainant organization also alleges that, in violation of the collective agreement, the MECD does not honour the "zone allowance" of more than 20,000 teachers or implement agreed salary increases;

(10) the Ministries of Labour and Education declare, in violation of article 83 of the Political Constitution of the Republic, that any strike would be illegal, and;

(11) the MECD prohibition on paying dues to the complainant organization is in breach of clause 12 of the collective agreement.

660. Finally, the complainant organization states that the MECD refuses to initiate negotiations as provided for by law, claiming that it is not yet time to do so since the budget has not been approved, but above all it calls on its affiliated organizations to manoeuvre and display reluctance to negotiate.

B. The Government's reply

661. In its communications dated 22 September and 14 October 2004, the Government states that there is full freedom in Nicaragua for workers and employers to establish the organizations they consider relevant for watching over and protecting their interests, and that the right to organize as trade unions is a constitutional right for both parties to the labour relationship. The Political Constitution lays down that there is unlimited freedom for organizing as trade unions or for not doing so.

662. With respect to the complaint in question, the Government indicates that it maintains a clear policy of negotiation (employers and workers), guaranteeing the human rights of workers and employers, in particular the principles of freedom of association and trade union pluralism.

663. As regards the situation of the union officials referred to by the complainant organization, the Government points out that it is the State's obligation to guarantee that workers' representatives enjoy effective protection against any harmful act committed on account of their union status or activities. This is the concept of trade union immunity, which employers are obliged to accept and in accordance with which they may not interfere in

any way with the formation or operation of trade unions. Anyone enjoying trade union immunity may not be punished or dismissed without just cause previously authorized by the Ministry of Labour. Labour legislation invokes clear grounds for termination of a contract and authorization by the Ministry of Labour to dismiss those to whom the law affords special protection. The Government adds that the holding of union office does not confer such immunity on the holder as to allow him to break the law: trade union immunity shall and does protect lawful acts. When a worker is continually absent from work without the employer's permission, it does not constitute a violation of the freedom of association.

664. The Government makes the following specific points:

- with respect to Mr. Julio Jimmy Hernández Paisano, labour secretary of the Departmental Federation of Teaching Staff in Managua, the appropriate channels under current labour legislation were used to secure his compliance with his obligations, in view of the fact that, in full violation of his contractual obligations, he refused to perform his duties consistently (according to the Government, he is not on trade union leave);

- as regards Mr. Norlan José Toruño Araúz, member of the union affiliated to ANDEN, the head of NERA "Rubén Darío" education centre in the municipality of Tipitapa in the department of Managua appeared before the departmental labour inspectorate to request authorization to terminate his contract. The administrative proceedings opened with a four-day period involving both parties. The respondent alleged that the departmental labour inspectorate was not competent to handle proceedings concerning his dismissal, since there are specific labour provisions which take precedence over the General Act establishing the Labour Code, and he therefore asked that the inspectorate be taken off the case. During the evidentiary period, the complainant submitted abundant evidence to support the grounds invoked by the employer, laid down by section 48(d) of the Labour Code. Proof was given of the misconduct of which the teacher had been guilty, failing to discharge the obligations laid down in his contract and those contained in the General Regulations on Primary Education. According to testimonies from the employer, the teacher took it upon himself to set parents and members of the school council against the headmaster. The school suffered serious harm from interruptions to classes, the organization of protests, the closure of gates preventing staff access, and from his dereliction of duty for the purpose of performing tasks not specified by his plan of work, all these actions having no legal authorization. The departmental inspector issued an order for the termination of the contract. Availing himself of his rights under labour law, the worker appealed against the order (the Government also refers in its reply to another worker who was not mentioned by the complainant organization);

- concerning union leader Mr. Manuel Sebastián Mendieta Martínez, the Government requests further information in this respect, since to date, no action has been brought before the Ministry of Labour by either the employer or the worker.

665. With regard to the alleged non-compliance with judicial rulings ordering the reinstatement of dismissed union officials and the payment of outstanding wages, the Government points out that where the employer unilaterally cancels the contract of a union official, the latter may apply to the labour judge to request reinstatement and the payment of outstanding wages and benefits, within 30 days following the dismissal. If the labour judge orders the reinstatement, the employer is obliged to implement it and pay the wages and benefits owed to the workers in question. The Government indicates that the Labour Code provides that the employer may pay double the seniority indemnity to a worker in respect of whom a definitive reinstatement order has been issued. According to case law, union officials have the choice either to accept the double indemnity or actually to be reinstated.

666. Regarding the premises for union meetings in the education sector, the MECD reiterates its undertaking to provide facilities for trade unions which are signatories to the collective agreement. The said unions are provided with the use of the facilities of departmental study centres for holding assemblies or meetings or undertaking any other union activity.

667. As regards trade union leave, the collective agreement provides the unions with up to 60 days each for activities which they consider appropriate. The MECD has a fund of up to NIC45,000 to cover replacements for leave granted for union training, seminars and congresses. Leave with pay is granted by the Central Human Resources Department no later than two days after the request is made. The unions undertake in turn to ensure that leave is used appropriately and in accordance with the applicable conditions.

668. The Government emphasizes that at the MECD there are 23 organizations of education workers duly constituted and registered with the Directorate of Trade Unions at the Ministry of Labour, and that CGTEN-ANDEN and the other unions are joint signatories to the collective agreement in force for 2004-2006. There is therefore no violation of freedom of association or social/labour rights as claimed in the present complaint.

669. With regard to the alleged exclusion of CGTEN-ANDEN from the National Education Commission, the Government indicates that this statement has no legal basis, as proved by the memo issued on 26 July 2004 by the President of the National Education Commission placing on record that there is no application for membership from the representatives of CGTEN-ANDEN in the Commission's files.

670. With respect to the exercise of the right to strike, the Government indicates that Article 83 of the Political Constitution recognizes the right to strike and that the right to strike of workers and their organizations constitutes one of the fundamental means at their disposal for promoting and defending their interests. According to the Government, holding public demonstrations is an important aspect of union rights. Nevertheless, the distinction must be made between demonstrations with purely union aims and demonstrations which have other objectives, such as criticizing the Government's economic and social policy. The important thing is that those means are exercised peacefully in accordance with the principles of freedom of association laid down in ILO Convention No. 98.

671. With regard to trade union dues, the Government states that the opening of a check-off code for CGTEN-ANDEN was authorized in April 2004. Every duly constituted trade union in the education sector, such as CGTEN-ANDEN, can access the codes in order to receive its respective trade union dues as laid down by section 224 of the Labour Code.

672. Finally, the Government declares that Article 88(2) (in Chapter V, Labour Rights) of the Political Constitution reads as follows: "The inalienable right of workers to conclude collective agreements with employers in defence of their individual or union interests is guaranteed.". The MECD has followed the procedures and conducted the negotiations prescribed by law with the various unions of education workers which have been duly constituted and registered with the Directorate-General of Trade Unions at the Ministry of Labour, concluding a collective labour agreement which guarantees economic, social and employment-related improvements for education workers. This is confirmed and demonstrated by the conclusion of the 2004-2006 collective agreement, negotiated with six confederations (including CGTEN-ANDEN), six federations, four departmental unions and seven unions.

C. The Committee's conclusions

673. *The Committee observes that the complainant organization alleges acts of anti-union persecution against its leaders, non-compliance with orders for the reinstatement of*

dismissed union leaders and the payment of outstanding wages, the granting of benefits (offices, use of telephones, etc.) to pro-Government organizations in the sector, the denial of union leave to its leaders, the impossibility of participating in the National Education Commission, the violation of agreements between the Ministry of Education, Culture and Sport (MECD) and educational establishments, the failure to pay salary increases agreed upon in the collective agreement, the declaration by the authorities that a strike in the sector would be illegal, the refusal to deduct members' union dues at source, the MECD's refusal to launch the negotiations prescribed by law or to allow union leaders access to various educational establishments.

674. *As regards the allegations concerning acts of anti-union persecution against leaders of the complainant organization, Messrs. Julio Jimmy Hernández Paisano, Norlan José Toruño Araúz, José Ismael Rodríguez Soto and Manuel Sebastián Mendieta Martínez, the Committee notes that the Government indicates that: (1) with regard to Mr. Julio Jimmy Hernández Paisano, who is not on union leave, the latter has refused to comply with his obligation to resume his duties; (2) as regards Mr. Norlan José Toruño Araúz: (a) the management of NERA "Rubén Darío" education centre requested authorization to terminate his contract; (b) an administrative investigation was set in motion and evidence was given of misconduct on the part of the official in question (the entrance gates were closed, barring entry to the staff, and he abandoned his duties for the purpose of engaging in tasks not specified by his plan of work); (c) the departmental inspectorate issued an order for termination of his contract and he lodged an appeal against the order; and (3) with regard to union official Mr. Manuel Mendieta Martínez, further information is needed since no proceedings have been brought before the Ministry of Labour by either the worker or the employer.*

675. *In this respect, the Committee requests the Government to keep it informed: (1) on the work situation of union leader Mr. Julio Jimmy Hernández Paisano (specifically, whether he has been dismissed for dereliction of duty) and on whether he has lodged an appeal in this respect; and (2) on the result of the appeal made by union leader Mr. Norlan José Toruño Araúz against the administrative decision to authorize the termination of his contract. In addition, the Committee requests the Government to carry out an investigation in relation to the work situation of union official Mr. José Ismael Rodríguez Soto, with respect to whom it was also alleged that the termination of his contract had been requested, and to keep it informed in this respect.*

676. *With regard to the allegation that union leader Mr. Manuel Sebastián Mendieta Martínez was the victim of anti-union persecution, having had a person assigned to watch his movements, the Committee requests the Government to take steps to carry out an investigation into these allegations and to send its observations in this respect.*

677. *As regards the alleged failure to implement judicial orders for the reinstatement of union officials and the payment of outstanding wages (the complainant organization refers by name to the officials concerned), the Committee notes that the Government states that: (1) if an order for reinstatement is issued by the labour judge, the employer is obliged to comply with it and pay the outstanding wages; and (2) the Labour Code stipulates that the employer may pay double the seniority indemnity to a worker covered by a definitive reinstatement ruling and, according to case law, union leaders have the choice either to accept the double indemnity or actually to be reinstated. Under these circumstances, the Committee requests the Government to ensure that the union officials named above by the complainant organization may opt freely for the implementation of the judicial decision or to accept the said indemnity. The Committee requests the Government to keep it informed in this respect.*

678. *Concerning the alleged preferential treatment of certain unions by the MECD, providing office facilities and other benefits such as the use of telephones in return for supporting the Government, the Committee notes the Government's statement that the MECD repeats its undertaking to provide facilities for those unions which are signatories to the collective agreement and accordingly provides them with facilities at departmental study centres so that they can hold assemblies, meetings or any other activity. In this respect, observing that all the unions which are representative in the sector may benefit from the use of the premises for carrying out their activities, the Committee requests the Government to take measures to guarantee that, in compliance with the undertaking mentioned above, the complainant organization may enjoy the same benefits as the other unions of the sector. The Committee requests the Government to keep it informed in this respect.*

679. *As regards the allegations concerning the refusal of the MECD to grant paid union leave to officials of the complainant organization, while doing so for other unions in the sector, the Committee notes the Government's statement that: (1) up to 60 days each for all the unions is laid down in the collective agreement so that they can carry out whatever union activities they see fit, and (2) paid leave is granted by the Central Human Resources Department no later than two days after the request is made, and the unions undertake in turn to ensure that leave is used appropriately. In this respect, the Committee requests the Government to ensure that, in accordance with the terms of the collective agreement, the officials of the complainant organization can avail themselves of paid union leave. The Committee requests the Government to keep it informed in this respect.*

680. *With regard to the allegation concerning the Government's refusal to allow CGTEN-ANDEN to participate in the National Education Commission, the Committee notes the Government's statement that in the Committee's records there is no application to join the Committee from the complainant organization. In this respect, observing that the Government does not oppose the complainant organization's participation in the National Education Commission, the Committee requests the Government, if CGTEN-ANDEN formally applies for membership, to take steps to allow its admission.*

681. *Concerning the allegation that the MECD does not allow the check-off of union dues from members of the complainant organization, the Committee notes with interest the Government's statement that in April 2004 the opening of a check-off code for CGTEN-ANDEN was authorized and that any duly constituted trade union in the education sector may access the codes in order to receive its respective union dues as laid down by section 222 of the Labour Code. The Committee hopes that CGTEN-ANDEN will be able to receive its members' union dues in the near future and requests the Government to keep it informed in this respect.*

682. *With respect to the allegations concerning statements by the Ministry of Labour and the MECD that a strike in the sector would be illegal, the Committee notes the Government's statement that the right to strike of workers and their organizations constitutes one of the fundamental means at their disposal for promoting and defending their interests, but that a distinction must be made between demonstrations with purely union aims and demonstrations for other purposes, such as criticising the Government's economic and social policy. The Committee recalls in this respect that organizations responsible for defending workers' socio-economic and occupational interests should be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 480].*

683. *With regard to the allegations concerning the non-observance of a collective agreement in the teaching sector with respect to the payment of performance-related pay, the right to a "zone allowance" and other benefits, and to the allegation that the MECD refuses to start negotiations claiming that the budget has not been approved, the Committee notes with interest the Government's statement that CGTEN-ANDEN and other trade unions in the sector have concluded a collective agreement for 2004-06 which guarantees economic, social and employment-related improvements for education workers. Taking this information into account, the Committee will not make any further examination of these allegations.*

684. *Finally, with respect to the allegations concerning the written orders from the MECD to educational establishments to bar entry to CGTEN-ANDEN leaders, the Committee observes that the Government has not communicated its observations in this respect. In these circumstances, the Committee requests the Government to take steps to ensure that CGTEN-ANDEN officials can have access to educational establishments in the context of the exercise of their union duties. The Committee requests the Government to keep it informed in this respect.*

The Committee's recommendations

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

(a) The Committee requests the Government to keep it informed: (1) on the work situation of union leader Mr. Julio Jimmy Hernández Paisano (specifically, whether he has been dismissed for dereliction of duty) and on whether he has lodged an appeal in this respect; and (2) on the result of the appeal made by union leader Mr. Norlan José Toruño Araúz against the administrative decision to authorize the termination of his contract. In addition, the Committee requests the Government to carry out an investigation in relation to the work situation of union official Mr. José Ismael Rodríguez Soto, with respect to whom it was also alleged that the termination of his contract had been requested, and to keep it informed in this respect.

(b) With regard to the allegation that union leader Mr. Manuel Sebastián Mendieta Martínez was the victim of anti-union persecution, having had a person assigned to watch his movements, the Committee requests the Government to take steps to carry out an investigation into these allegations and to send its observations in this respect.

(c) As regards the alleged failure to implement judicial orders for the reinstatement of union officials and the payment of outstanding wages (the complainant organization refers by name to the officials concerned), the Committee requests the Government to ensure that the union officials named above by the complainant organization may opt freely for the implementation of the judicial decision or to accept the said indemnity. The Committee requests the Government to keep it informed in this respect.

(d) With regard to the allegation concerning the Government's refusal to allow CGTEN-ANDEN to participate in the National Education Commission, the

Committee requests the Government, if CGTEN-ANDEN formally applies for membership, to take steps to allow its admission.

(e) With respect to the allegations concerning the written orders from the MECD to educational establishments to bar entry to CGTEN-ANDEN leaders, the Committee requests the Government to take steps to ensure that CGTEN-ANDEN officials can have access to educational establishments in the context of the exercise of their union duties. The Committee requests the Government to keep it informed in this respect.

(f) Concerning the alleged preferential treatment of certain unions by the MECD, providing office facilities and other benefits such as the use of telephones in return for supporting the Government, the Committee requests the Government to take measures to guarantee that, in compliance with the undertaking mentioned above, the complainant organization may enjoy the same benefits as the other unions of the sector. The Committee requests the Government to keep it informed in this respect.

(g) As regards the allegations concerning the refusal of the MECD to grant paid union leave to officials of the complainant organization, the Committee requests the Government to ensure that, in accordance with the terms of the collective agreement, the officials of the complainant organization can avail themselves of paid union leave. The Committee requests the Government to keep it informed in this respect.

CASE NO. 2332

DEFINITIVE REPORT

Complaint against the Government of Poland presented by the Building Workers Trade Union (BUDOWLANI)

Allegations: The complainant organization alleges that a recent amendment to the Trade Union Act setting forth a minimum membership requirement for trade unions at the enterprise level violates the provisions of Conventions Nos. 87 and 98

686. The complaint was presented by the Building Workers Trade Union (BUDOWLANI) in a letter dated 23 March 2004. The complainant sent additional information in a letter dated 4 May 2004.

687. The Government sent its observation in a letter of 25 October 2004.

688. 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

689. In its communication of 23 March 2004, the complainant refers to the law of 26 July 2002 "on the amendment of the Labour Code and on the amendment of some other acts", which introduced a new section 25/1 to the Trade Union Act. According to an unofficial translation, this section provides that: "the rights of the establishment trade union organizations are exercised by the organizations associating at least ten members being:

(1) employees or persons performing work on the basis of home work contract with the employer where the organization is active;

(2) officials of the police, frontier guards and prison service, who are on duty in the unit where serving for units covered by the activity of this organization.

Such a trade union organization is obliged to provide the employer or unit commander (in case of officials) on a quarterly basis – and on the last day of the quarter – by the tenth day of the month following a given quarter, with information on a total number of members of this organization. In accordance with section 34 of the Trade Union Act, this provision is also applicable to multi-establishment trade union organizations."

690. The complainant submits that section 25/1 deprives organizations with less than ten members working for a particular employer of the rights of establishment trade union organizations. According to the complainant, this provision implies that trade unions will not be able to carry on their activities if they regroup less than ten members, or in particular enterprises which employ less than ten employees. It also gives the employers an opportunity to eliminate trade union organizations by simply reorganizing their companies and creating smaller divisions. The complainant considers that section 25/1 discriminates against smaller trade union organizations as it defines the scope of trade unions' rights on the basis of the number of their members.

691. The complainant also indicates that it made some representations to national authorities on the question of compatibility of section 25/1 with the Constitution and with the ILO Conventions ratified by Poland. It received replies, which are summarized in its communication. In particular, the complainant submits that, on 23 May 2003, the "Bureau of Research of the Parliament of the Republic of Poland Chancellery" answered that depriving organizations which associate less than ten members of rights of trade union organizations should be considered as the introduction of another grade in the organizational structure of the trade union movement. No particular rights are recognized for trade unions associating less than ten members and the rights resulting from the interpretation of the Trade Union Act can only be very general. The new "trade union structure" creates a distinction between organizations associating less than ten members, which have no power to enter legal action, and larger organizations. The Bureau finally concludes that this distinction does not limit the worker's freedom to associate, but marginalizes organizations with less than ten members.

692. Furthermore, the complainant also indicates that the Trade Union Organization NSZZ Solidarnosc (hereafter NSZZ Solidarnosc) has addressed a complaint to the Constitutional Tribunal of the Republic of Poland to verify the constitutionality of section 25/1 of the Trade Union Act with article 12 of the Constitution of the Republic of Poland. [1] In its communication of 4 May 2004, the complainant indicates the Constitutional Tribunal ruled on 12 March 2004 that section 25/1 of the Trade Union Act is not inconsistent with article 12 of the Constitution of Poland.

[1] Article 12 of the Constitution states that: "the Republic of Poland shall ensure freedom for the creation and functioning of trade unions".

693. The complainant adds that, in fact, the Constitutional Tribunal considered that, by raising only the question of compatibility of section 25/1 with article 12 of the Constitution, NSZZ Solidarnosc chose the wrong Constitution article in its complaint. Article 12 is a general rule, which does not give either collective or individual legal rights, and cannot be substituted for other, more detailed articles of the Constitution. According to the complainant, the Constitutional Tribunal underlined that NSZZ Solidarnosc omitted to invoke articles 59 (concerning freedom of association in trade unions as a right of persons and citizens) and 31 (concerning admissibility of limitations of constitutional freedoms and rights) of the Constitution and that, because of this omission, it could not answer the question whether section 25/1 of the Trade Union Act was in conformity with those two articles.

694. The complainant also indicates that the Constitutional Tribunal stated that the complaint of NSZZ Solidarnosc also raised the question of conformity of section 25/1 with ILO Conventions and that this problem could only be resolved by the Committee on Freedom of Association.

B. The Government's reply

695. In its communication of 25 October 2004, the Government takes the view that the allegations of the complainant are groundless and do not constitute a violation of Conventions Nos. 87 and 98.

696. The Government indicates that the principle of freedom for the creation and functioning of trade unions in Poland is enshrined in the Constitution of Poland (article 12) and that this principle corresponds to the standards set out in Conventions Nos. 87 and 98.

697. The Government indicates that the question of conformity of section 25/1 of the Trade Unions Act with the Constitution of Poland was examined by the Constitutional Tribunal, which decided, on 24 February 2004, that the provisions of this section were not inconsistent with the Constitution.

698. The Government submits that the principal ground for the Constitutional Tribunal's ruling was the following: the Constitutional Tribunal stated that the general principle contained in article 12 of the Constitution is specified in the provisions of article 59 of the Constitution, which stipulate that the scope of freedom of association in trade unions and in employers' organizations may only be subject to such statutory limitations as are permissible in accordance with international agreements to which the Republic of Poland is a party. According to the Constitutional Tribunal's decision, making the rights of the establishment trade unions dependent on the number of members does not limit the basic right of trade unions to freedom of association.

699. The Government further explains that the provisions of section 25/1 of the Trade Union Act take into consideration the protection of entrepreneurs' rights and freedom of association, deriving from article 20 of the Constitution which stipulates that a social market economy, based on the freedom of economic activity, private ownership, solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland. According to the Government, the lack of any conditions would lead in practice to the limitation of freedom of economic activity, inconsistent with the role of a trade union.

700. On the other hand, the Government indicates that it has noticed that, if read in conjunction with section 25/1, the meaning of section 34 of the Trade Union Act could be unclear. For this reason, the Government proposed an amendment to the Trade Union Act, which was adopted by the Parliament on 8 October 2004 and sent on the same date for the President's

signature. The amendment is to enter into force in November 2004. According to the amended Act, the process of determining the number of members of a multi-establishment trade union organization will take into consideration the total number of members employed in all the establishments covered by the trade union in question. The Government indicates that this amendment allows for better protection of multi-establishment trade union members associated in small and medium enterprises.

C. The Committee's conclusions

701. *The Committee notes that in this case the complainant alleges that the Government has violated Conventions Nos. 87 and 98 by imposing, through the adoption of section 25/1 of the Trade Union Act, a legal requirement of a minimum membership of ten workers in order for an organization to exercise the rights recognized to establishment trade unions, thus giving the opportunity to employers to eliminate trade union organizations simply by reorganizing their companies and creating smaller divisions.*

702. *The Committee understands, in particular in light of the answer submitted to the complainant, on 23 May 2003, by the "Bureau of Research of the Parliament of the Republic of Poland Chancellery", that the minimum membership requirement applies to the recognition of certain rights and not to the creation of trade unions at the level of the enterprise; an organization which has less than ten members can be recognized as a trade union, but will not be able to exercise the rights recognized by the Trade Union Act to the establishment trade unions. Furthermore, the Committee notes that, according to the Government, an amendment to the Trade Union Act was adopted by the Parliament on 8 October 2004, clarifying section 25/1 so as to ensure that the process of determining the number of members of a multi-establishment trade union organization will take into consideration the total number of members employed in all the establishments covered by the trade union in question. Consequently, the Committee notes that the present complaint raises the question whether the imposition of a minimum requirement of ten members for a trade union to exercise the rights recognized to an establishment trade union under the Trade Union Act constitutes a violation of the right of workers to establish and join organizations of their own choosing, as provided by Article 2 of Convention No. 87.*

703. *In this respect, the Committee recalls that, while a minimum membership requirement is not in itself incompatible with the Convention, the number should be fixed in a reasonable manner so that the establishment of organizations is not hindered. What constitutes a reasonable number may vary according to the particular conditions in which a restriction is imposed [see 324th Report of the Committee on Freedom of Association, Case No. 2090, para. 198].*

704. *In the present case, the Committee considers that the minimum requirement of ten members to exercise the rights recognized to establishment trade unions would not appear to be excessive since, according to the Government's explanations on the amendment to the Trade Union Act adopted on 8 October 2004, workers from an enterprise of less than ten employees can form a multi-establishment trade union with other workers from different enterprises and such a trade union will be considered as having met the minimum requirement of ten members by taking into account the total number of members employed in all the establishments covered by the trade union. The Committee can therefore conclude that the minimum membership requirement set out in section 25/1 of the Trade Union Act does not jeopardize the right of workers to establish and join organizations of their own choosing.*

The Committee's recommendation

705. ***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. 2358

DEFINITIVE REPORT

Complaint against the Government of Romania presented by the National Trade Union Confederation "Cartel Alfa"

Allegations: The complainant organization alleges that legislation concerning the organization and conduct of public meetings is contrary to Convention No. 87, to the Constitution of Romania and to national legislation, in that it requires previous authorization for public meetings and allows the authorities to refuse such authorization for subjective reasons

706. The complaint is contained in a communication of June 2004 from the National Trade Union Confederation "Cartel Alfa".

707. The Government sent its observations in a communication dated 22 December 2004.

708. Romania has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

A. The complainant's allegations

709. In its communication of June 2004, the complainant organization states that Act No. 31/2004, which amends Act No. 60/1991, on the organization and conduct of public meetings, entitles local authorities to prohibit public meetings for subjective reasons.

710. Section 1, paragraph 2, of Act No. 31/2004 provides that public meetings may only be arranged following the submission of an application. According to section 8 of this Act, such an application must be examined by an approval committee consisting of the mayor, the town secretary and, where appropriate, representatives of the police and the civil guard. According to section 10 of the Act, the mayor can, at the behest of the committee, prohibit a public meeting from being held if she/he has evidence that leads her/him to believe that the meeting would lead to a violation of section 2 of the Act if it were to go ahead.

711. The complainant organization alleges that these provisions are in violation of: article 36 of the Constitution of Romania, which authorizes the conduct of demonstrations, marches and other peaceful meetings whose participants are unarmed; Act No. 54/2003 on trade unions, which entitles unions to organize their activities and formulate their programmes within the limits set by law; and Article 8 of Convention No. 87. The organization asks that the law be modified to guarantee freedom of public assembly without previous authorization.

B. The Government's reply

712. In its communication of 22 December 2004, the Government states that the adoption of Act No. 31/2004, which amends and supplements Act No. 60/1991, on the organization and conduct of public meetings, results from commitments made by Romania in its negotiations with the European Union concerning the adoption of the Community acquis in the fields of justice and internal affairs.

713. The provisions of Act No. 31/2004 cannot be in violation of article 36 of the Constitution of Romania, which deals with the right to vote – a matter which is not covered by the Act. Act No. 31/2004 does not regulate the ways in which trade union organizations are created and function; these questions are dealt with in article 40 of the Constitution and section 7, paragraph 1, of Act No. 54/2003, which provides in particular that trade union organizations shall be entitled to organize their activities and formulate their programmes within the limits set by law.

714. Section 1, paragraph 1, of Act No. 31/2004 provides that the right to organize and participate in meetings, strikes, demonstrations or any other form of gathering shall be guaranteed by law for all citizens, on condition that those gatherings which are to take place in public squares and on public roads, or in the open air, be announced in accordance with the law. Such gatherings shall be conducted in an orderly fashion and without the use of weapons, and shall be announced in advance.

715. In order to guarantee that trade union rights are respected, Romanian legislation places obligations both on the organizers of public meetings and on the authorities. These obligations are clearly defined in law and deal with the places, routes and timing of meetings. Authorization is refused only where there is a danger to public safety and order, in accordance with section 2 of Act No. 31/2004, which provides that "public meetings shall be conducted in a civilized and peaceful manner which ensures the protection of participants and the surroundings, without disturbing traffic on public roads ... without disrupting the work of public or private institutions ... or giving rise to unruly actions of a type to endanger public order or security or the safety, health or life of persons or to cause damage to private or public property".

716. Section 6 of Act No. 31/2004 states that organizers of public meetings shall give written notice to the mayor of the locality concerned. At the behest of the committee, the mayor can decide to stop a meeting from going ahead if she/he has information from specialist bodies showing clearly that the meeting would lead to a violation of section 2 of the Act, or if large-scale public works are being carried out at the same time, in the same place and on the same routes as those planned for the demonstration. Furthermore, section 5 of the Act prohibits public meetings from taking place in the immediate vicinity of railway stations, port facilities, airports, underground railway stations, hospitals, military sites and enterprises whose premises contain plant, equipment or machinery which, by their use, present an elevated level of risk. It is also prohibited for two or more different public meetings, whatever their nature, to take place at the same time and in the same place or along the same routes.

717. The Government concludes that Act No. 31/2004 does not constitute a violation of trade union rights. Its purpose is to protect the freedom of assembly and to ensure that meetings run smoothly with regard to the safety of participants and public security and order.

C. The Committee's conclusions

718. *The Committee notes that the complainant organization alleges that national legislation violates Convention No. 87 because it requires previous authorization for public meetings*

from the public authorities, which could be refused for subjective reasons. The Government replies that Act No. 31/2004, which applies to trade union organizations as well as to other groups wishing to organize public demonstrations, is intended solely to protect the freedom of assembly and to ensure that meetings run smoothly, with regard to the safety of participants and public security and order.

719. *While stressing that restrictions on the right to hold demonstrations must be reasonable and that the authorities must examine requests for authorization for such demonstrations on a case by case basis, the Committee recalls that 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, and that trade unions must conform to the general provisions applicable to all public meetings and must respect the reasonable limits which may be fixed by the authorities to avoid disturbances in public places [see* ***Digest of decisions and principles of the Freedom of Association Committee,*** *4th edition, 1996, paras. 138 and 141].*

720. *The Committee notes that, in this case, the local authorities do not have discretionary power as they can refuse to allow a public meeting to be held only on the advice of a competent committee, and on the basis of information which leads them to consider that there is a danger to public security and order. Noting also that the complaint does not raise any specific cases of abusive refusal to allow a public meeting or demonstration to take place, the Committee expects that the local authorities will respect the abovementioned principles in their examination of applications for authorization of trade union demonstrations.*

The Committee's recommendation

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

CASE NO. 2383

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

Complaint against the Government of United Kingdom presented by the Prison Officers' Association (POA)

Allegations: The complainant alleges that the legislation deprives prison officers of the right to take industrial action and that they do not enjoy adequate compensation guarantees to protect their interests in the absence of the right to strike

722. The complaint is contained in a communication from the Prison Officers' Association (POA) dated 20 August 2004.

723. The Government replied in a communication dated 1 November 2004.

724. The United Kingdom has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining

Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainant's allegations

725. In its communication of 20 August 2004, the complainant states that the statutory prohibition of industrial action by prison officers found in section 127 of the Criminal Justice and Public Order Act 1994 (the 1994 Act – see annex) constitutes a breach of the right to strike – as prison officers do not exercise authority in the name of the State and do not provide essential services in the strict sense of the term – and that no adequate compensatory measures have been put in place whereby prison officers or their union can ensure that their interests are protected in the absence of a right to strike.

726. The complainant states that, although it had been able to stage industrial action for over half a century, since 1993 this right has been restricted as a result initially of certain court decisions and then section 127 of the 1994 Act. The effect of section 127 is to make it unlawful in all circumstances for prison officers to call for a strike or other form of industrial action. Such a call would inevitably induce a prison officer to withhold his services or to commit a breach of discipline and would therefore expose the union to suit by the Secretary of State under section 127(3). Such suit could include an action or an injunction for damages.

727. The complainant adds that, although there are proposals to amend section 127 so that it does not apply to England, Wales and Scotland, such proposals are premised on the existence of a legally binding no-strike agreement between the complainant and the public sector employers in England, Wales and Scotland. In respect of Northern Ireland, where there is no legally binding no-strike agreement, the Government has reaffirmed its intention to retain section 127. Moreover, as there is no legally binding no-strike agreement covering prison officers working in the private sector, there is now some doubt as to whether prison officers in the private sector will be included in the proposed exemption from section 127 or whether, like the prison officers in Northern Ireland, they will continue to be subject to section 127. The complainant states that the granting of the right to strike should not be premised on an agreement not to use that right because the voluntary nature of the agreement is undermined if there is a threat to reinstate the criminal prohibition should the agreement be terminated.

The exercise of authority in the name of the State

728. The complainant argues that the restriction of the right to strike of prison staff on the basis that the latter exercise authority in the name of the State is not justified. In the first place, prisoner custody officers who are employed by private companies owe their duty of loyalty to their employer, take their instructions from their employer and act in the name of their employer. They are not public employees, and they are not subject to the Code of Discipline which applies to public sector prison officers, nor do they have the powers of a constable which are afforded to public sector prison officers.

729. In the second place, prison officers in the public sector do not exercise authority in the name of the State: first, because they perform the same work as private sector prison officers and it would be anomalous to treat one group as exercising authority in the name of the State and the other as not doing so; second, they are not in a position to take decisions on behalf of the State but simply to be carrying out public functions. Prison officers are under a strict code of discipline, and are under the orders of the prison governor but do not actively exercise authority in the sense of making decisions on behalf of the State.

730. The complainant emphasizes that this contention is not changed by the fact that prison officers in the public sector were given the power, authority, protection and privileges of a constable by section 8 of the Prison Act 1952. The common law powers of arrest and search which belong to a constable are now heavily regulated by statute and are almost exclusively in the hands of the police, thus merely enabling prison officers to lawfully apprehend an absconding prisoner. Even in exercising this function, prison officers remain under the orders of the prison governor and are bound by the prison code of discipline. Moreover, prison officers in Scotland do not have the powers of a constable and it would be anomalous to regard prison officers in England, Wales and Northern Ireland as exercising authority in the name of the State on the basis of their powers of a constable, while prison officers in Scotland are not considered to exercise such authority.

The provision of essential services

731. The complainant considers that the prison service is not an essential service in the strict sense of the term. Interruption of the prison service by industrial action has caused discomfort and inconvenience by obliging prisoners to remain in their cells longer than they should or depriving them temporarily of various prison activities, but this has not endangered their life, personal safety or health.

Compensatory guarantees

732. The complainant submits that even if it were held that prison officers are public servants exercising authority in the name of the State, so that abridgement of the right to take industrial action is justified, the necessary condition for such abridgement, namely, the provision of adequate compensatory guarantees, does not exist.

733. The complainant states that there is no compensatory mechanism in the private sector. The Pay Review Body set up for prison officers in England and Wales does not provide pay reviews for the nine private sector prison establishments and there are no procedures for resolving collective disputes or grievances as found in the Industrial Relations Procedure Agreement in relation to public sector prisons in England and Wales.

734. In addition to this, the complainant notes that in England and Wales, two forms of machinery for settling terms and conditions in the prison service have been established. Pay is determined by the Pay Review Body (established only in March 2001 although the power to establish it is found in the Act of 1994). Other disputes are processed through the Industrial Relations Procedure Agreement (IRPA), also known as the Voluntary Agreement. In Northern Ireland, the Pay Review Body (set up in February 2001 and having given its first report in February 2003) has recommendatory powers only and there is no mechanism for resolving non-pay disputes.

735. In Scotland, there is no Pay Review Body. There is a legally binding disputes procedure agreement, similar to that in England and Wales, which refers to an interim procedure regarding pay. There is also a "partnership agreement".

736. With regard to the Pay Review Body which functions in England and Wales, the complainant states that this Body is found in the 1994 Act, section 128. Its remit is "to examine and report on such matters relating to the rates of pay and allowances to be applied to the prison service in England and Wales, and Northern Ireland, as may from time to time be referred to them by the Secretary of State" (Regulation 2 of the Prison Service (Pay Review Body) Regulations, 2001). Its recommendations and advice are based on its independent judgement, but it has the duty to give the representative organizations the opportunity of submitting evidence and making representations (Regulation 5 of the

Prison Service (Pay Review Body) Regulations, 2001). These organizations include the prison service, the complainant (POA) and the staff. The Pay Review Body does not provide pay reviews for the nine private sector prison establishments.

737. The complainant submits that the Pay Review Body fails to fulfil the criteria of adequate compensatory measures in three major respects. Firstly, its members, including the chairman, are appointed by the Prime Minister (Schedule to the Prison Service (Pay Review Body) Regulations, 2001). Secondly, it has no power to make binding pay awards. Its remit is strictly to report and recommend. Regulation 8 of the Prison Service (Pay Review Body) Regulations, 2001, provides that "where, following the reference of any matter to them the Pay Review Body have made a report, the Secretary of State may determine the rates of pay and allowances to be applied to the prison service in England and Wales, and Northern Ireland, in accordance with the recommendations of the Pay Review Body, or make such other determination with respect to the matters in that report as he thinks fit". Thirdly, there is no duty on the Minister to implement the award promptly or at all. The first report of the Pay Review Body (presented to Parliament in January 2002) recommended a general increase in basic pay, representing an annual rise of 4.8 per cent with effect from 1 January 2002. However, although the recommendations were accepted in principle, it was decided that the general pay recommendation would be paid in two instalments. Thus, only 3.5 per cent was awarded in January 2002 and the balance in January 2003 (Prison Service Pay Review Body, Second Report on England and Wales 2003, paragraph 1.3-4).

738. The complainant further adds that in England and Wales disputes apart from pay are dealt with through the Voluntary Agreement entered into on 11 April 2001 between the prison service, acting on behalf of the Secretary of State for the Home Department, and the complainant. The aim of the agreement is to establish procedures for resolving all collective disputes or grievances except for those concerning pay, individual grievances and disciplinary action. If the parties fail to agree informally, the matter proceeds to conciliation by the Advisory Conciliation and Arbitration Service (ACAS). If no agreement is reached following conciliation, either party may refer the matter to the director-general of the prison service and the general secretary of the POA for them to decide whether or not to refer the matter to arbitration. The arbitrator is nominated by ACAS. However, the arbitrator's award is not fully binding on the Secretary of State. Paragraph 14 of the Schedule to the Voluntary Agreement gives the Secretary of State the power to overrule the award of the arbitrator for reasons of national security or public interest. To exercise the power, the Secretary of State must give a reasoned explanation to the House of Commons or the Prime Minister. If the Secretary of State does not exercise his power to overrule the award, the award will be implemented.

739. The complainant adds that the Voluntary Agreement is unique in British industrial relations terms in being legally enforceable (paragraph 4(1)). Remedies are not, however, symmetrical. In the event of a breach by the complainant, the prison service may apply for an injunction. In the event of a breach by the prison service, the complainant may only seek a declaratory order (paragraph 4(10)). The asymmetry of the Voluntary Agreement is further underscored by the inclusion of a wide-ranging no-strike undertaking by the complainant. Under paragraph 4(11), the complainant agrees not to induce, authorize or support any form of industrial action by any of its members relating to a dispute concerning any matter, whether covered by the agreement or not, which would have the effect of disrupting the operations of the prison service. Under paragraph 4(13), if there is a dispute about whether the action would have the effect of disrupting operations of the prison service, the question will be decided by the Secretary of State, whose decision is final. The no-strike clause is wider than that of section 127 of the 1994 Act in that the latter applies only to inducements to a prison officer to withhold his services as such an officer or to commit a breach of discipline, whereas clause 4 refers to any disruption of the

operations of the prison service. The result is that in return for a comprehensive surrender of the right to strike, the complainant's only resort is for declaratory relief from the court in the event of breach by the prison service.

740. The complainant notes that it entered into the Voluntary Agreement at a time of weakness when its bargaining strength was not commensurate with that of the prison service (not least because of the statutory bar on industrial action). It has considered (and might consider again) giving notice to terminate the Voluntary Agreement for the reason that it is unbalanced in the respects outlined above. Until such notice, if given, expires, the POA is obliged to comply with the terms of the Voluntary Agreement. However, because of the statutory bar on industrial action contained in section 127, the complainant continues to be deprived of an essential means of applying industrial pressure to negotiate a better or, indeed any, replacement agreement.

B. The Government's reply

741. In a communication dated 1 November 2004, the Government states in summary that prison officers are pubic servants who exercise authority in the name of the State and/or are engaged in the provision of essential services. It is therefore permissible under Conventions Nos. 87 and 98 to prohibit them from taking strike action and, in any event, adequate measures have been taken to compensate them for this limitation on their freedom of association.

742. The Government explains that the background to the enactment of sections 126-128 of the Criminal Justice and Public Order Act, 1994 (the 1994 Act) was the industrial action taken at a number of prisons throughout the United Kingdom in the late 1980s and early 1990s, with an extremely negative effect both on the prisoners and the administration of justice. Section 126 of the 1994 Act specified that prison officers are "workers" and, accordingly, the complainant (POA) is "an organization of workers" and therefore a trade union as defined under section 1 of the Trade Union and Labour Relations (Consolidation) Act, 1992 (the 1992 Act). Thus, the POA and its members have the same freedom of association as any other worker under UK law. The effect of section 127 of the 1994 Act is to create a statutory duty, which is owed to the relevant minister or ministers, not to induce a prison officer either to withhold his services or to commit a breach of discipline. The section therefore creates a statutory duty not to organize industrial action in the prison service. This prevents the organizing of strike action by prison officers whether they are employed by the State or by private sector companies to which certain of the functions of the prison service have been contracted out. The prohibition also applies in all parts of the United Kingdom. Section 128 of the 1994 Act finally paved the way for the creation of the Prison Service Pay Review Body.

743. The Government adds that in England, Wales and Scotland the continued existence of section 127 has, until recent months, engendered a significant improvement in relations between the Government and the complainant, and a stable employee relations environment. Ongoing good relations led, in England, Wales and Scotland, to the establishment of voluntary agreements, which include a provision preventing the organizing of industrial action by prison officers and procedural agreements on the resolution of trade disputes (in England and Wales the Industrial Relations Procedure Agreement (IRPA), and the Voluntary Industrial Relations Agreement (VIRA) in Scotland). The Government then established a Pay Review Body in England, Wales and Northern Ireland which was inextricably linked to the introduction of the voluntary agreements in that the prison service gave up the right to set pay increases in exchange for the complainant's agreement not to organize industrial action.

744. The Government adds that on 27 January 2004 the complainant gave the required one-year's notice to withdraw from the Voluntary Agreement covering England and Wales. The new voluntary agreement, which will be known as the Joint Industrial Relations Procedural Agreement (JIRPA), has been mandated through a ballot of the complainant's membership but has yet to be signed by both signatories. In recent months, the complainant has shown its intention to take industrial action (against the principles of the present Voluntary Agreement and the future JIRPA) over issues such as health and safety of its members in the Northern Ireland Prison Service and also the recent indication of the implementation of market testing.

745. The Government indicates that its current position is that it considers that the work of prison officers and the circumstances in which it is carried out are such that industrial action in the prison service is not appropriate, particularly given the alternative means which are available for the resolution of disputes. It would, however, prefer to achieve this objective by voluntary means and has, therefore, indicated its willingness to repeal section 127 in relation to those parts of the prison service where there is in place a voluntary agreement under which the complainant undertakes not to organize industrial action. Difficulties have, however, arisen because the complainant has given notice of termination of the Voluntary Agreement in force in respect of England and Wales, and the JIRPA has not yet been signed. There is no voluntary agreement in place in Northern Ireland, and for this reason it is not proposed to repeal section 127 in relation to Northern Ireland. In the absence of any applicable voluntary agreement, section 127 will also continue to apply where certain of the functions of the prison service have been contracted out to private sector companies.

The exercise of authority in the name of the State

746. The Government considers that there can be no doubt that prison officers fall into the category of public servants exercising authority in the name of the State, on the basis of both the functions which they perform and the special powers and protection which have been conferred on them so that they can carry out their work. Moreover, there is no material distinction in this regard between prison officers in the employment of the Crown and prisoner custody officers employed by private sector companies to whom certain of the functions of the prison service have been contracted out.

747. As regards the functions performed by prison officers and prisoner custody officers, the Government holds that they are the agents by which the State effects the deprivation of liberty of its subjects who are awaiting trial or have been convicted of criminal offences whilst at the same time ensuring their well-being. In each case, they assist in the implementation of the decision of a court that the individual should be held in custody. In the context of the prison, they are responsible for ensuring that the prisoners do not escape and do not injure each other, or themselves, or the staff or visitors to the prison. They also exercise powers over the prisoners in relation to their daily activities, the degree of liberty which they enjoy within the prison and their privileges and entitlements. Prisoner custody officers also have an important role in accompanying prisoners to and from police stations and courts, and they are responsible for preventing the prisoner from effecting an escape or otherwise injuring members of the public or the court staff or the judiciary. The Government concludes that, therefore, prison officers and prisoner custody officers have a central role in the administration of justice and, in this capacity, exercise authority in the name of the State.

748. The Government adds that prison officers are given special powers to enable them to do their work. In the case of prison officers employed by the Crown, when performing their duties they have the powers of a constable (a police officer), including common law powers of arrest and search. They also have the protections afforded to a police officer. An

assault on a prison officer constitutes an assault on a constable in the execution of his duty and attracts a criminal sanction. In the case of prisoner custody officers employed by private sector companies, special powers are conferred on them by statute in the Criminal Justice Act, 1991. They must be approved and certified by the Secretary of State in relation to both custodial duties and escort functions. Their powers include powers to search the prisoner, to prevent his escape from lawful custody, to ensure good order and discipline on his part and to give effect to any directions as to the prisoner's treatment which are given by a court. They also have duties to prevent or detect crime by prisoners as well as to attend to their well-being. Prisoner custody officers have the right to use reasonable force where necessary and they are also given special protection by the criminal law against assault by prisoners and wilful obstruction. Thus, the Government concludes both prison officers employed by the Crown and prisoner custody officers employed by a private sector company exercise authority in the name of the State and have special powers and protections conferred on them by the law in order to do so. It is quite apparent that prison officers do take "decisions on behalf of the State" – a criterion used by the complainant in its submissions – as they are responsible for making decisions which affect the activities, the liberty and the other rights and privileges of prisoners, including decisions about discipline.

749. Moreover, according to the Government, it does not follow from the fact that prison officers have a right to organize that they must also have a right to strike. There is no illogicality and it is indeed in conformity with freedom of association principles to hold that prison officers should be entitled to form and join trade unions and participate in trade union activities, as they are under United Kingdom law, whilst at the same time holding that they are not entitled to take strike action.

750. As for the position in Scotland, the Government indicates that, although prison officers do not have the powers of a constable, they have the same functions as prison officers in England and Wales and are provided by statute with analogous powers in order to perform their duties effectively.

The provision of essential services

751. The Government states that it is self-evident that the interruption of the service provided by prison officers and prisoner custody officers would endanger the life, personal safety or health of part of the population – primarily the prisoners, but also the wider public. Self-evidently, a significant proportion of the prison population comprises individuals who are a danger to others. An important part of the role of the prison officer is to ensure that, for example, prisoners are prevented from injuring fellow prisoners or other persons present in the prison, that they are prevented from escaping (in order to ensure the protection of the lives and personal safety of at least part of the population), that the health and well-being of prisoners is ensured (including by preventing prisoners from committing self-harm or suicide or preventing the trafficking and consumption of illegal drugs and alcohol), that prisoners have access to activities to ensure their general well-being, their personal safety, their health, their rehabilitation and ultimate resettlement in the community, that prisoners are well fed, and receive appropriate medical treatment, education, training, exercise and visits from their families.

Compensatory guarantees

752. The Government submits that adequate compensatory measures are in place. In England and Wales the voluntary agreement between HM Prison Service and the complainant, which includes the IRPA, governs all matters of dispute other than pay and individual grievance or disciplinary issues. Pay is a matter for the Pay Review Body and individual

grievance or disciplinary issues are matters for procedures set out in the staff handbook. In Scotland, pay is negotiated through collective bargaining arrangements and the Pay Review Body mechanism does not apply. Disputes may be referred to the Advisory, Conciliation and Arbitration Service (ACAS) and ultimately binding arbitration using the VIRA dispute resolution mechanism.

753. As to the complainant's criticisms of the IRPA, the Government considers that they are not significant. The Government states that the award of the arbitrator is binding on the Secretary of State subject only to a power to overrule the award for reasons of national security or public interest. This power has never been invoked in practice and it is difficult to envisage circumstances in which it would be, given that the arbitrator is nominated by ACAS and given that it is extremely unlikely that a decision of the arbitrator will affect national security or be contrary to the public interest. Indeed, this has not occurred in any of the 31 arbitrations which have taken place under this provision.

754. As to the argument that the complainant may only seek a declaratory order as opposed to an injunction, the Government holds that this is both misconceived and immaterial. Firstly, paragraph 4(10) of the IRPA states that the relief which the complainant may seek includes seeking a declaratory order. It does not limit the relief to be sought and, in any event, the remedy in the case of breach is a matter for the discretion of the court. Secondly, in any event a declaratory order is a binding declaration as to the rights of the parties and it is inconceivable that the Government would act contrary to such an order. There is therefore no material difference between such an order and an injunction.

755. As far as the Pay Review Body is concerned, the Government indicates that the fact that members of the Pay Review Body are appointed by the Prime Minister does not impair their independence or create any risk of bias. There are many circumstances in which arbitrational bodies have their members appointed by one arm of the State, and these members must then adjudicate in disputes in which another arm of the State is a party. In all these circumstances, the body in question has carried out its work fairly and impartially. Although the recommendations of the Pay Review Body are not binding in law, in practice they would only be departed from in exceptional circumstances. The practice and procedure of the Pay Review Body is such that adequate, impartial and speedy conciliation can be, and has been, implemented, leading to a result satisfactory to both parties. As for the complainant's statement that there is no duty on the minister to implement the award promptly or at all, the Government states that although the recommendations of the Pay Review Body are not legally binding, they are complied with in practice. With regard to the reference made by the complainant to the decision to implement the 2002 recommendation in two stages, the Government notes that the substance of the recommendation was implemented by the Secretary of State in principle and in practice. The fact that budgetary powers remain, out of necessity, with the legislative authority, resulted in an alteration of the practicalities of the recommendation, but ultimately did not prevent compliance with the terms of the award handed down by the Pay Review Body.

756. The Government concludes by recalling that sections 126-128 of the 1994 Act are linked and cannot be judged independently of each other. The Pay Review Body takes away from the prison service the discretion to determine the percentage increase in pay awards and has since its formation, consistently determined that there should be above-inflation pay awards in the prison service. The Government considers, therefore, that there are sufficient compensatory measures in place to justify the prohibition on strike action effected by section 127 of the 1994 Act.

C. The Committee's conclusions

757. *The Committee notes that the present case concerns allegations that section 127 of the Criminal Justice and Public Order Act 1994 deprives prison officers of the right to take industrial action and that they do not enjoy adequate compensation guarantees to protect their interests in the absence of the right to strike.*

758. *The Committee notes that the complainant claims, and the Government agrees, that section 127 of the 1994 Act makes it unlawful under all circumstances for prison officers to call for a strike or other form of industrial action. Such a call would inevitably induce a prison officer to withhold his or her services or to commit a breach of discipline and would expose the union to suit by the Secretary of State, including a possible action or an injunction for damages. Section 127 is applicable to both prison officers employed by the State and prisoner custody officers employed by private sector companies to which certain of the functions of the prison service have been contracted out. The Committee notes that the Government is currently considering amending section 127 on the premise that voluntary no-strike agreements have been reached in England, Wales and Scotland between the complainant and the prison authorities. However, as such agreements do not exist in Northern Ireland and in respect of the nine prisons where certain of the functions have been contracted out to private sector companies, the Government may maintain the prohibition of section 127 in this respect.*

759. *The Committee recalls that the right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population) [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 526].*

760. *The Committee notes that, according to the complainant, the prison officers' right to strike should not be restricted as they do not exercise authority in the name of the State and do not provide essential services in the strict sense of the term. Moreover, even if the restrictions on the right to strike of prison officers are justified, there are no adequate compensatory guarantees in this respect. The Committee also notes that the Government rejects these allegations and submits that prison officers exercise authority in the name of the State and provide essential services in the strict sense of the term while there are adequate compensatory guarantees for the restriction of their right to strike.*

The exercise of authority in the name of the State

761. *The Committee notes that, according to the complainant, prison officers employed by the State or prisoner custody officers employed by private sector companies do not exercise authority in the name of the State. With regard to prisoner custody officers who are employed by private sector companies to which certain of the functions of the prison service have been contracted out, the complainant points out that they owe their duty of loyalty to their (private) employer, are not subject to the code of discipline applicable to public sector prison officers and do not have the powers of a constable. With regard to prison officers in the public sector, the complainant points out that they perform the same work as those of the private sector and it would be anomalous to treat one group as exercising authority in the name of the State and the other as not doing so. Moreover, they are not in a position to take decisions on behalf of the State but simply to carry out public functions. As for their power as constable, the complainant considers that these powers are now heavily regulated by statute and are almost exclusively in the hands of the police, merely enabling prison officers to lawfully apprehend an absconding prisoner. Finally, prison officers in Scotland do not have the powers of a constable and it would be*

anomalous to treat other prison officers as exercising authority in the name of the State on the basis of their powers as constable while prison officers in Scotland are not considered to exercise such authority. Thus, according to the complainant, neither prison officers nor prisoner custody officers exercise authority in the name of the State.

762. *The Committee notes that, according to the Government, prison officers fall into the category of public servants exercising authority in the name of the State (without any material distinction between prison officers employed by the State and prisoner custody officers employed by private sector companies to which certain of the functions of the prison service have been contracted out) because they are the agents by which the State effects the deprivation of liberty of its subjects who are awaiting trial or have been convicted of criminal offences. They therefore have a central role in the administration of justice. Moreover, prison officers are given the powers of a constable to enable them to do their work, while special powers are conferred in this respect by statute on prison officers in Scotland and prisoner custody officers employed by private sector companies to which certain of the functions of the prison service have been contracted out. Thus, all prison officers and prisoner custody officers are responsible for making decisions which affect the activities, the liberty and the other rights and privileges of prisoners including decisions about discipline and, in this sense, exercise authority in the name of the State. Finally, according to the Government, it does not follow from the fact that prison officers have a right to organize that they must also have the right to strike.*

763. *The Committee has considered that officials working in the administration of justice are officials who exercise authority in the name of the State and whose right to strike could thus be subject to restrictions or even prohibitions [see **Digest**, op. cit., para. 537]. The Committee considers that to the extent that prison officers and prisoner custody officers exercise authority in the name of the State, their right to strike can be restricted or even prohibited.*

The provision of essential services

764. *The Committee notes that, according to the complainant, the prison service is not an essential service in the strict sense of the term, because interruption of this service by industrial action has not endangered the life, personal safety or health of the prisoners, even though it has caused discomfort and inconvenience.*

765. *The Committee notes that the Government enumerates a list of duties performed by prison officers and prisoner custody officers and argues that it is self-evident that the interruption of this service would endanger the life, personal safety or health of part of the population – primarily, the prisoners but also the wider public.*

766. *The Committee recalls that to determine situations in which a strike could be prohibited, the criteria which have to be established are the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population [see **Digest**, op. cit., para. 540]. The Committee considers that the prison service is clearly one where the interruption of the service could give rise to an imminent threat to the life, personal safety or health of the whole or part of the population, in particular, the prisoners and the wider public.*

767. *Considering that the prison service constitutes an essential service in the strict sense of the term and that prison officers, as well as prisoner custody officers to the extent that they perform the same functions, exercise authority in the name of the State, the Committee is of the view that it is in conformity with freedom of association principles to restrict or prohibit the right to take industrial action in the prison service.*

Compensatory guarantees

768. *The Committee notes that, according to the complainant, even if it were held that abridgement of the right to take industrial action is justified, the necessary condition for such abridgement, namely, the provision of adequate compensatory guarantees, does not exist.*

769. *With regard to prisoner custody officers employed by private sector companies to which certain of the functions of the prison have been contracted out, the complainant states that there is no mechanism at all to compensate for the limitation placed on their right to strike. The Committee notes that the Government does not provide any information in this respect. The Committee recalls that where the right to strike is restricted or prohibited in certain essential undertakings or services, adequate protection should be given to the workers to compensate for the limitation thereby placed on their freedom of action with regard to disputes affecting such undertakings and services [see* ***Digest****, op. cit., para. 546]. The Committee requests the Government to take the necessary measures so as to establish appropriate mechanisms in respect of prisoner custody officers in private sector companies to which certain of the functions of the prison have been contracted out so as to compensate them for the limitation of their right to strike, and to keep it informed in this respect.*

770. *With regard to England and Wales, the complainant states that two forms of machinery for settling the terms and conditions of employment in the prison service have been established. Pay is determined by the Pay Review Body (which has also been set up in respect of Northern Ireland), and other disputes are processed through the Industrial Relations Procedure Agreement (IRPA), otherwise known as the Voluntary Agreement.*

771. *With regard to the Pay Review Body, the complainant states that its recommendations and advice are based on its independent judgement, but it has the duty to give the representative organizations the opportunity of submitting evidence and making representations. According to the complainant, this body fails to fulfil the criteria of adequate compensatory measures in three major respects: (1) all members of the Pay Review Body, including the chairman, are appointed by the Prime Minister; (2) the Pay Review Body has no power to make binding arbitration awards; (3) there is no duty on the minister to implement the award promptly or at all (the first general pay recommendation of the Pay Review Body which was presented to Parliament in 2002 was according to the complainant implemented through payment in two instalments rather than at once).*

772. *The Committee takes note of the Government's indication that: (1) the fact that the members of the Pay Review Body are appointed by the Prime Minister does not impair their independence or create any risk of bias as it is common to have arbitrational bodies which have their members appointed by one arm of the State and then adjudicate in disputes in which another arm of the State is a party; (2) although the recommendations of the Pay Review Body are not binding in law, in practice they could only be departed from in exceptional circumstances; (3) as for the implementation of the 2002 recommendation in two stages, the fact that budgetary powers remain, out of necessity, with the legislative authority, resulted in an alteration of the practicalities of the recommendation, but ultimately did not prevent compliance with the terms of the award.*

773. *With regard to point (1) above, the Committee notes that the Government does not specify the method (including any relevant guidance or criteria) for the appointment of the members of the Pay Review Body, and recalls that in mediation and arbitration proceedings it is essential that all the members of the bodies entrusted with such functions should not only be strictly impartial but if the confidence of both sides, on which the successful outcome even of compulsory arbitration really depends, is to be gained and*

*maintained, they should also appear to be impartial both to the employers and to the workers concerned [see **Digest**, op. cit., para. 549]. With regard to point (2) above, the Committee notes that the Government does not specify which exceptional circumstances might justify a departure from the recommendations of the Pay Review Body. The Committee also observes that the text of Regulation 8 of the Prison Service (Pay Review Body) Regulations, 2001, seems to leave complete discretion upon the Secretary of State as regards the implementation of the recommendations of the Pay Review Body, by providing that "where, following the reference of any matter to them, the Pay Review Body has made a report, the Secretary of State may determine the rates of pay and allowances to be applied to the prison service in England and Wales, and Northern Ireland, in accordance with the recommendations of the Pay Review Body, or make such other determination with respect to the matters in that report as he thinks fit". The Committee recalls that as regards the nature of appropriate guarantees in cases where restrictions are placed on the right to strike in essential services and the public service, restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented [see **Digest**, op. cit., para. 547]. The Committee requests the Government to initiate consultations with the complainant and the prison service with a view to improving the current mechanism for the determination of prison officers' pay in England, Wales and Northern Ireland. In particular, the Committee requests the Government to continue to ensure that: (i) the awards of the Prison Service Pay Review Body are binding on the parties and may be departed from only in exceptional circumstances; and (ii) the members of the Prison Service Pay Review Body are independent and impartial, are appointed on the basis of specific guidance or criteria and have the confidence of all parties concerned. The Committee requests to be kept informed in this respect.*

774. *As for the Voluntary Agreement, which deals with disputes apart from pay in England and Wales, the complainant states that: (1) the arbitration provided in the Agreement is not binding (paragraph 14 of the Schedule to the Voluntary Agreement gives the Secretary of State the power to overrule the award for reasons of national security or public interest; to exercise this power, the Secretary of State must give a reasoned explanation to the House of Commons or the Prime Minister); (2) although the Voluntary Agreement is enforceable, remedies are not symmetrical: in the event of a breach by the complainant, the prison service may apply for an injunction while in the event of a breach by the prison service, the complainant may only seek a declaratory order. This asymmetry is further underscored, according to the complainant, by the inclusion in the agreement of a wide-ranging no-strike undertaking.*

775. *The Committee notes that, according to the Government: (1) the award of the arbitrator is binding on the Secretary of State subject only to a power to overrule the award for reasons of national security or public interest; this power has never been invoked in practice and it is difficult to envisage circumstances in which it would be; (2) the relief to be sought is not limited to a declaratory order and in the event of a breach the remedy is a matter for the discretion of the court. In any event, a declaratory order is binding and it is inconceivable that the Government would act contrary to such an order. The Committee takes note of this information and expects that the Government will continue to act in line with any declaratory order.*

776. *With regard to Scotland, the complainant states that there is a legally binding disputes procedure agreement, which refers to an interim procedure regarding pay, as well as a partnership agreement. In this respect, the Government indicates that in Scotland pay is negotiated through collective bargaining arrangements and disputes may be referred to the Advisory, Conciliation and Arbitration Service (ACAS) and ultimately binding*

arbitration using the Voluntary Industrial Relations Agreements (VIRA) dispute resolution mechanisms. The Committee takes note with satisfaction of this information.

The Committee's recommendations

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

(a) Noting that the prison service is an essential service in the strict sense of the term where the right to strike can be restricted or even prohibited, the Committee requests the Government to take the necessary measures so as to establish appropriate mechanisms in respect of prisoner custody officers in private sector companies to which certain of the functions of the prison have been contracted out so as to compensate them for the limitation of their right to strike.

(b) The Committee requests the Government to initiate consultations with the complainant and the prison service with a view to improving the current mechanism for the determination of prison officers' pay in England, Wales and Northern Ireland. In particular, the Committee requests the Government to continue to ensure that:

(i) the awards of the Prison Service Pay Review Body are binding on the parties and may be departed from only in exceptional circumstances; and

(ii) the members of the Prison Service Pay Review Body are independent and impartial, are appointed on the basis of specific guidance or criteria and have the confidence of all parties concerned.

(c) The Committee requests to be kept informed of developments in respect of the above.

Annex

Section 127 of the Criminal Justice and Public Order Act 1994:

"(1) A person contravenes this subsection if he induces a prison officer: (a) to withhold his services as such an officer; or (b) to commit a breach of discipline.

(2) The obligation not to contravene subsection (1) above shall be a duty owed to the Secretary of State …

(3) Without prejudice to the right of the Secretary of State … by virtue of the preceding provision of this section, to bring civil proceedings in respect of any apprehended contravention of subsection (1) above, any duty mentioned in subsection (2) above, which causes the Secretary of State to sustain loss or damage shall be actionable … against the person in breach.

(4) In this section "prison officer" means any individual who –

(a) holds any post, otherwise than as a chaplain or assistant chaplain or as a medical officer, to which he has been appointed for the purposes of section 7 of the [1952 c.52] Prison Act 1952 or under section 2(2) of the [1953 c.18 (N.I.)] Prison Act (Northern Ireland) 1953 (appointment of prison staff);

(b) holds any post, otherwise than as a medical officer, to which he has been appointed under section 3(1) of the Prisons (Scotland) Act 1989; or

(c) is a custody officer within the meaning of Part I of this Act or a prisoner custody officer, within the meaning of Part IV of the Criminal Justice Act 1991 or Chapter II or III of this Part.

(5) The reference in subsection (1) above to a breach of discipline by a prison officer is a reference to a failure by a prison officer to perform any duty imposed upon him by the prison rules or any code of discipline having effect under those rules or any other contravention by a prison officer of those rules."

CASE NO. 2380

INTERIM REPORT

Complaint against the Government of Sri Lanka presented by the International Textile, Garment and Leather Workers' Federation (ITGLWF)

Allegations: The complainant alleges that Workwear Lanka, located in the Biyagama Free Trade Zone, has undertaken a campaign of intimidation and harassment, including the dismissal of 100 workers suspected of trade union membership, in order to prevent its workers from setting up a branch of the Free Trade Zones and General Services Employees Union

778. The complaint is set out in two communications made by the International Textile, Garment and Leather Workers' Federation (ITGLWF) dated 18 March 2004 and 23 July 2004, on behalf of its affiliate, the Free Trade Zone and General Services Employees' Union (FTZGSEU).

779. The Government made its observations in a communication dated 4 January 2005.

780. Sri Lanka has ratified both 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

781. The complaint relates to the workers of Workwear Lanka (Pvt.) Ltd. located in the Biyagama Free Trade Zone. The complainant alleges that the management of the company has indulged in various acts of anti-union discrimination to prevent the workers of the company from unionizing themselves. According to the complainant, the workers in the plant started the process of forming a branch union towards the end of December 2003. On 27 December 2003, the workers held a work stoppage to protest against the management's verbal abuse aimed at members of the Employees' Council who had gone to the office to raise their concern about the company's failure to pay the month's wages and the end of year bonus. The next day, the workers held a founding meeting to set up a branch union of the Free Trade Zones and General Services Employees Union (FTZGSEU). Thereafter, the management spoke to every single worker about their union affiliation asking them to resign from the membership of the union. On 31 December 2003, the management issued letters to the vice-president, treasurer and committee members of the branch union and

three other activists accusing them of going on strike on 27 December and thus causing financial losses to the company.

782. The complainant alleges that the company stepped up its anti-union campaign after the union wrote to the company on 1 January 2004, notifying the names of its office-bearers. The next day when the night shiftworkers reported for work, five of the office-bearers of the branch union were denied work. On 4 January, the union wrote to the company asking that it immediately cease the harassment of its union members. On the same day, the union also wrote to the Minister of Labour and the Commissioner of Labour requesting the immediate intervention of the labour authorities. On 8 January, the company issued a charge sheet against the branch secretary holding her responsible for the work stoppage on 27 December and the company's subsequent losses. The management also demoted a number of other workers because they refused to resign from the union.

783. The complainant further alleges that the representatives of the company failed to turn up at the meeting convened by the Commissioner of Labour on 12 January 2004. The management then wrote to the office-bearers of the union indicating that it would not dismiss them if they pled guilty to the charges brought by the company and asked for a pardon in writing. The union office-bearers refused. The representatives of the company then wrote to the Additional Commissioner General of Labour indicating that there was no union in the plant and if the union continued to claim membership, then it should submit a membership list with members' signatures. The union responded that it had already informed the management of the creation of the union and furnished the names of the office-bearers and that it would submit the requested membership list on condition that the company put an end to its campaign of harassment and reinstate the dismissed workers. On 3 February, those union leaders and activists who had been asked to admit their guilt and ask for a pardon were dismissed. On 9 February, the representatives of the company again failed to turn up at the meeting convened by the Additional Commissioner General of Labour. According to the complainant, by 10 February, about 100 suspected union members had been dismissed on the grounds that they were casual labourers and their services were no longer required. In the meantime, however, the company had been recruiting new workers through an agency.

784. The complainant states that on 16 February 2004, it wrote to the Minister of Employment and Labour asking him to intervene to ensure that the company ceases its anti-union activities and takes corrective action to reinstate all those workers whose services had been terminated, withdraw the suspension of the branch union office-bearers, committee members and activists and cancel all transfers and demotions of union members and restore them to their earlier place of work and that it respect the right of workers to organize without interference from the management. The complainant states that it has not received a response from the Minister.

785. In its communication of 23 July 2004, the complainant alleges that, despite the Commissioner General of Labour's intervention, the situation has not improved in the company. According to the complainant, on 6 April, another meeting with the Commissioner of Labour was held during which the company agreed to conclude the domestic inquiries into the accusations against the suspended workers before 30 April and to pay the suspended workers 50 per cent of their salary from the date of suspension until the finalization of the inquiry. The company agreed to pay these wages on 10 April and to hold new meetings with branch union office-bearers on 23 April. On 9 April, the company informed the suspended workers of the domestic inquiry, with various starting dates beginning from 18 April. The suspended workers then wrote to the company requesting an opportunity to retain defending officers on their behalf. The complainant alleges that on 10 April, the management refused to pay the suspended workers as agreed and stated that it will only pay the workers if the domestic inquiry was not finalized before 30 April. On

18 April, workers attending the domestic inquiry learnt that their demand of having defending officers retained on their behalf was refused. The company however retained its own attorney. The workers protested the injustice and the inquiry was postponed until 24 April. On 25 April, the suspended workers attended the domestic inquiry with a jointly signed letter explaining the unfair manner in which the domestic inquiry had been conducted. When the workers submitted this letter to the inquiry officer, they made it clear that their participation in the inquiry would be under protest due to these concerns. At the behest of the company's lawyer, the inquiry officer then denied the suspended workers admittance to the inquiry and requested that they withdraw their letter. The workers did not agree and the inquiry officer decided to hold the domestic inquiry without the workers being present. On 27 April, the suspended workers sent a joint letter to the inquiry officer protesting the decision to hold an ex parte inquiry.

786. The complainant states that on 28 April 2004, the union wrote another letter to the Commissioner General of Labour mentioning the violations of the agreement reached at the 6 April meeting and requesting that the following action be taken: (a) that the employer be asked to pay 50 per cent of the workers' salaries; (b) compulsory arbitration of the dispute regarding the termination of services of about 100 workers on the pretext of their being contract workers; and (c) legal action against and prosecution of the company for its unfair labour practices. On 7 May, the Commissioner General of Labour held another discussion to which the Director of Industrial Relations of the Board of Investment of Sri Lanka was invited. The Commissioner General of Labour put forward the following proposals to settle the dispute: (a) to allow the suspended officers to retain a defending officer and restart the domestic inquiry. The findings of the domestic inquiry should be issued before 30 July and, in the meantime, the suspended workers should be paid 50 per cent of their salary from the date of their suspension; (b) alternatively, the company should reinstate the suspended workers and the workers would submit a letter of apology which could not be used against them in the future; and (c) the company should discuss with branch union officials matters related to their members. The company representatives asked for time to get advice from their directors about these proposals. The union representatives agreed to consider the proposal after hearing the company's decision. On 13 May, the union once again wrote to the Commissioner General of Labour requesting immediate prosecution due to the company's reluctance to settle the matter on the basis of his proposals. The union is still awaiting the Commissioner General's responses.

787. The complainant further states that respect for the principles of freedom of association requires that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious and fully impartial. The complainant alleges that by showing no will to take any decisive action to settle the case and by not being able to apply sufficiently dissuasive sanctions against the company, the Commissioner General of Labour has shown his inability to ensure rapid and effective protection against acts of anti-union discrimination. The complainant further alleges that this also indicates the Government of Sri Lanka's inability to provide adequate protection against acts of anti-union discrimination and to effectively ensure the right of workers to establish organizations of their own choosing.

B. The Government's reply

788. The Government states that Workwear Lanka (Pvt.) Ltd. is an enterprise situated in the Biyagama Free Trade Zone and is involved in the manufacture of rubber, leather and cotton industrial and sports gloves. It commenced operations in 1996 and employs around 700 workers. A labour dispute arose in the enterprise in early January 2004 over an issue of the management failing to pay wages before Christmas 2003 and the workers had become restless reportedly as a result of a female worker being abused by a supervisor over this issue. The formation of a branch union coincided with this incident and it is

alleged by the union that the management had resorted to unfair labour practices. The management's position is that they were unaware of the existence of a trade union and asserts that eight workers had been dealt with on disciplinary grounds. The eight workers had violated the disciplinary procedure of the company and had been served with charge sheets. The management was not satisfied with the responses given by the eight workers, therefore they were asked to tender apologies to the company for what they had committed. Since the eight workers did not respond, disciplinary inquiries were held and they were offered work subject to punishments. According to the management, disciplinary measures were necessitated as some of the workers were resorting to disruptive activities. Hence, the services of one female worker had been terminated. Five workers had reported for work and two had resigned. According to the management, the disciplinary inquiry was delayed due to the protests made by the trade union against having a disciplinary inquiry.

789. The trade union's position is that eight workers were instrumental in the formation of the trade union and 263 workers had already received the membership of the union. The management did not want to accept the existence of the union. Seven out of the nine charges in the charge sheets of the eight workers concerned were related to their participation in the strike and thereby the management had committed an unfair labour practice in terms of the Industrial Disputes (Amendment) Act No. 56 of 1999. The union is also of the view that around 100 workers participated in the strike and serving charge sheets only on eight of them was a clear proof of victimization.

790. The Department of Labour has taken measures to settle the dispute by way of conciliation. The trade union is not in favour of holding a referendum in terms of the Industrial Disputes (Amendment) Act No. 56 of 1999 in order to ascertain 40 per cent representative strength of the union for the purposes of collective bargaining. The trade union contends that the management had obstructed formation of the union and brought disrepute to them. Unless corrective measures are taken, the union is not agreeable to a referendum. However, the management is agreeable to the holding of a referendum. Attempts were also made recently on 24 November and 14, 15 and 23 December to settle the dispute by way of conciliation. However, these attempts were not successful. In the circumstances, action is being taken by the Department of Labour to prosecute the management in terms of the Industrial Disputes (Amendment) Act No. 56 of 1999 for resorting to unfair labour practices. The action taken and their outcome will be intimated.

C. The Committee's conclusions

791. *The Committee notes that this case concerns allegations of anti-union discrimination by an employer in a free trade zone. The complaint indicates that the management of Workwear Lanka (Pvt.) Ltd. engaged in various acts of anti-union discrimination pursuant to the formation of a branch union of the Free Trade Zone and General Services Employees' Union (FTZGSEU) in its plant on 28 December 2003. The sequence of events as set out in the complaint is as follows: following the formation of the union, the management spoke to every single worker about their union affiliation and asked them to resign from membership of the union. On 31 December 2003, the management issued letters to the vice-president, treasurer and the committee members of the branch union and three other activists accusing them of going on strike on 27 December and causing financial losses to the company. The union notified the names of its office-bearers to the employer on 1 January 2004. On the next day, when the night shiftworkers reported for work, five of the union office-bearers were denied work. On 4 January, the union made a representation to the company seeking that it immediately cease the harassment of its members and also made a representation to the Minister of Labour and the Commissioner of Labour requesting the immediate intervention of the labour authorities. On 8 January, the company issued a charge sheet against the branch secretary holding her responsible for the work stoppage on 27 December and the consequent losses. The management also*

demoted a number of other workers who refused to resign from the union. The management thereafter wrote to the office-bearers of the union indicating that it would not dismiss them if they pled guilty to the charges brought by the management and asked for a pardon in writing. The union office-bearers refused. On 3 February, the union leaders and activists who had been asked to admit their guilt and ask for a pardon were dismissed. By 10 February, about 100 suspected union members had been dismissed on the grounds that they were casual labourers and that their services were no longer required. In the meantime, however, the company began recruiting new workers.

792. *The Committee also notes that according to the complainant, the management failed to turn up at meetings convened by the Commissioner of Labour on 12 January 2004 and by the Additional Commissioner General of Labour on 9 February 2004. Further, the management failed to honour its commitment made on 6 April 2004 during a meeting convened by the Commissioner of Labour wherein the management agreed to pay the suspended workers 50 per cent of their salary from the date of suspension until the finalization of the inquiry. The request of the workers for having defending officers retained on their behalf for the inquiry was refused while the company retained its own attorney. Pursuant to a joint representation by the concerned workers recording that their participation in the inquiry would therefore be under protest and their refusal to withdraw the representation, it was decided to hold the inquiry ex parte without the workers being present.*

793. *The Committee notes that all the dismissals, suspensions and demotions took place soon after the formation of the branch union and a work stoppage organized to protest against the company's failure to pay wages and benefits. The Committee also notes that the company accuses some of the concerned workers of having been responsible for the work stoppage on 27 December 2003 and the alleged subsequent losses. Notwithstanding the management's claim that it was unaware of the existence of the trade union, the Committee considers that given the sequence of events detailed above, the dismissals, suspensions and demotions of the office-bearers and members of the union appear to be linked to the trade union activities and membership of the workers concerned.*

794. *In this regard, the Committee recalls that no person shall be prejudiced in his or her employment by reason of his or her trade union membership or legitimate trade union activities, whether past or present and that necessary measures should be taken so that trade unionists who have been dismissed for their activities related to their establishment of a union are reinstated in their functions, if they so wish [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, paras. 690 and 703].*

795. *The Committee takes note of the Government's observations that the efforts of the Department of Labour to settle the dispute by conciliation had not met with success and that it is taking steps to prosecute the employer. In these circumstances, the Committee urges the Government to take without delay the necessary steps to ensure that a procedure on the allegations of anti-union discrimination be opened and be brought to a speedy conclusion in a fully impartial manner and to keep it informed in this respect. Further, if the allegations are found to be justified, the Committee requests the Government to ensure in cooperation with the employer concerned that: (i) the workers dismissed as a result of their legitimate trade union activities are reinstated without loss of wages and without delay or, if reinstatement in one form or another is not possible, that they are paid adequate compensation which would represent sufficient dissuasive sanctions for such anti-trade union actions; (ii) the workers demoted as a result of their legitimate trade union activities are restored to their former posts without delay; and (iii) the workers under suspension because of their legitimate trade union activities are allowed to resume*

work without delay and are paid wages for the period when they were unjustly denied work. The Committee requests the Government to keep it informed in this regard.

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

The Committee's recommendations

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

(a) The Committee urges the Government to take without delay the necessary steps to ensure that a procedure on the allegations of anti-union discrimination be opened and be brought to a speedy conclusion in a fully impartial manner and to keep it informed in this respect. Further, if the allegations are found to be justified, the Committee requests the Government to ensure in cooperation with the employer concerned that: (i) the workers dismissed as a result of their legitimate trade union activities are reinstated without loss of wages and without delay or, if reinstatement in one form or another is not possible, that they are paid adequate compensation which would represent sufficient dissuasive sanctions for such anti-trade union actions; (ii) the workers demoted as a result of their legitimate trade union activities are restored to their former posts without delay; and (iii) the workers under suspension because of their legitimate trade union activities are allowed to resume work without delay and are paid wages for the period when they were unjustly denied work. The Committee requests the Government to keep it informed in this regard.

(b) The Committee requests the Government to solicit information from the employers' organization concerned, with a view to having at its disposal its views, as well as those of the enterprise concerned, on the questions at issue.

CASE NO. 2087

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

Complaint against the Government of Uruguay presented by the Association of Bank Employees of Uruguay (AEBU)

Allegations: Anti-union dismissals; irregular denouncement of a collective agreement; threats of dismissal

798. The Committee has previously examined the substance of this case at its May-June 2001, May-June 2002 and March 2004 meetings, at which times it presented interim reports to the Government Body [see 325th Report, paras. 561-575, approved by the Governing Body at its 281st Session (June 2001); 328th Report, paras. 606-616, approved by the Governing Body at its 284th Session (June 2002); and 333rd Report, paras. 1002-1012, approved by

the Governing Body at its 289th Session (March 2004)]. The Government has sent new observations in a communication dated 28 December 2004.

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. Previous examination of the case

800. In this case, it is alleged that, when the unionized workers of the Savings and Loans Cooperative of Officials of the Armed Forces (CAOFA) decided that the trade union at the CAOFA needed to affiliate to the complainant organization, the CAOFA denounced the collective labour agreement that was in force at the time, and which had been concluded with the union in question. Following this, it dismissed six trade union leaders, transferred another trade unionist to a different position and threatened to dismiss the workers who intended to retain their affiliation to the AEBU. In light of the interim conclusions given by the Committee when it last examined the case, the Governing Body approved the following recommendations at its March 2004 session [see 333rd Report, para. 1012]:

(a) Noting that both the judicial authority and the administrative authority have established that the dismissal of the six trade union members in question arose as a result of their trade union membership, the Committee considers that this case involves a serious violation of trade union rights and, in these circumstances: (1) it requests the Government to provide information on which the legal decision of July 2002 has been carried out; (2) it requests the Government to take measures to expedite the administrative appeals lodged against the administrative decision of April 2003 and to provide information on the outcome; and (3) it once again requests the Government to mediate immediately between the parties in order to obtain the reinstatement without loss of pay of those workers affected.

(b) The Committee regrets to note that the Government makes no reference to the allegations relating to: (i) the denouncement of the collective agreement by the CAOFA once it became aware of the intentions of union leaders of the cooperative to become affiliated to the AEBU; (ii) the transfer to trade union member Virginia Orrego; and (iii) the threats to dismiss workers who joined the AEBU. In these circumstances, the Committee urges the Government to send its observations in this respect without delay.

B. The Government's reply

801. In its communication of 28 December 2004, the Government provides the following, more detailed information on the situation with regard to the judicial and administrative proceedings under way at national level and relevant to this case.

802. The CAOFA launched an appeal with regard to the decision of the Labour Court of First Instance (No. 78, dated 22 July 2002), noted by the Committee in its last examination of the case [see 333rd Report, para. 1009] concerning the dismissal of the six trade union representatives. The Court of Appeal passed a decision on 10 June 2003, a copy of which has been sent by the Government. In this decision, the appeal court confirms the lower court's judgement with regard to the anti-union nature of the dismissals and the sentencing of the CAOFA to pay damages with interest – a sentence with which the CAOFA has complied.

803. With regard to the administrative proceedings, the complainant organization's allegation against the CAOFA, of which the General Labour and Social Security Inspectorate has been informed, initially resulted in a decree from the Inspectorate, dated 28 April 2003, penalizing the CAOFA for dismissing workers because of their trade union membership by

fining it 690 variable units (equivalent to US$5,347) [see 333rd Report, para. 1009]. In regard to this, the Government states that the CAOFA lodged administrative appeals with both the Inspectorate and its immediate superior. These two appeals resulted in two decisions, dated 5 and 30 January 2004 respectively, confirming the decree of 28 April 2003 (the Government encloses copies of the decisions). Having exhausted the administrative options, the CAOFA has lodged an appeal with the Court of Administrative Proceedings to have the decree revoked. These proceedings are currently at the evidence-gathering stage; in fact, the Court has ordered an on-site inspection in accordance with the notice received by the Ministry of Labour and Social Security on 6 December 2004. The Government will communicate the Court's judgement to the Committee as soon as it has been given.

804. Regarding the reinstatement of the dismissed workers, the Government reiterates that Uruguay has no legal provisions under which it would be possible to force the enterprise to reinstate the dismissed workers, and that this has been confirmed numerous times by the national courts. For instance, in its Judgement No. 148 of 29 August 1998, the Supreme Court ruled that an employer could not be constrained to reinstate [a worker] in the absence of an explicit text stipulating this obligation. The Government encloses several examples of this fact from case law with its reply.

805. In respect of the allegations concerning the denouncement of the collective agreement by the CAOFA, the transfer of Ms. Virginia Orrego and the threats to dismiss workers affiliated to the complainant organization, the Government claims that all of these aspects of the case were denounced during the administrative proceedings that took place before the general labour inspection that resulted in the appropriate penalty for violation of freedom of association being imposed. The Government adds that a judicial appeal was made concerning Ms. Orrego's case, which resulted in decisions vindicating her in both the first instance and the appeal courts. According to the information received by the Government from the complainant organization, these decisions were respected by the CAOFA, which thus paid the special compensation required of it. The Government states that it will keep the Committee informed of all developments relating to this case.

C. The Committee's conclusions

806. *The Committee recalls that the complainant organization alleged: (i) the denouncement of the collective agreement in force at the time by the Savings and Loans Cooperative of Officials of the Armed Forces (CAOFA) when the management of this enterprise became aware of the intentions of trade union leaders at the enterprise to affiliate to the Association of Bank Employees of Uruguay (AEBU); (ii) the dismissal of several trade union members (Mr. Nelson Corbo, Mr. Eduardo Cevallos, Mr. Gonzalo Ribas, Mr. Andrea Oyharbide, Mr. Gerardo Olivieri and Mr. Marcelo Almadia) and the transfer of a unionized worker (Ms. Virginia Orrego); and (iii) threats to dismiss workers who were members of the AEBU. Furthermore, the Committee recalls that, at its March 2004 meeting, it requested the Government to provide information on whether the legal decision of 22 July 2002 had been carried out, to take measures to expedite the administrative appeals lodged by the CAOFA against the administrative decision of 28 April 2003 by the General Labour and Social Security Inspectorate and provide information on the outcome and, lastly, to mediate between the parties in order to obtain the reinstatement without loss of pay of those workers affected. The Committee also requested the Government to provide its observations on the allegations concerning the denouncement of the collective agreement by the CAOFA, the transfer of Ms. Virginia Orrego and the threats to dismiss workers who were members of the AEBU.*

807. *Regarding the issue of dismissals, the Committee recalls that the dismissal of the six trade union representatives has been examined in two parallel sets of proceedings – one judicial*

and one administrative. These two proceedings led to the same conclusion – that the dismissals were anti-union in nature – and resulted in two decisions dealing with two aspects of national-level protection against anti-union discrimination: rectification of the loss to the victims by the judicial proceedings, and the imposition of a penalty by the administrative proceedings.

808. *In respect of the judicial proceedings, the Committee notes the Government's statement that Decision No. 78 of 22 July 2002 of the Labour Court of First Instance was confirmed by the Court of Appeal, with regard both to the anti-union nature of the dismissals and to the requirement that the CAOFA pay damages with interest. In view of the fact that over five years have elapsed since the six workers were dismissed, and that they have been paid damages with interest, the Committee takes note of the decision of the Court of Appeal.*

809. *Regarding the administrative proceedings, the Committee notes the Government's statement that the decree of 28 April 2003 of the General Labour and Social Security Inspectorate punishing the CAOFA for dismissing the workers because of their trade union membership has been confirmed following two judicial appeals. This decree is at present the subject of an administrative action which is currently at the evidence-gathering stage, and the competent court has ordered an on-site inspection. The Committee requests the Government to do all in its power without delay in order that the appeals of the CAOFA against the decree of 28 April 2003 of the General Labour and Social Security Inspectorate result in a definitive decision as soon as possible. The Committee requests the Government to keep it informed in this regard.*

810. *With regard to the transfer of Ms. Virginia Orrego, the Committee notes that, according to the Government, the CAOFA was required to pay her special compensation and that this payment has been made. However, the Committee requests the Government to verify that Ms. Virginia Orrego has been returned to the position that she occupied at the time of her transfer or to another equivalent post appropriate to her qualifications and experience, if the court establishes that this transfer had anti-union motives. The Committee requests the Government to keep it informed in this regard.*

811. *Finally, with regard to the allegations relating to the denouncement of the collective agreement by the CAOFA and to the threats to dismiss workers who were members of the complainant organization, the Committee takes note of the Government's claim that these aspects of the case were denounced in the administrative proceedings which took place before the General Labour and Social Security Inspectorate – proceedings which led to the imposition of the appropriate penalty for violation of freedom of association. Nevertheless, the Committee requests the Government to provide it with information on the current trade union situation in the CAOFA and, in particular, on the following aspects: (1) the possibility for workers to join an organization of their choice in practice, and, in particular, to join the complainant organization, without fear of reprisals, and the question of which trade union is currently active in the cooperative; (2) the situation with regard to collective bargaining and, in particular, to the conclusion of a collective agreement.*

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 do all in its power without delay in order that the appeals of the CAOFA against the decree of 28 April 2003 of the General Labour and Social Security Inspectorate result in a definitive

decision as soon as possible. The Committee requests the Government to keep it informed in this regard.

(b) The Committee requests the Government to verify that Ms. Virginia Orrego has been returned to the position that she occupied at the time of her transfer or to another equivalent post appropriate to her qualifications and experience, if the court establishes that this transfer had anti-union motives. The Committee requests the Government to keep it informed in this regard.

(c) The Committee requests the Government to provide it with information on the current trade union situation in the CAOFA and, in particular, on the following aspects: (1) the possibility for workers to join an organization of their choice in practice, and, in particular, to join the complainant organization, without fear of reprisals, and the question of which trade union is currently active in the cooperative; (2) the situation with regard to collective bargaining and, in particular, to the conclusion of a collective agreement.

CASE NO. 2174

DEFINITIVE REPORT

Complaint against the Government of Uruguay presented by the Staff Association of the Medical Assistance Centre of the Medical Trade Union of Uruguay CASMU (AFCASMU)

Allegations: The complainant alleges that the Medical Assistance Centre of the Medical Trade Union of Uruguay suspended 46 workers without pay and ordered that proceedings be instituted against them for their participation in a strike, and that proceedings were instituted against five workers for having participated in a protest organized by the trade union outside the workplace and one year later the workers were dismissed

813. The Committee last examined this case at its March 2004 meeting [see 333rd Report, paras. 1013-1023].

814. The Government sent its observations in a communication dated 28 December 2004.

815. 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. Previous examination of the case

816. At its March 2004 meeting, the Committee made the following recommendations [see 333rd Report, para. 1023]:

(a) The Committee once again requests the Government to indicate, without delay, why the CASMU preventively suspended 46 workers from their duties without pay and instituted proceedings against them, and whether, on reinstatement, they were paid the wages withheld during the five days that the examination proceedings lasted.

(b) With regard to the institution of administrative proceedings and subsequent dismissal of Graciela Sadi, Daniel Fernández, Julio César Ximénez, Héctor Pereira and Cyro Simoes allegedly because of their participation in a protest against the President of the Republic, the Committee urges the Government to take steps to ensure that the administrative investigation being carried out by the General Labour Inspectorate concludes without delay and, should it show that the dismissals arose as a result of the participation of the trade union members in the protest, that it take steps to ensure the workers' reinstatement in their posts. The Committee requests the Government to send it all decisions handed down in this respect.

B. The Government's reply

817. In its letter of 28 December 2004, the Government states that following the Committee's recommendations, it sent a note to the CASMU management asking whether it had suspended 46 workers without pay and instituted administrative proceedings against them, and specifically whether they were paid for the five days that the proceedings lasted. The Government reports that CASMU's adviser informed it that the CASMU Board decided to drop the proceedings against these workers without making any adverse observations against the workers and that their wages had not been withheld for the five days of suspension that the proceedings lasted.

818. With respect to the other allegations still pending, the Government reports that the General Labour Inspectorate, ex officio, instituted an administrative investigation concerning the dismissals in question. The Government indicates that in view of the fact the AFCASMU had indicated that the sanctioned workers were carrying out an activity decided by the trade union, the General Labour Inspectorate, by a decision of 13 July 2004, ordered the AFCASMU to present the resolution adopted by the general assembly of 23 May which decided on the strike in compliance with which the workers subject to the proceedings were sanctioned by the CASMU Board. The Inspectorate concluded from the documents provided by CASMU, and the comments by AFCASMU concerning the documentation produced, that there was no evidence that the CASMU workers identified as having participated in a protest against the President of the Republic involving verbal abuse and physical assault were doing so in compliance with the industrial action ordered by AFCASMU and duly notified to the heads of the departments in which the workers were employed, nor that the sanction was based on political motives. This is admitted by AFCASMU which indicates that the workers participated in the protest in their half-hour break, and in their capacity as private citizens.

819. The Government adds that, from the proceedings properly instituted at the time, there was no evidence that the four staff were using their break. In that circumstance, the General Labour Inspectorate concluded in its decision of 20 September 2004 that "in this case it is not found that the summary proceedings initiated against the four workers who were absent from their posts without authorization and who were identified in a protest in which the President of the Republic was verbally abused and physically assaulted, wearing the uniform which linked them to their employer, were politically motivated or that the sanctions implied any obstruction of trade union activity."

C. The Committee's conclusions

820. *The Committee recalls that at its March 2004 meeting, it requested the Government to indicate, without delay, why the Medical Assistance Centre of the Medical Trade Union*

(CASMU) preventively suspended 46 workers from their duties without pay and instituted proceedings against them, and whether, on reinstatement, they were paid the wages withheld during the five days that the examination proceedings lasted. In this respect, the Committee notes that the Government reports that the CASMU Board decided to drop the proceedings against these workers without making any adverse observations against the workers and that their wages had not been withheld for the five days of suspension that the proceedings lasted. In this respect, the Committee considers that this aspect of the case does not require further examination.

821. *The Committee also recalls that concerning the allegations of the institution of summary proceedings and subsequent dismissal of Graciela Sadi, Daniel Fernández, Julio César Ximénez, Héctor Pereira and Cyro Simoes for having participated in a protest during the visit of the President of the Republic, the Committee urged the Government to take steps to ensure that the administrative investigation being carried out by the General Labour Inspectorate concluded without delay and, should it show that the dismissals arose as a result of the participation of the trade union members in the protest, that it take steps to ensure the workers' reinstatement in their posts.*

822. *In this respect, the Committee notes that the Government states that the General Labour Inspectorate carried out an administrative investigation into the dismissals in question and that: (1) taking into account that the trade union AFCASMU indicated that the sanctioned workers were carrying out an activity decided by the trade union, it was asked to present the resolution adopting the strike action concerned; (2) from the documents presented by CASMU and the comments provided by the trade union AFCASMU, there was no evidence that the CASMU workers who participated in a protest against the President of the Republic in which he was verbally abused and physically assaulted did so in compliance with the industrial action ordered by AFCASMU, duly notified to the heads of the departments in which they were employed, nor that the sanction was politically motivated; (3) there is no evidence from the investigation that the workers in question were using their break, as indicated by AFCASMU; and (4) taking into account all of the above, the General Labour Inspectorate, by a decision of 20 September 2004, concluded that there was no evidence in the event that the summary proceedings and sanctions imposed on the four workers who were absent from their posts without authorization and who were identified in a protest in which the President of the Republic was verbally abused and physically assaulted, implied any obstruction of trade union activity. In the light of the information sent by the Government, the Committee will not proceed with the examination of these allegations.*

The Committee's recommendation

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

CASE NO. 2359

DEFINITIVE REPORT

Complaint against the Government of Uruguay presented by — the National Federation of Secondary School Teachers (FENAPES) and — the Association of Secondary Education Teachers (ADES)

Allegations: The complainant organizations allege acts of anti-trade union discrimination against a trade union official by the authorities in an educational establishment

824. The complaint is contained in a communication from the National Federation of Secondary School Teachers (FENAPES) and the Association of Secondary Education Teachers (ADES) dated June 2004. In a communication dated July 2004, these organizations sent additional information.

825. The Government sent its observations in a communication dated 28 December 2004.

826. 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 complainants' allegations

827. In their communication of June 2004, the National Federation of Secondary School Teachers (FENAPES) and the Association of Secondary Education Teachers (ADES) allege that the freedom of association and trade union rights of one of its officials, Mrs. Silvia Lujambio, deputy head of an educational establishment (Liceo No. 13) had been infringed.

828. The complainant organizations state that in Uruguay, the career path of teachers in secondary education is based on advancement, by what the statutory rules call "qualified seniority", i.e., the allocation of a general points score based on length of service, computed activity (number of classes actually taught) and teaching skills, i.e., the teachers' training, judgements and assessments. The latter concept, teaching aptitude, has the highest weighting in calculating the points score for "qualified seniority" (100 out of 140). In turn, one of the most important factors in teaching aptitude are assessments contained in an annual report by heads of educational establishments (liceos) and by subject inspectors.

829. They indicate that this has meant that, at times, these annual reports are used by the hierarchy as means of controlling the teacher's adaptability to the imposed models. In other words, the annual report on the teacher is used not to evaluate his technical and pedagogical performance but to reward or censure the teachers' ideological conformity with the model, plan or simply the profile required by the school programme drawn up by the management. In other words, a dangerous manipulation can be observed of a highly sensitive aspect of professional life in the context of a relationship not of respect and tolerance, but of authority. This has left members of the complainant organizations highly vulnerable in respect of the educational reforms which were rejected or denounced by their trade unions. Even more serious, however, according to the complainants, is that the

method complained of here has begun to be used directly to suppress the exercise of trade union rights.

830. The FENAPES and ADES allege that this has occurred with the trade union official, Mrs. Silvia Lujambio, at the time of her annual report as deputy head by the head of the educational establishment where she is employed (Liceo No. 13). The complainants state that she was the victim of a clear anti-trade union posture which infringes her legal rights and entitlements, forcing the trade union to intervene and present this complaint. All this is aggravated by the fact that it is not just hindrance or obstruction of the exercise of such rights, including the imposition of sanctions for exercising them, but simply that for participating in trade union activity, especially as an official, a person's technical and pedagogical performance is assessed unfavourably.

831. The complainants indicate that the abovementioned report on the official in question, includes remarks such as the existence of "circumstantial observations", "for attending an ADES meeting in the staff room and not communicating" and in the "general opinion" on the teacher, it is stated: "teacher who should perform her work impartially, and keep her work separate from her trade union activity". It is clear that, because she was an official, Mrs. Lujambio's performance was assessed unfavourably compared with the average of her assessments for recent years and in comparison with her peers.

832. The complainants state that this matter has caused alarm in teacher trade union circles, alarm which reflects the nature of the rights infringed. This is because it shows a disregard for the fundamental rights which by their nature go beyond this member's particular situation. The fact is that an observation amounting to disciplinary censure was made in an assessment of technical performance because of Mrs. Lujambio's participation as an official in a trade union meeting.

833. The complainants state that the situation of which they complain shows a clear disregard for the exercise of trade union rights and thereby violates article 57 of the Constitution of the Republic and ILO Conventions Nos. 98 and 151. Finally, they state that a complaint was also made to the Secondary Education Council, a public body responsible for the administration of the education system at secondary level.

834. In its communication of July 2004, the complainant organizations report that the trade union official in question, under the provisions of article 55 of the Teaching Staff Rules, exercised the right of rebuttal concerning the assessment made, on the grounds that it infringed her legitimate right to freedom of association and trade union rights as well as her professional career. According to the complainants, the management report and the trade union official's rebuttal should have resulted in the convening of an assessment panel to settle the dispute. Until now, this panel has not taken action. It further adds that despite the seriousness of the complaint, neither has the Secondary Education Council of the National Public Education Administration made any pronouncement.

B. The Government's reply

835. In its letter of 28 December 2004, the Government states that civil servants in general and those of the central administration in particular, are subject to regulations which govern their rights, duties and obligations. Their rights include security of tenure, advancement, remuneration and administrative disciplinary proceedings with guarantees of due process, without prejudice to the right to subsequent review by the courts. These regulations are a solid guarantee for civil servants, both with regard to protection of their career path in the administration and citizens' rights and rights of freedom of association and collective bargaining. Convention No. 151, ratified by Uruguay, is applied in full to government workers with the exception of military personnel, police, diplomatic staff and persons of a

political character (ministers, directors of executing agencies, directors of autonomous entities, etc.) who are subject to different regulations by virtue of the nature of their functions. Under the terms of the Constitution, public employees enjoy adequate trade union protection.

836. The Government adds that there is no general law that provides free time for the exercise of trade union duties, but in all public organizations trade union officials are granted trade union leave to carry out the tasks inherent in their office, and various collective agreements expressly provide for trade union leave.

837. With respect to the annual assessment report of Mrs. Silvia Lujambio by the head of the establishment in which she works (Liceo No. 13), the Government states that, on 11 August 2004 the legal office of the Primary Education Council reported as follows: (1) the legal office is not dealing with the points score awarded to Mrs. Lujambio because it is not relevant to this case; (2) in relation to the substance of the matter, it considers that: (a) the assessment report in question contains matters which "while not constituting clear persecution" depart from the comments that a report should contain; (b) it considers that the head of the establishment should not have included in the report matters which go beyond functional (pedagogical or technical) aspects and even less should they be taken into account as positive or negative factors in her assessment; (c) the assessment must be totally objective and impartial; (d) consequently, the legal office considers that the head of the establishment should be cautioned that she should not consider matters other than functional aspects when assessing her staff; and (e) opinions such as those expressed in the report on Mrs. Lujambio may infringe the fundamental rights enshrined in the Constitution of the Republic.

838. The Government adds that the Montevideo Head Teacher Assessment Board, at its meeting of 3 September 2004, concluded that the assessment made in the report in question should be rejected, and Mrs. Lujambio's last performance report on her work in 2002 at the Liceo San Jacinto taken into account as her latest performance report.

839. Finally, the Government states that the Secondary Education Council, considering the report of the legal office of 11 August 2004 and the Montevideo Head Teacher Assessment Board at its meeting on 3 September 2004, decided: "to reject the assessment made in the management report for 2003 by the Head of Liceo No. 13 on Mrs. Silvia Lujambio Grene". "It ordered that Mrs. Lujambio's last performance report in 2002 as deputy head at the Liceo San Jacinto should be taken into account as the latest teacher performance report". The Government emphasizes that in the light of the foregoing reports, in its opinion there has been no violation of Conventions Nos. 98, 151 and 154.

C. The Committee's conclusions

840. *The Committee observes that the complainant organizations allege that the authorities of the educational establishment, Liceo No. 13, had used the annual assessment report of Mrs Silva Lujambio, a trade union official of FENAPES and ADES, to curb the exercise of her trade union rights. Specifically, the complainant organizations allege that she was assessed unfavourably as a result of exercising her trade union activities and that a disciplinary censure was made in an assessment of technical performance because she had participated in a trade union meeting.*

841. *The Committee notes that the Government states that: (1) The legal office stated that: (a) the assessment report in question contains matters which "while not constituting clear persecution" depart from the comments that such a report should contain; (b) it considers that the head of the establishment should not have included in the report matters which went beyond the functional (pedagogical or technical) aspects and even less should they be*

taken into account as positive or negative factors in her assessment; (c) the assessment must be totally objective and impartial; (d) consequently, the legal office considers that the head of the establishment should be cautioned that she should not consider matters external to the functional aspects when assessing her staff; and (e) opinions such as those expressed in the report on Mrs. Lujambio may infringe the fundamental rights enshrined in the Constitution of the Republic; (2) the Montevideo Head Teacher Assessment Board, at its meeting of 3 September 2004, concluded that the assessment made in the report in question should be rejected, taking into account Mrs. Lujambio's last performance report in 2002 at the Liceo San Jacinto as her latest performance report; and (3) the Secondary Education Council, considering the report of the legal office, and the Montevideo Head Teacher Assessment Board decided to reject the assessment made in the management report for 2003 by the Head of Liceo No. 13 on Mrs. Silvia Lujambio Grene and ordered that Mrs. Lujambio's last teacher performance assessment in 2002 should be taken into account.

842. *Observing that the annual assessment report of the trade union official, Mrs. Lujambio, which had been contested by the complainant organizations on the grounds that its contents constituted an act of anti-trade union persecution, had been rejected, the Committee considers that the present case does not require further examination.*

The Committee's recommendation

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

CASE NO. 2353

DEFINITIVE REPORT

Complaint against the Government of Venezuela presented by the Latin American Central of Workers (CLAT)

Allegations: Interference by the authorities in the complainant's trade union elections in the public health sector of Carabobo State; the National Electoral Council forced the complainant to hold new (partial) elections; the trade union headquarters were seized by force by security forces; individuals on one of the lists of candidates were denied access to trade union headquarters; and the National Guard, in collaboration with activists from the Government's party, erroneously assigned more than 300 votes to the other list of candidates

844. The complaint is contained in a communication from the Latin American Central of Workers (CLAT) dated 20 May 2004.

845. The Government sent its observations in a communication of 5 November 2004.

846. 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 complainant's allegations

847. In its communication of 20 May 2004, the Latin American Central of Workers (CLAT) alleges that on 15 March 2002, the electoral commission of the Single Trade Union of Workers of Health Care and Private and Public Social Security Institutions in Carabobo State (SUTRASALUD CARABOBO) announced the results of elections to the union's executive board and swore in the new members. On 23 April 2002, Carlos Viloria and Jesús Pinto filed a complaint regarding the elections with the National Electoral Council (CNE), on the grounds that at one of the voting centres four voting tables were supposed to be set up (there were 1,217 voters), but only one actually was set up, violating the electoral rules and preventing many voters from voting. The National Electoral Council, in a decision dated 5 November 2003, ordered new elections at the centre in question for 19 November 2003, with four voting tables, but upheld the election results at the other voting centres.

848. The president of SUTRASALUD CARABOBO appealed to the Supreme Court of Justice to overturn the CNE decision and initiated constitutional protection *(amparo)* proceedings, but abandoned these in February 2004 in view of the fact that the Supreme Court did not suspend the new partial elections ordered by the CNE. The president consequently appealed to the CNE which, however, did not respond.

849. The CLAT states that Carlos Viloria and Jesús Pinto, who filed the complaint regarding the elections that took place on 26 March 2002, ceased to be members of SUTRASALUD CARABOBO because they had set up another, parallel trade union body before appealing against the CNE decision; they therefore did not have the status of SUTRASALUD CARABOBO members. This allegation was filed with the National Electoral Council, which nevertheless called for new elections in its decision of 5 November 2003. The elections held on 19 November 2003 at SUTRASALUD CARABOBO Voting Centre No. 10, Section 5, located at the Enrique Tejera de Valencia Hospital Complex, Carabobo State, were disrupted by force by the Ministry of Health, the National Guard and the Directorate of Intelligence and Prevention (DISIP), which acts as the state political police. The complainant states further that:

– a DISIP commission under the aegis of the Ministry of Health and assisted by the National Guard, supervised the electoral commission to ensure that ballots were transferred to a location other than the agreed one for counting;

– in a commando-style operation, the National Guard, accompanied by activists from the Government's party (Fifth Republic Movement) assigned more than 300 votes to candidates on List 4;

– the headquarters of SUTRASALUD CARABOBO were seized by the National Guard and government party activists and are still held by them.

850. At the same time, candidates on List 3, which represents the electoral group to which the president of the union belongs and which won a majority on the SUTRASALUD CARABOBO executive board in the elections of 26 March 2002, won another resounding victory by a margin of 500 votes which then "disappeared" when a count was conducted by the National Guard and the DISIP. The National Guard and the DISIP appropriated election materials and adjusted the results in favour of List 4 (the government list).

851. Following the seizure by force of SUTRASALUD CARABOBO headquarters by members of the state security forces, the president of the union and other union officers of List 3 were prevented from entering the headquarters for three months. The headquarters have been permanently guarded by the National Guard since 19 November 2003. The doors and padlocks were broken, bars and grilles removed and taken away, and all the furnishings, equipment, archives and other trade union property there were taken or used to help members of List 4.

852. The National Electoral Council certified the results of the elections on 19 November 2003, in a new decision dated 27 February 2004. This means that the authorities endorsed the illegal, arbitrary and violent presence, between 19 November 2003 and 27 February 2004 (three months and eight days), of persons other than permanent members of the SUTRASALUD CARABOBO executive board at the latter's headquarters (which was guarded by state security forces).

853. For these reasons, the president of the union lodged a complaint against the decision upholding the election results with the Electoral Chamber of the Supreme Court of Justice (at the time of this complaint, the case was at the submission of evidence stage).

B. The Government's reply

854. In its communication of 5 November 2004, the Government provides a copy of Ruling No. 85 of 8 June 2004 by the Electoral Chamber of the Supreme Court of Justice, which concerns issues relevant to the case currently before the Committee on Freedom of Association.

855. In proceedings currently under way before national bodies, in a written communication dated 10 March 2004, José Mogollón, acting in his own name and as president of the Single Trade Union of Workers of Health Care and Private and Public Social Security Institutions in Carabobo State (SUTRASALUD CARABOBO), lodged an appeal to suspend Decision No. 040122-06 of 22 January 2004, published in the *Electoral Gazette* No. 189 of 27 February 2004, which had acknowledged the validity of the electoral process. The appeal was based on the following arguments:

> The appellant made a number of complaints against the partial rerun of elections held by the Single Trade Union of Workers of Health Care and Private and Public Social Security Institutions in Carabobo State (SUTRASALUD CARABOBO) *(underlining added)*, namely:
>
> (i) invalidity of the Trade Union Electoral Commission which conducted the partial rerun of the election;
>
> (ii) invalid set up of the voting tables and balloting arrangements, under the terms of section 216 of the Organic Act respecting voting rights and political participation;
>
> (iii) invalidity of the votes because of the illegal constitution of the polling station, in accordance with section 218 of the Organic Act respecting suffrage and political participation;
>
> (iv) lack of evidence of "other factors adverse to the supposed winning list" owing to interference by the National Guard;
>
> (v) inconsistency with the election results;

(vi) invalidity of the ballot records; and

(vii) ineligibility of Carlos Viloria and Jesús Pinto.

856. These complaints are the basis for the presumed violation of trade union rights. The Electoral Chamber of the Supreme Court of Justice gave the following ruling:

> According to the jurisprudence of this Electoral Chamber (cf. Ruling No. 117 of 12 June 2002), "acknowledgement of the validity" of a trade union election is a formal act issued by the highest electoral body as the "organizer" of trade union elections (article 293, para. 6, of the Constitution of the Bolivarian Republic of Venezuela), which in accordance with the principle of freedom of association recognized in article 95 of the Constitution implies a ruling to the effect that certain objective criteria have been met for the purpose of determining the representation of the trade union organizations. According to section 56 of the Special Statute for the renewal of the trade union leadership, this means receiving the certificated ballot counts, adjudications and announcements of the results and verifying that the electoral procedure has been followed; it does not imply an exhaustive ruling on the legality of the process in question. Even after such "acknowledgment" has been given, the interested parties can lodge an administrative appeal with the National Electoral Council – provided that statutory time limits for such appeals are respected – against electoral rulings given by trade union electoral commissions. *(Underlining added.)*

857. For this reason, the Electoral Chamber in its Ruling No. 117 of 12 June 2002 stated that:

> [...] given that the purpose of this action is to overturn the decision in question, the allegations referred to in the case should be restricted to that decision, to ensure that there is a correspondence between the reported facts of the case and the petition. If there is no such correspondence, the arguments will lack relevance and not be germane to the resolution of the dispute; the court in that case will have to dismiss the arguments, since there will be no logical relationship between the decision and the grounds given for it, and this would be inconsistent with the right to effective judicial protection. *(Underlining added.)*
>
> The Chamber concludes that the appellant's allegations should have focused on the matter of acknowledgement of the validity of the trade union elections – the act that is being legally challenged – rather than on the elections of the Single Trade Union of Workers of Health Care and Private and Public Social Security Institutions in Carabobo State (SUTRASALUD CARABOBO), because there has to be a direct correspondence between the reported facts and allegations and the act which is the subject of the complaint, in this case, the act of acknowledgement of the validity of the elections. *(Underlining added.)*

858. This decision set aside the appeal filed on 10 March 2004 by José Mogollón against the Decision of the National Electoral Council (No. 040122-06) of 22 January 2004, published in the *Electoral Gazette* (No. 189 of 27 February 2004), which had acknowledged the validity of the elections held by the Single Trade Union of Workers of Health Care and Private and Public Social Security Institutions in Carabobo State (SUTRASALUD CARABOBO).

859. On the basis of the above, and in the light of the documentation provided, the Government trusts that the complaint will be set aside on the grounds that it is without foundation, given the need for a direct coherence between the facts and allegations made.

C. The Committee's conclusions

860. *The Committee notes that in the present case, the complainant objects to the interference by the authorities following trade union elections held in March 2002 by the Single Trade Union of Workers of Health Care and Private and Public Social Security Institutions in Carabobo State (SUTRASALUD CARABOBO).*

861. *The Committee notes the decision of the Electoral Chamber of the Supreme Court of Justice of 8 July 2004, which sets aside the appeal filed on 10 March 2004 by José Mogollón, former president of SUTRASALUD CARABOBO, against the Decision of the National Electoral Council No. 040122-06 of 22 January 2004, published in the* Electoral Gazette *No. 189 of 27 February 2004, which formerly acknowledged the validity of the elections held by SUTRASALUD CARABOBO on 19 November 2003. These elections were a partial rerun of elections held in March 2002 and were ordered by the National Electoral Council.*

862. *The Committee notes that, for the reasons indicated in the Electoral Chamber's decision, reproduced in the Government's reply, the Chamber has not substantively examined a number of complaints by the appellant (former president of SUTRASALUD CARABOBO) against the partial rerun of the elections held by the Single Trade Union of Workers of Health Care and Private and Public Social Security Institutions in Carabobo State (SUTRASALUD CARABOBO) on 19 November 2003, namely:*

(i) invalidity of the Trade Union Electoral Commission which conducted the partial rerun of the election;

(ii) invalid set up of the voting tables and balloting arrangements, under the terms of section 216 of the Organic Act respecting voting rights and political participation;

(iii) invalidity of the votes because of the illegal constitution of the polling station, in accordance with section 218 of the Organic Act respecting suffrage and political participation;

(iv) lack of evidence of "other factors adverse to the supposed winning list" owing to interference by the National Guard;

(v) inconsistency with election results;

(vi) invalidity of the ballot records; and

(vii) ineligibility of Carlos Viloria and Jesús Pinto.

863. *In his complaint, the former president of SUTRASALUD CARABOBO alleges, for example, that the Electoral Commission did not include the requisite number of members on 19 November 2003, because three of the principle members were prevented from attending the elections, and the ballot records were signed by only two members, in contravention of union rules.*

864. *The Committee points out that on previous occasions, it has objected to the role assigned by the Constitution and legislation to the National Electoral Council in organizing and supervising trade union elections, including the power to suspend elections; it has considered that the organization of elections should be exclusively a matter for the organizations concerned, in accordance with Article 3 of Convention No. 87, and that the power to suspend elections should be given only to an independent judiciary, which alone can provide sufficient guarantees of the right to defence and due process. In addition, the complainant has highlighted the presence of and interference by the National Guard and other authorities in the (partial) elections which the National Electoral Council had ordered to be rerun on 19 November at one of the voting centres. The Committee also notes the delays by the CNE, which did not give a ruling on the trade union elections of March 2002 until 5 November 2003, and by the Electoral Chamber of the Supreme Court of Justice, which gave its ruling on 8 July 2004 regarding the CNE decision, but without giving any ruling on the substance of the appellant's arguments. The Committee greatly regrets the interference by various state authorities, including the National Electoral*

Council, in the SUTRASALUD CARABOBO elections, and requests the Government in future to refrain from such interference and to ensure that trade union elections can take place without interference by the public authorities, and that any suspension of trade union elections is a matter solely for the judicial authority. The Committee considers, however, given the Electoral Chamber's ruling in June 2004 and the considerable time that has passed since the elections in March 2002, that it will not recommend a further rerun of the elections.

The Committee's recommendation

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

> ***The Committee greatly regrets the interference by various state authorities including the National Electoral Council, in the SUTRASALUD CARABOBO union elections, and requests the Government in future to refrain from such interference and to ensure that trade union elections can take place without interference by the public authorities, and that any suspension of such elections is a matter solely for the judicial authority.***

CASE NO. 2328

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

Complaint against the Government of Zimbabwe presented by — the Organisation of African Trade Union Unity (OATUU) — the Union Network International (UNI) and — the International Confederation of Free Trade Unions (ICFTU)

Allegations: The complainant organizations (OATUU) allege that the President of the Zimbabwe Congress of Trade Unions (ZCTU) has been dismissed for alleged absence from work, whereas he was attending a congress of the OATUU; and that three other union executives have been indefinitely suspended for allegedly disrupting an employer meeting

866. The complaint is contained in a communication from the Organisation of African Trade Union Unity (OATUU) dated 1 March 2004, as well as a communication from the Union Network International (UNI) dated 1 April 2004. The International Confederation of Free Trade Unions (ICFTU) sent allegations referring to the same matter in a communication dated 9 July 2004.

867. The Government sent its observations in communications dated 14 May 2004 and 19 November 2004.

868. Zimbabwe 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

869. In its communication dated 1 March 2004, the OATUU stated that Mr. Lovemore Matombo, President of the Zimbabwe Congress of Trade Unions (ZCTU), was dismissed from work on 23 January 2004 by the management of Zimbabwe Posts (Zimpost). The complainant organization stated that Mr. Matombo was initially suspended from work on 13 January 2004 for allegedly disrupting a Zimpost board meeting on 11 December 2003. The complainant organization recorded Zimpost's allegation that Mr. Matombo was absent from work without official leave from 5-12 January 2004, when in fact he had led the ZCTU's delegation to the 8th Congress of the OATUU in Khartoum, Sudan on those dates.

870. The OATUU considered Mr. Matombo's dismissal to be irregular and a flagrant violation of Convention No. 98. The organization stated that it had received neither an acknowledgement nor a response to a letter dated 26 January 2004 it had sent to the Minister of Public Service, Labour and Social Welfare seeking Mr. Matombo's reinstatement. The organization appended that letter to its communication, as well as an email dated 24 January 2004 from the ZCTU informing it that Mr. Matombo had been dismissed.

871. The UNI communication, dated 1 April 2004, substantially repeated the OATUU's allegations concerning Mr. Matombo's dismissal. It was explained that Mr. Matombo was also the President of the Communications and Allied Services Workers' Union (CASWUZ), an affiliate of the UNI. The UNI indicated that, in relation to Mr. Matombo's attendance of the OATUU Congress, it had been advised that, despite Zimpost's allegations to the contrary, Mr. Matombo had indeed "carefully followed all the necessary procedures as required i.e. apply for special leave and attach the invitation letter of the host organisation (OATUU)".

872. The organization further alleged that three other CASWUZ officials – Mr. C. Nkala (Vice-President), Mr. C. M. Chizura (Deputy General Secretary), and Mr. D. C. Munandi (Financial Secretary) – were suspended indefinitely by Zimpost management on 12 January 2004, allegedly for disrupting the Zimpost board meeting on 11 December 2003. The UNI stated that the union executives had gone to the board meeting to demand the payment of workers' salaries after 41 days without pay and following a failed appeal to meet management. The salary payments had been delayed because management had decided to deduct 17 leave days from the workers' salaries as punishment for a strike called by CASWUZ between 17 November-4 December 2003 demanding a cost of living adjustment. The UNI alleged that the "negotiations" at the board meeting resulted in an agreement that workers would be paid on 12 December 2003, the following day. It was further stated that "at no point during the meeting or in the days after the meeting did the Board claim that the union's behaviour was in any way rude or disrespectful".

873. In a communication dated 9 July 2004, the ICFTU also referred to the dismissal of Mr. Matombo. The ICFTU considered that Mr. Matombo was dismissed from his Zimpost position due to his trade union activities.

B. The Government's reply

874. In a communication dated 14 May 2004, the Government gave the following account of the circumstances pertaining to the dismissal of Mr. Matombo. The Government stated that the OATUU invited the ZCTU to attend its 8th Ordinary Congress in Khartoum during the period 5-12 January 2004 and that Mr. Matombo was nominated by the ZCTU to be part of its delegation to the Congress. The Government stated that Mr. Matombo had not completed the required leave application procedures but had instructed Mr. Chimanikire, the Secretary-General of the CASWUZ, to make an application for special leave on his

behalf, well after he had already left for the Congress. It was indicated that Zimpost management submitted that they had not received a leave application on Mr. Matombo's behalf as alleged.

875. On Mr. Matombo's return to Zimbabwe, the Government stated that he was charged with misconduct pursuant to the company's code of conduct and subsequently appeared before a formally constituted disciplinary hearing committee under the Posts and Telecommunications Employment Code of Conduct. The Government considered it pertinent that the disciplinary committee included two union and two management representatives, including members from Mr. Matombo's trade union. Mr. Matombo was found guilty by the disciplinary committee and accordingly dismissed; he subsequently appealed in terms of the code of conduct's disciplinary procedure. Having failed to reach a decision within 30 days, the appeals board sent the matter to the Ministry of Public Service, Labour and Social Welfare pursuant to section 101(6) of the Labour Act 28:01. The Government stated that "the matter will be handled by our competent Labour Officer like any other Labour disputes in terms of our Labour Act 28:01".

876. The Government wished to make it clear that the role of the Ministry and the Government was to ensure that justice was not only done but was seen to be done and in this regard it could only watch the agreed and approved mechanisms in the country take their course. The Government considered Mr. Matombo to be first and foremost a worker of Zimpost.

877. In a communication dated 19 November 2004, the Government submitted additional information particularly in relation to the allegations pertaining to the suspension by Zimpost of Mr. C. Nkala, Mr. C. Chizuro and Mr. D. C. Munadi. The information obtained suggested that the workers in question had been suspended on the basis of allegations of disrupting a board meeting, in accordance with the Posts and Telecommunications Code of Conduct.

878. The Government advised that, as the Zimpost disciplinary committee had failed to reach a decision on this within 30 days, it had accordingly referred the matter to the Ministry on 15 April 2004 pursuant to section 101(6) of the Labour Act 28:01. After numerous conciliation attempts by the labour officer assigned to deal with the matter, a "certificate of no settlement" was issued on 17 August 2004 and the matter was referred for arbitration in accordance with the dispute settlement procedures in the Act. The Government advised that the parties had been summoned to appear before the arbitrator on 15 December 2004 for an arbitration hearing.

879. The Government wished to make it clear that industrial relations disputes at Zimpost, like any other private company in Zimbabwe, fell under the Labour Act 28:01, which was enforced indiscriminately by the Ministry, and the Government could only watch the established legal mechanisms take their course. The Government indicated that the Ministry remained "open to educate the concerned trade union leaders on the provisions of the Labour Act 28:01 which protect the workers rights and the available remedies should there be any violation".

880. In relation to the ICFTU's allegations concerning the dismissal of Mr. Matombo, the Government referred to its communication dated 14 May 2004.

C. The Committee's conclusions

881. *The Committee notes that this complaint concerns allegations of anti-union discrimination in relation to two related matters. The first matter is the dismissal of Mr. Matombo, President of the ZCTU and the CASWUZ, following a decision that he had been absent*

from work without permission. The second matter is the suspension of three union officials on the basis that they had disrupted a board meeting of the company.

882. *In relation to the dismissal of Mr. Matombo, President of the ZCTU and the CASWUZ, the Committee notes that Mr. Matombo was initially suspended from work on 13 January 2004 together with Mr. Nkala, Mr. Chizura and Mr. Munandi, who it seems are still indefinitely suspended. Mr. Matombo was dismissed from his employment on the basis of an apparently separate matter and it seems that this overrode his initial suspension.*

883. *The Committee notes that both the complainant organizations and the Government stated that the reason given for the dismissal of Mr. Matombo by Zimpost was his unauthorized absence from work between 5-12 January 2004, when he had led the Zimbabwe delegation to the OATUU 8th Congress in Khartoum. The Committee recalls that the complainant organizations alleged that the reason given was untrue and, in particular, the UNI stated that Mr. Matombo had carefully followed the necessary procedures of applying for the special leave and attaching the invitation letter from the host organization.*

884. *The Committee recalls that the Government stated that Mr. Matombo had not completed the required leave application procedures but had instructed the Secretary-General of the CASWUZ to make the application on his behalf, well after he had already left for the Congress; Zimpost management maintained that a leave application on Mr. Matombo's behalf had not been received. The Government stated that Mr. Matombo was found guilty of misconduct by a properly constituted disciplinary committee and accordingly dismissed. His appeal to an appeals board was subsequently referred to the Ministry of Public Service, Labour and Social Welfare under the Labour Act as no decision had been reached within 30 days, and the Government has indicated that the matter will be handled by the competent labour officer like any other labour dispute.*

885. *The Committee recalls that participation by trade unionists in international trade union meetings is a fundamental trade union right [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th (Revised) edition, 1996, para. 151] and that another 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****, op. cit., para. 724]. The Committee further recalls that the Government is responsible for preventing all acts of anti-union discrimination and it must ensure that complaints of anti-union discrimination are examined in the framework of national procedures which should be prompt, impartial and considered as such by the parties concerned [see* ***Digest****, op. cit., para. 738]. The Committee finally recalls that the dismissal of trade unionists for absence from work without the employer's permission, for example, to attend a workers' education course, does not appear in itself to constitute an infringement of freedom of association [see* ***Digest****, op. cit., para. 728].*

886. *The Committee notes that there is a direct conflict in the statements provided by the complainant organizations and the Government, in addition to an absence of written evidence in relation to this matter. In these circumstances the Committee is unable to reach any final conclusion as to the veracity of the allegations and therefore requests the complainants to provide additional information. It must nevertheless record its concern that the dismissal of Mr. Matombo, coming soon after a strike action called by the CASWUZ and the indefinite suspension of not only Mr. Matombo, but also other CASWUZ leaders, appears to raise the suggestion of a link between these events and, thus, the possibility that Zimpost's actions may have had an anti-union component. In light of these*

concerns, the Committee requests the Government to convene an inquiry that is independent and considered as such by the parties, to thoroughly and promptly consider the allegations of anti-union discrimination against Mr. Matombo and to ensure that appropriate measures are taken in response to any conclusions reached. The Committee expects that if it appears that Mr. Matombo has fulfilled the requirements applicable for trade union leave, he will be reinstated in his job, without loss of pay. The Committee requests the Government to keep it informed of any developments in this regard.

887. *In relation to the second matter, the Committee notes that on 13 January 2004, three CASWUZ officials were indefinitely suspended from their jobs at Zimpost for allegedly disrupting a Zimpost board meeting on 11 December 2003. The Committee recalls that the complainant organizations alleged that Mr. Nkala, Mr. Chizura and Mr. Munandi, all of whom are executive officials of the CASWUZ, had attended the board meeting to demand the payment of workers' salaries after 41 days without pay. This followed a strike action called by CASWUZ during November-December 2003 and a failed earlier attempt to meet with management. The complainant organizations alleged that during the board meeting an agreement was reached that the salary arrears would be paid to workers, and that at no time then or in the following days was it claimed that the officials had behaved in a disrespectful manner.*

888. *The Committee recalls that the Government stated that Mr. Nkala, Mr. Chizura and Mr. Munandi were suspended for disrupting the board meeting, in accordance with the appropriate code of conduct. It appears that the proper procedure was followed: the matter was considered by the Zimpost disciplinary committee which failed to reach a decision within the prescribed 30 days and so referred the matter to the Minister on 15 April 2004 pursuant to the Labour Act. On 17 August, a certificate of no settlement was issued after the responsible labour officer had attempted various conciliation attempts. The matter was referred to arbitration according to the statutory procedure, and the parties were summoned to appear on 15 December 2004.*

889. *In this respect, the Committee recalls its earlier comments concerning the fundamental nature of the protection against anti-union discrimination and, in particular, such discrimination against trade union leaders and officials [see **Digest**, op. cit., para. 738]. It further repeats its concern that the events described by the complainant organizations appear to raise the possibility that Zimpost's actions may have had an anti-union component. The Committee requests the Government to convene an inquiry that is independent and considered as such by the parties, to thoroughly and promptly consider the allegations of anti-union discrimination in relation to the indefinite suspension of Mr. Nkala, Mr. Chizura and Mr. Munandi, and to ensure that appropriate measures are taken in response to any conclusions reached. If the competent body were to decide that they were suspended from their positions for anti-union reasons, the Committee expects that these three workers will be reinstated in their jobs or an equivalent position, without loss of pay or benefits. The Committee requests to be kept informed in this regard.*

The Committee's recommendations

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

(a) Given the direct conflict between the statements of the complainants and the Government, the Committee requests the complainants to provide additional information, including any written documentation, in relation to Mr. Matombo's dismissal.

(b) The Committee requests the Government to convene an inquiry that is independent and considered as such by the parties, to thoroughly and promptly consider the allegations of anti-union discrimination in relation to the dismissal of Mr. Matombo and the indefinite suspension of Mr. Nkala, Mr. Chizura and Mr. Munandi, and to ensure that appropriate measures are taken in response to any conclusions reached. In particular, the Committee expects that if it appears that Mr. Matombo has fulfilled the requirements applicable for trade union leave, he will be reinstated in his job, without loss of pay. If the competent body were to decide that Mr. Nkala, Mr. Chizura and Mr. Munandi were suspended from their positions for anti-union reasons, the Committee expects that they will be reinstated in their jobs or in equivalent positions, without loss of pay or benefits. The Committee requests the Government to keep it informed of any developments in this regard.

CASE NO. 2365

INTERIM REPORT

Complaint against the Government of Zimbabwe presented by the International Confederation of Free Trade Unions (ICFTU)

Allegations: The complainant organization alleges that the Government is directly responsible for numerous violations, such as attempted murders, assaults, intimidation, arbitrary arrests and detentions, as well as arbitrary dismissals and transfers committed against members, activists and leaders of the country's trade union movement and the members of their families

891. The complaint is contained in a communication dated 9 July 2004 from the International Confederation of Free Trade Unions (ICFTU). The ICFTU sent new allegations in a communication dated 7 February 2005.

892. The Government provided its observations in communications dated 6 September 2004 and 21 February 2005.

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

A. The complainant's allegations

894. In its communication of 9 July 2004, the ICFTU alleges that the Government of Zimbabwe has a long history of violating trade union and other human rights, and is widely known for suppressing any kind of trade union activity that might interfere with its policy. The ICFTU alleges that the Government is directly responsible for numerous violations of trade union and other human rights against members, activists and leaders of the country's trade union movement, and members of their families. These violations include harassment

measures such as arbitrary dismissals, demotions and transfers, as well as arbitrary detentions and arrests, intimidation, threats, assault, beatings, torture, rapes and other violations.

895. The complainant organization provided some information relating to the national protest of October 2003, and to the case of Mr. Lovemore Matombo, which will be dealt with in Cases Nos. 2313 and 2328, respectively.

896. On 17 February 2004, members of the ZCTU western region committee, Mr. Reason Ngewnya (regional chairman), Mr. Davis Shambare (regional vice-chairman), Mr. Percy McIjo (regional officer) and Mr. Ambrose Manenji (member of the Commercial Workers' Union of Zimbabwe) were picked up by the police in Bulawayo around 7 a.m. It is not clear why they were detained, since the police did not inform them of the reasons for their arrest nor did they have any pending issue with the police. However, since all these persons are widely known to be actively involved in the trade union movement, the ICFTU considers that they were in fact arrested as a measure of harassment or retaliation for their legitimate trade union activities.

897. On 4 March 2004, Mr. Matthew Takaona, president of the Zimbabwe Union of Journalists (ZUJ) was dismissed from his journalist position at Zimpapers, after he had addressed the staff of Associate Newspapers of Zimbabwe, who were facing an impending retrenchment. His dismissal thus appears to have been in direct reprisal for his legitimate trade union activity.

898. On 25 March 2004, Mr. Raymond Majongwe, general secretary of the Progressive Teachers' Union of Zimbabwe (PTUZ) was requested to pick up documents in Belgravia; he became suspicious and sent his driver instead. On his way the driver was trailed by a light blue Nissan, which tried to collide with Mr. Majongwe's car, until the assailant realized that he was not in it. The PTUZ believes that this constituted a failed attempt on the life of its leader.

899. On 27 March 2004, a group of unknown political activists violently attacked Mr. Charles Gombo, general secretary of the Zimbabwe Construction and Allied Workers' Union, who is also a town councillor. About 50 people besieged his residence at night when Mr. Gombo was not at home, vandalizing and stealing property. They attempted to lock the family members in the house and forced at gunpoint Mr. Gombo's wife and three children to march to a nearby hospital, where they were later released.

900. In April 2004, Mr. David Mangezi, vice-chairman of the ZCTU Chegutu district and a member of the Food Federation, was transferred from his workplace at a company called Bonnezim Private Ltd. in Chegutu to Harare. The reason given by the company management for the transfer was that:

> ... following persistent allegations by our communal basic publics … your presence and employment at Bonnezim in Chegutu because of your alleged clandestine involvement in political activities at the workplace … . This situation becomes very unsafe for both yourself and the company. It also puts the company in a situation contrary to its espoused public relations policy, especially given that all its crucial resources, like land and labour, are derived from them. … We have decided to transfer you to our sister group company in Harare, without loss of service or benefits.

The ICFTU argues that, despite the company's efforts to transfer Mr. Mangezi without loss of benefits, this shows that Bonnezim management bows to outside pressure, thereby compromising its employees' right to freedom of association.

B. The Government's reply

901. Concerning the dismissal of Mr. Matthew Takaona, the Government states in its communication of 6 September 2004 that this worker should follow the channels of appeal that exist in national legislation.

902. The Government submits that the case of Mr. Raymond Majongwe is merely an allegation. It is illogical to suggest that the Government was involved in causing this road incident without ascertaining first who were the people who requested Mr. Majongwe to pick up the documents. Road accidents do happen to anyone if proper driving conduct is not followed. The Government is surprised that a reputable organization would make such allegations based on hallucinations of individuals obsessed with a zeal to demonize the Government of Zimbabwe.

903. The Government states that the case of Mr. Charles Gombo is purely a case of political contestation, as this happened during a time of elections in his constituency. It is wrong to refer to his trade union position in this context. The Government asserts that he is actually a political activist. Mr. Gombo can institute civil legal proceedings against the perpetrators.

904. As regards the case of Messrs. Ngewnya, Shambare, McIjo and Manenji, the Government states that they are known political activists of an oppositional party. On the day in question, they were involved in political conduct that is contrary to the Public Order and Security Act (POSA). It is the responsibility of the police to safeguard order and security. The country cannot degenerate into anarchy because certain individuals seek to promote political agendas under the guise of trade unionism.

905. As regards the case of Mr. David Mangezi, the Government fails to understand how it can be directly involved in such a matter between a worker and his employer. It is normal for companies to transfer employees within or between their branches of sister companies, in the interest of the company or of the workers concerned. The Government's interest in such matters is to ensure that workers are not prejudiced. The right to freedom of association does not give workers a blank cheque to pursue social behaviour or conduct that is detrimental to the success or competitiveness of the company they work for. For the Government, Mr. Mangezi's activities at his workplace are additional evidence that the ZCTU has elements pursuing a political agenda of the Movement for Democratic Change (MDC), an oppositional party whose purpose is to remove the legitimate Government of Zimbabwe by violence.

906. For the Government, it is no surprise that such individuals seek to perpetuate the spiral of confrontation, polarization and politicization of the workplace, which is totally unacceptable by any standards. This group of individuals in the ZCTU are organized, instructed and financed by the former colonial master to carry out mercenary activities for the purpose of subverting the constitutional order, while hiding under the cloak of "defence of workers' rights". The Government states in conclusion that it is unfortunate that the ICFTU should seek to reduce the ILO to a workplace dispute resolution machinery, despite the fact that there are established systems to deal with such matters in Zimbabwe. The real objectives of these manoeuvres are to overthrow the Zimbabwe Government and its constitutional system which is backed by the overwhelming majority of Zimbabweans, and to stigmatize and demonize Zimbabwe, so as to create an international climate for furthering their treasonous agenda. This comes in the wake of a recent admission by the former colonial master that they are working in cohorts with the Movement for Democratic Change (MDC) and other organizations (presumably the ICFTU) to cause a regime change in Zimbabwe.

C. The Committee's conclusions

907. *The Committee notes that this complaint concerns allegations of violations of trade union and other human rights, which have affected members of the Zimbabwe Congress of Trade Unions (ZCTU) and of some of its affiliate organizations. The complainant organization alleges in particular arbitrary arrests and detentions, dismissals and transfers, as well as assaults, anti-union intimidation and harassment. The Government replies that all the persons in question are well-known activists of an oppositional party who are pursuing a political agenda and want to overthrow the constitutional order, and that there exist legal remedies at national level to address the workplace issues raised by the complainant organization.*

908. *As regards the Government's argument that there exist legal remedies at national level to address the workplace issues raised by the complainant organization, the Committee recalls that, although the use of internal legal procedures, whatever the outcome, is undoubtedly a factor to be taken into consideration, it has always considered that, in view of its responsibilities, its competence to examine allegations is not subject to the exhaustion of national procedures [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, Annex I, para. 33].*

909. *Regarding the case of Mr. Matthew Takaona, the complainant organization alleges that his dismissal is motivated by anti-union reasons; the Government replies that he should follow national channels of appeal. Noting that Mr. Takaona was dismissed shortly after he had engaged in activities directly germane to his trade union functions and responsibilities, the Committee requests that, if the competent body decides that the dismissal was for anti-union reasons, Mr. Takaona be rapidly reinstated in his functions, or in an equivalent position, without loss of pay or benefits. The Committee requests the Government to keep it informed of developments in this respect and to provide it with a copy of any decision handed down.*

910. *As regards the case of Messrs. Ngewnya, Shambare, McIjo and Manenji, the complainant organization alleges that these workers, actively involved in the trade union movement, were arrested as a measure of harassment or retaliation for their legitimate trade union activities, and that they were not informed of the reasons for their arrest. The Government replies that these persons are known political activists of an oppositional party and that, on the day in question, they were involved in political conduct that is contrary to the Public Order and Security Act (POSA). Noting that the Government does not provide information on the nature of said acts, which it says are contrary to the POSA, the Committee recalls once again, as it did recently in connection with Zimbabwe [Case No. 2313, 334th Report, para. 1116] 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; workers' organizations should therefore be able to voice their opinions on political issues in the broad sense of the term. 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****, op. cit., paras. 454-455]. The Committee expresses its particular concern since this kind of government interference seems to be recurrent in the country [see Case No. 2238, 332nd Report, paras. 957-970 and Case No. 2313, 334th Report, paras. 1090-1121], and may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities [see* ***Digest****, op. cit., para. 76]. It urges once again the Government to abstain in future from resorting to such*

measures of arrest and detention of trade union leaders or members for reasons connected to their trade union activities.

911. *As regards the case of Mr. David Mangezi, the Committee notes that, while the employer's decision was motivated by reasons having a political overtone, this worker was not dismissed or disciplined but transferred without loss of pay or benefits to a parent company in the same group. Taking into account the fact that Mr. Mangezi is an elected trade union representative who may thus be prevented from exercising his legitimate trade union activities, the Committee urges the employer, the union concerned and Mr. Mangezi to reconsider that transfer decision, with a view to permitting Mr. Mangezi's return to his initial workplace in due course, if he so desires. The Committee requests the Government to keep it informed of developments in this respect.*

912. *Regarding the cases of Messrs. Raymond Majongwe and Charles Gombo, the Committee considers, on the basis of the scant information and evidence available, that no discernible link can reasonably be inferred between the incidents mentioned by the complainant organization and the trade union status of these persons. The Committee therefore considers that this aspect of the case does not call for further examination.*

913. *From a more general perspective, the Committee observes that some of the incidents alleged in the present case follow similar events:(a) 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]; (b) in December 2002, where it reiterated its call to the Government to refrain from interfering in 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]; and (c) in October-November 2003, where it once again urged the Government not to resort to measures of arrest and detention of trade union leaders and members for reasons connected to their legitimate trade union activities [Case No. 2313, 334th Report, para. 1121]. Noting further the discussion that took place in June 2004 before the Conference Committee on the Application of Standards, and that two other similar cases are pending before it, the Committee expresses its deep concern with the extreme seriousness of the general trade union climate in Zimbabwe, and once again calls the Governing Body's special attention on the situation.*

The Committee's recommendations

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

(a) The Committee requests that, if the competent body decides that the dismissal of Mr. Takaona was for anti-union reasons, Mr. Takaona be rapidly reinstated in his functions, or in an equivalent position, without loss of pay or benefits. The Committee requests the Government to keep it informed of developments in this respect and to provide it with a copy of any decision handed down.

(b) The Committee urges once again the Government to abstain in future from resorting to measures of arrest and detention of trade union leaders or members for reasons connected to their trade union activities.

(c) The Committee urges the employer and the union to reconsider the transfer decision affecting trade union leader Mr. Mangezi, with a view to permitting his return to his initial workplace in due course, if he so desires. The

Committee requests the Government to keep it informed of developments in this respect.

(d) The Committee once again calls the Governing Body's special attention on the extreme seriousness of the general trade union situation in Zimbabwe.

(e) The Committee will examine the new allegations made by the ICFTU in a communication of 7 February 2005 and the Government's reply of 21 February 2005 at its next meeting.

Complaint concerning non-observance by Venezuela 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), made by various delegates at the 92nd Session (2004) of the Conference under article 26 of the ILO Constitution

915. At its meeting in November 2004, the Governing Body of the ILO examined the document prepared by its Officers on the complaint concerning non-observance by Venezuela 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), made by various delegates to the 92nd Session (2004) of the Conference under article 26 of the ILO Constitution. The text of the complaint is contained in Appendix I.

916. In this regard, the Governing Body adopted the following recommendations:

The Governing Body:

(a) requested the Director-General to invite the Government of Venezuela, as the Government against which the complaint had been filed, to communicate its observations on the complaint so that they reached the Director-General no later than 10 January 2005;

(b) decided to consider at its 292nd Session, in the light of:

(i) the information supplied by the Government of Venezuela on the complaint; and

(ii) the recommendations of the Committee on Freedom of Association;

whether the complaint should be forwarded to a commission of inquiry.

917. The Government presented its observations in a communication dated 10 January 2005, received by the International Labour Office on 20 January 2005 and reproduced in Appendix II. The Government also sends many other attachments concerning: the 18 per cent increase in economic growth; the fall in unemployment in 2004 (from 19.1 per cent to 10.9 per cent); the economic consequences of the political and economic sabotage; the achievements of the Ministry of Labour in terms of the number of associations that have been legalized; the results of the recall referendum and other political elections won by the Government party, and the reports of the Carter Center and the OAE; statements by the Government of Venezuela in the Governing Body on Cases Nos. 2249 and 2254; a statement by GRULAC on the duplication of procedures, requesting closure of the complaints procedure under article 26 of the Constitution; consultations on minimum wages, stability of employment and reform of the Organic Labour Act undertaken by FEDECAMARAS; a ruling on the unconstitutionality of certain provisions of the Lands

Act; the FEDECAMARAS manifesto of 30 August 2004; press cuttings on the willingness of the Government to engage in dialogue with the employers and on the reaction of FEDECAMARAS and FEDEINDUSTRIAS; the meeting of FEDECAMARAS REGIONALES with the Government; the Government's reply to the ILO's Office of Legal Services regarding the absence of any reply to the consultation on the suspensive effects of the direct contacts procedure, and the subsequent sudden response in the Governing Body in favour of the Employers' group; and the Government's decrees on the acquisition of foreign currency, information and statistics on exchange controls, improvements in international reserves, foreign currency case reserves, imports, and the positive effects of exchange controls on the economy including reduced flight of capital, interest rates, liquidity and inflation.

Point for decision

918. ***The Committee was not able to examine the complaint presented by virtue of article 26 of the ILO Constitution or formulate recommendations to the Government Body, given that all the Employer members of the Committee who were present at this meeting had signed the complaint in question. In these conditions, it is for the Governing Body, in the light of the information available to it, to decide the action to be taken on the complaint made under article 26 of the ILO Constitution.***

Appendix I

92nd Session of the International Labour Conference

Geneva, 17 June 2004

Received in NORMES on 18 June 2004

Received in CABINET on 17 June 2004 – 10168

Mr. Juan Somavia
Secretary-General of the International Labour Conference
Palais des Nations
Geneva
Switzerland

Dear Secretary-General:

The undersigned Employers' delegates to the 92nd Session of the International Labour Conference 2004 wish here to launch a complaint under article 26 of the ILO Constitution against the Government of Venezuela for violations of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), which was ratified by the Government of Venezuela on 20 September 1982, and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), ratified by Venezuela on 19 December 1968.

Since 1999, Venezuela has repeatedly violated Conventions Nos. 87 and 98 as recorded by the ILO supervisory bodies. During this period employers' and workers' groups have denounced the harassment they are going through in the Freedom of Association Committee of the Governing

Body as well as in the Conference Committee on Application of Standards and Credentials Committee of the International Labour Conference. The policies of the Venezuelan Government have led to the closure of over 100,000 companies as well as the unemployment of several hundred thousand workers, resulting in the largest economic and social crisis in Venezuela.

Non-compliance of the application of ILO Convention No. 87 and national law and practice have been examined every year by the Conference Committee on Application of Conventions and Recommendations since 1999, leading in 2000 to the inclusion of its conclusions in a special paragraph of the Committee's report and, in 2002, in a special paragraph for the persistent and continued failure to comply.

Within the International Labour Conference, the Credentials Committee has, during recent years, regularly examined objections concerning the composition of the Venezuelan delegation attending the Conference.

Despite previous recommendations handed down by the ILO supervisory bodies (Conference Committee on Application of Standards, Committee of Experts on Application of Conventions and Recommendations and the Committee on Freedom of Association), the Government of Venezuela continues to carry out actions against the social partners. Regarding employers, these actions include:

– physical, economic and moral attacks by the Government on the Venezuelan independent business community, their organizations and their representatives;

– marginalization of most employers' organizations and their exclusion from social dialogue and tripartite consultations;

– actions and interferences by the Government to encourage the development of parallel employers' organizations for the purposes of bypassing and weakening their most representative organizations, including the Federación de Cámaras y Asociaciones de Comercio y Producción de Venezuela (FEDECAMARAS);

– the creation of a hostile environment for independent employers resulting in orders to remove land and to stimulate the illegal occupation of productive farms; and

– the implementation of a discriminatory foreign exchange control system to companies affiliated to the most representative employers' organization, FEDECAMARAS, in retaliation of their membership.

In light of the foregoing, we the undersigned Employers' delegates at the 92nd Session of the International Labour Conference present this complaint under article 26 of the ILO Constitution for the non-observance by the Venezuelan Government of ILO Conventions Nos. 87 and 98, and hereby request the ILO Office to initiate the appropriate action, including, but not limited to, the examination of all pending cases in the ILO to bring about the hearing of this complaint. We reserve the right to submit more detailed information at the appropriate time.

92nd Session of the International Labour Conference

Complaint under article 26 of the ILO Constitution presented against the Government of Venezuela by Employers' delegates to the 92nd Session of the International Labour Conference on 17 June 2004.

Argentina	*(Signed)* Mr. Daniel Funes de Rioja, Substitute delegate.
Australia	*(Signed)* Mr. Bryan Noakes, Delegate.
Austria	*(Signed)* Mr. Peter Tomek, Delegate.
Brazil	*(Signed)* Mr. Dagoberto Lima-Godoy, Substitute delegate.

Canada	*(Signed)* Mr. Andrew Finlay, Delegate.
Cyprus	*(Signed)* Mr. Costas Kapartis, Substitute delegate.
France	*(Signed)* Mr. Bernad Boisson, Delegate.
Germany	*(Signed)* Ms. Antje Gerstein, Delegate.
India	*(Signed)* Mr. I. P. Anand, Substitute delegate.
Italy	*(Signed)* Ms. Lucia Sasso-Mazzufferi, Delegate.
Jamaica	*(Signed)* Mr. Herbert Lewis, Delegate.
Japan	*(Signed)* Mr. Toshio Suzuki, Substitute delegate.
Mexico	*(Signed)* Mr. Jorge de Regil, Delegate.
Norway	*(Signed)* Mr. Vidar Lindefjeld, Delegate.
Saudi Arabia	*(Signed)* Mr. Abdullah Dahlan, Delegate.
South Africa	*(Signed)* Mr. Bokkie Botha, Delegate.
Spain	*(Signed)* Mr. Javier Ferrer Dufol, Delegate.
Sweden	*(Signed)* Ms. Göran Trogen, Substitute delegate.
Switzerland	*(Signed)* Mr. Michel Barde, Delegate.
Tunisia	*(Signed)* Mr. Ali M'Kaissi, Substitute delegate.
United Kingdom	*(Signed)* Mr. Mel Lambert, Delegate.
United States	*(Signed)* Mr. Edward Potter, Delegate.
Venezuela	*(Signed)* Mr. Bingen de Arbeloa, Delegate.

Appendix II

Position of the Government of the Bolivarian Republic of Venezuela with regard to the complaint made by a group of employers under article 26 of the ILO Constitution

I. Introduction

In a communication addressed to the Director-General of the International Labour Office (ILO) dated 17 June 2004, [1] certain delegates from the Employers' group (hereinafter referred to as *the complainants*) [2] presented a complaint under article 26 of the ILO Constitution against the Government of Venezuela concerning alleged violations 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).

In the first place, the Government notes the contradictory use by the complainants of terms such as "violation(s)", and by the Office itself of the expression "non-observance", [3] when articles 24 and 26 of the Constitution in fact refer to failure "to secure [in any respect] the effective observance" of a Convention.

In their communication, the complainants refer to a number of situations – which date not from 1999, as they maintain, but from 1991 – referring expressly to cases already brought by employers and workers before the ILO's various supervisory bodies (the Committee on the Application of Standards, the Committee on Freedom of Association, and the Credentials Committee of the Conference) and erroneously take over complaints originally made by the workers, despite the fact that they have no right or authority to do so.

As regards the substance of the complaint, the Government rejects the complainants' arguments in their entirety, and reiterates all its own previous arguments before the ILO's supervisory bodies and the Governing Body in November 2004. It requests that the complaint be declared irreceivable and therefore closed on the grounds that the complainants' arguments are **without foundation**; that it would be **unnecessary** and **inappropriate** to set up a commission of inquiry in the context of the new conditions that have prevailed in Venezuela since the presidential referendum of August 2004; that it would be **inappropriate** to allow the overlapping of procedures that have not been concluded yet and concern the same subjects or situations; and lastly, that using the complaints procedure for publicity and political purposes would be a distortion of the ILO's objectives.

II. Irreceivability of the complaint on the grounds that it is without foundation

The Government of Venezuela rejects all the arguments and opinions presented by the complainants to substantiate an alleged *violation or non-observance* of ILO Conventions Nos. 87 and 98.

[1] In the context of the 92nd Session of the International Labour Conference.

[2] A total of 23 delegates from the Employers' group, including regular and substitute members from Argentina, Australia, Austria, Brazil, Canada, Cyprus, France, Germany, India, Italy, Jamaica, Japan, Mexico, Norway, Saudi Arabia, South Africa, Spain, Sweden, Switzerland, Tunisia, the United Kingdom, the United States and Venezuela.

[3] Letter of 23 July 2004 from Mr. K. Tapiola, Executive Director, Standards and Fundamental Principles and Rights at Work.

A. The Government's policies are intended to promote continual and systematic measures to secure the observance of the Conventions

According to article 26, paragraph 1, of the ILO Constitution, "*Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member* ***is securing the effective observance of*** *any Convention which both have ratified in accordance with the foregoing articles"* (italics and bold type added).

Apart from the fact that the complainants do not indicate the specific provisions that are supposed to have been infringed by Venezuela in a manner that would justify invoking article 26 of the ILO Constitution, the Government also wishes to point out that the complaint is more concerned with statements and criticisms concerning the country's social and economic policy than with the rights and freedoms protected by Conventions Nos. 87 and 98. [4] A number of complaints are currently before ILO supervisory bodies; these concern specific situations in connection with which the Government has taken the necessary investigative and corrective measures.

The country is not currently in an extreme situation so as to warrant or necessitate the establishment of a commission of inquiry. The policies adopted by the Government in direct and immediate implementation of the Constitution on which the people voted in the 1999 referendum, and in accordance with its leading role and commitment in efforts to combat poverty, have led to renewed economic growth, [5] higher wages in real terms, and financial and monetary stability. At the same time, unemployment indicators have fallen [6] as a result of action by traditional and newer enterprises, as have informal employment, inflation, interest rates and national risk indicators, a fact acknowledged by the international community (see the attached report).

Furthermore, as a result of the policies that have been adopted to combat poverty and exclusion, millions of Venezuelans are now covered by massive education, vocational training, health care and social security programmes; they now have institutions for financing and promoting small and medium-sized enterprises, and co-management models involving new forms of enterprise that are socially responsible and accountable to the workers, and committed to joint efforts to create and maintain decent employment. [7]

The Government of Venezuela guarantees the rights to establish in full freedom any occupational organization deemed suitable for better defending its members' rights and interests, as well as the right to join or not to join such an organization, without interference. The State protects associations from any act of discrimination or interference contrary to the exercise of the rights provided for in the Conventions (see appendix). [8]

Given that the complaint does not specify the obligations which the State has failed to fulfil, the measures it has failed to adopt, or the standards or rights under the Convention that have been infringed, the Government of Venezuela requests that the complaint be declared irreceivable.

[4] Its defects are similar to those of Case No. 2254.

[5] By the end of 2004, economic growth will increase by 18 per cent, according to the Economic Commission for Latin America and the Caribbean (ECLAC), with growth occurring in all sectors over the last five quarters. Employment levels and wages have also started to rise again.

[6] From the highest ever recorded level resulting from the lockout of 2002-03 (20.7 per cent in February 2003), unemployment fell by almost 10 percentage points to 10.9 per cent in December 2004.

[7] On 27 December 2004, the Nutrition of Workers Act *(Ley de Alimentación para los Trabajadores)* entered into force.

[8] Constitution of Venezuela, article 95. During the period 1999-2004, some 2,135 associations were established, an annual average of 356. During the period 1994-98 by contrast, only 1,275 were established (255 per year on average).

B. The complainants have no right or authority to take over cases originally presented by workers

The complainants inappropriately rely on situations with regard to which they have no standing or legitimacy, as they refer to requests made by organizations of workers before the ILO supervisory bodies. Applications which present as one's own situations that have nothing to do with the complainant, should not be receivable. Under international law principles, the complainants would be justified in taking action only in cases in which they have a legitimate interest or a material connection with a dispute.

The only representation brought by the employers before the Committee on the Application of Standards was in 1991 and concerned the entry into force of the Organic Labour Act of 1990. The only government in more than a decade to comply with that Committee's recommendations has been the Government of President Chávez, through the Fifth Republic Movement which leads the National Assembly.

With regard to the Committee on Freedom of Association, the complainants refer to situations of which they have direct knowledge in relation to a single case (Case No. 2254). [9] Lastly, the complainants claim that objections were brought before the Conference Credentials Committee concerning the Venezuela delegation during the 91st and 92nd Sessions of the International Labour Conference in 2003 and 2004, respectively.

Apart from the particular situations referred to, the Government requests the dismissal of all the employers' arguments on which they have no standing or legitimacy, given that they cannot take over cases which are of no direct concern to them or even contradictory, and the majority of which has been resolved through democratic dialogue.

C. The denunciations brought before the various ILO supervisory bodies are entirely without foundation

The Government of Venezuela thinks it appropriate to consider the arguments put forward by the complainants with regard to the alleged violations previously examined by ILO supervisory bodies, in particular, the Committee on Freedom of Association, the Credentials Committee and the Committee on the Application of Standards.

1. Cases examined by the Committee on Freedom of Association

(a) The arguments relating to the Committee's interim report are invalid and irreceivable because the report contains conclusions and recommendations that are contrary to international law

A number of the Committee's conclusions and recommendations [10] cannot be implemented, are contrary to international law, and disregard certain fundamental aspects of life in Venezuela.

- The Committee recommended that the Government set up an "independent" commission – endorsed by those responsible for the *coup d'état* and the oil industry lockout of 2002-03 – to "dismantle", proscribe or prohibit various social organizations that exercise the right to organize. These included the Fifth Republic Movement, the ruling party with a majority in the National Assembly as well as in 20 of the country's 22 districts and 270 out of 340 local

[9] The text of the complaint to the Committee on Freedom of Association was presented in March 2003, a few days after the end of the 62-day lockout against the country's democratic institutions.

[10] The recommendations of the Committee on Freedom of Association adopted by the Governing Body at its 290th Session.

authorities [11] and the Revolutionary Youth of the MVR. The party has won nine national, regional and local elections since 1998. [12] It is noteworthy that the Committee on Freedom of Association requested the "dismantling" of Venezuela's main political party and other legitimately constituted social organizations, which apart from being legally impossible would not be practicable.

- The Committee describes the Government's political party as "violent", "paramilitary" and "armed", an assessment at variance with the reports of the international facilitating agencies (the Organization of American States and the Carter Center) that have observed recent elections in the country (see appendices). In Venezuela, neither political parties and movements nor occupational organizations are prohibited, and the Committee's conclusion is therefore surprising, given that its implementation would have involved violations of fundamental civil and political rights.
- The Committee – without identifying the enterprises supposedly affected by discriminatory treatment – requests the Government to modify the current exchange controls system, thereby encroaching on areas of monetary and exchange policy. The system in question was adopted after a massive flight of capital that was intended to create political instability in 2002 and 2003. That flight of capital was also accompanied by shortages of basic foodstuffs and acts of sabotage against essential public services (especially domestic gasoline and natural gas supplies) which endangered the lives, health and safety of the population.

It is evident from the above that the interim conclusions and recommendations made previously have affected the principles of impartiality, balance and objectivity required of an ILO supervisory body. The result is a set of recommendations that contradict the principles and standards of international law in this area, including those established by the Committee itself with regard to strike action, acute national crisis and essential public services.

To conclude, these conclusions and recommendations, which cannot be implemented or are inconsistent with international law, cannot serve as the basis of a complaint against the Government of the Bolivarian Republic of Venezuela, and the complaint must therefore be declared irreceivable.

(b) The arguments relating to economic and social policies are invalid and irreceivable because they have no relation to the rights enshrined in Conventions Nos. 87 and 98

The complainants in their arguments draw attention to economic and social policies, in particular, exchange control and monetary measures, measures to promote small and medium-sized enterprises, inclusion in social dialogue of sectors hitherto excluded, and the development of uncultivated land, much of which had previously been occupied by individuals, despite being state property. These issues have no bearing at all on the provisions of Conventions Nos. 87 and 98.

The Government of Venezuela notes that the complainants refer to political issues, making generic allegations (without giving any specific, documented information corroborated by evidence) and vague assertions that were set out in the employers' communication to the Director-General of the ILO on 17 June 2004. [13]

[11] It won 97 per cent of the state or provincial government seats and 80 per cent of the local authorities.

[12] We refer to the position adopted by the Government of Venezuela as reflected in the Minutes of the Governing Body's 290th Session in June 2004.

[13] The Committee has said 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*, 1985, para. 204]. It has also referred to abuses by representative organizations: "Trade union organizations should not engage in political activities in an abusive manner and go beyond their true functions by promoting essentially political interests" (idem., para. 455).

The Government is surprised by the recommendation to modify the foreign exchange controls and administration system in Venezuela, given that the complainants do not indicate the specific provision(s) on which their claim is based. Moreover, the interpretation of Convention No. 87 applied is a broad one.

This not only disregards the Vienna Convention on the Law of Treaties; a broad interpretation of a Convention could be regarded as tantamount to the creation of new standards, which is the exclusive prerogative of the International Labour Conference.

(c) The arguments presented to the Committee on Freedom of Association with regard to Case No. 2254 are totally unfounded

The only case brought before the Committee on Freedom of Association by the complainants is known as Case No. 2254, on which an interim report has been published. The Government has rejected the complainants' arguments in their entirety, and is able now to present new allegations.

As regards the points raised in the complaint of 17 June 2004, which are also referred to in Case No. 2254, the Government draws attention to the following:

- With regard to the alleged discrimination in the **foreign exchange controls and administration system**, the measure in question was adopted by the Government in response to the massive and deliberate flight of capital which led to a reduction in international reserves and pushed the country into an inflationary spiral which adversely affected the population's access to basic foodstuffs and services. The employers are required to meet certain basic obligations (relating to tax and social security contributions), and where delays or other problems occur, they can have recourse to the administrative and judicial authorities. At any event, given the non-specific and generic nature of the allegations, we believe that the complainants have confused the initial problems of implementing the foreign exchange controls and administration system with deliberate discrimination. Historically, similar problems led to similar measures in 1961, 1983 and 1994. The case for dismissing the complaint is supported by information contained in the appendices concerning the distribution of foreign currencies at the end of 2004 which affected all the productive sectors, including national and internationally owned enterprises.
- As regards the alleged harassment of employers, it should be emphasized that, despite the tense situations that occurred during this period, no officials of any trade union or employers' organization were detained and no organization's premises were broken into, except for isolated measures undertaken in accordance with decisions by the courts and the public prosecution service. These decisions are directly linked to investigations of those responsible for the *coup d'état* of April 2002 and the economic and oil industry sabotage of December 2002 and 2003. [14] The Conventions do not authorize or legitimize unlawful action, and indeed require the social partners to respect the basic rules of democratic coexistence. [15] The measures adopted by the police followed in all cases previous decisions by independent and autonomous public prosecution organs, and did not involve persecution or restrictions on the exercise of the rights flowing from freedom of association.
- Assertions made by the Committee regarding the supposed violation of due process exhibit certain weaknesses with regard to the principles of burden of proof and evaluation of evidence, and are not consistent with domestic or international law. The Government cannot make up arguments for the complainants, nor overlook the absence of hard evidence in the complainants' arguments, nor can it initiate inquiries into suppositions or vague allegations

[14] Those implicated in acts against the Constitution and the country's democratic institutions include Pedro Carmona Estanga and Carlos Fernández, both former presidents of FEDECAMARAS. The former became President of the Republic for less than 24 hours on 12 April 2002. In both cases, the courts placed them under house arrest instead of sentencing them to imprisonment. They absconded and were subsequently granted asylum. The wife of Fernández even acknowledged publicly that he had been well treated.

[15] Article 8, paragraph 1, of Convention No. 87 stipulates that "In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land."

that are not supported by the facts. [16] Similarly, the Government is required to abide by the decisions of the Public Prosecution Service and courts, which were challenged in the courts by some of those concerned until they finally fled the country. [17] In other cases, the situations lack the systematic character and importance claimed, mistakenly, by the original complainants. [18]

- As regards the alleged establishment of a parallel employers' organization to weaken the more representative existing organization, the Government reiterates that the complaint makes use of generic, imprecise and unfounded arguments. At any event, the Government notes that the federation representing craftsmen, micro, small and medium-sized manufacturers in Venezuela (FEDEINDUSTRIA) was established in 1973 and has thus been in existence for 32 years; its involvement in economic policy is crucial to the creation and preservation of jobs, and furthermore is consistent with ILO guidelines including the Job Creation in Small and Medium-Sized Enterprises Recommendation, 1998 (No. 189). Other employers' organizations have also been founded through the exercise of the rights of participation and association in defence of the interests of micro-enterprises and entrepreneurs, in towns and in the countryside, without any threat to the existence of other associations and their members, unless the latter claim exclusive or monopolistic rights of representation.
- The complainants allege the "marginalization" of most of the existing employers' organizations and their exclusion from social dialogue and tripartite consultation. In this regard, consultations by correspondence have been taking place since 2002 on minimum wages with FEDECAMARAS and its regional and sectoral affiliated organizations. [19] Such consultations were identical in form to those applied to the other employers' organizations, and there was no preferential treatment. Since September 2004, these consultations, as well as covering wages, have been extended at various levels to cover areas such as immunity from dismissal. [20]
- With regard to more integrated social dialogue, always in a framework of a strategy for sustainable development and combating poverty and unemployment, the Government, after the failed *coup d'état* of 2002, activated social dialogue processes at the national and sectoral levels, involving employers' organizations affiliated to FEDECAMARAS, FEDEINDUSTRIA, CONFAGAN and EMPREVEN. These led to 170 agreements in sectors such as automobiles, textiles and clothing, tourism, the social economy and small and medium-sized enterprises.

[16] The complaints regarding the alleged ill-treatment of Carlos Fernández were never documented or corroborated by basic evidence. On the contrary, statements in the media by his wife were provided, confirming that he had been well treated. In view of this, it is inappropriate and indeed impossible to initiate inquiries which, instead of elucidating the truth, would seek to create suspicions regarding the actions of institutions that defend the rule of law.

[17] Before fleeing the country, Carlos Fernández obtained some court rulings in his favour, as well as some that went against him. For example, some of the original charges brought against him were dropped, and the ruling of the Appeals Court was overruled by the Criminal Chamber of the Supreme Court of Justice, until the Constitutional Chamber of the Supreme Court made a final ruling ordering his arrest in August 2003.

[18] In the case of the former president of CONSECOMERCIO (Julio Brazón) and the president of the Bejuma Chamber of Commerce in Carabobo State, the complainants refer to isolated situations arising from the actions of individuals, not the authorities, in a context of political strife, including within the opposition. Neither of these two cases involves official institutions, and they do not reflect any recurrent pattern of conduct in a country characterized by political and trade union participation and pluralism.

[19] The last of these communications was sent on 16 April 2004 and was answered on 21 April by the President of FEDECAMARAS.

[20] Communication of 24 September 2004 from the Deputy Minister of Labour to the President of FEDECAMARAS.

- As regards the adoption of legislation as part of an "Enabling Act" in 2000, consultations took place, in particular in August 2001, with all the sectors, in particular FEDECAMARAS and its affiliated organizations, with common timetables and methods. [21] Nevertheless, the State, having consulted various sectors with a view to ascertaining their specific interests, adopted measures which gave priority to the general public interest, especially the interests of excluded segments of the urban or rural population, and thereby demonstrated its political will to act in accordance with the wishes of the majority of the electorate which elected it. In any event, any disputes concerning the substance of the legislation in question were examined and decided upon by the Supreme Court of Justice, which made the necessary adjustments, including by declaring certain specific provisions null and void. [22]
- Following the presidential referendum of August 2004 and the regional and municipal elections in October 2004, a positive change was noted in the FEDECAMARAS leadership – from disregard of the will of the people, reflected at first in voices that claimed "electronic fraud", towards an appreciation of the Government's efforts to re-establish a climate for social dialogue with the active participation of the Executive Vice-President of the Republic and of various ministries including the Ministry of Labour. [23] In the last of these cases, we have already reported in writing on the initiatives to promote progress in consultations on the reform of the Organic Labour Act and social security legislation. [24] As a result, the leadership of FEDECAMARAS has become involved in the intensive democratic dialogue that has been taking place in the country since 1999, first on the constitutional process and then the transformation of the country's political, economic and social model.
- In addition, the complainants add another argument, to the effect that 100,000 enterprises have been closed and jobs have been lost. Both of these are consequences of the destabilization that has occurred since December 2001, the culmination of which was the economic sabotage and oil industry lockout of 2002-03 which FEDECAMARAS actively instigated. [25] In particular, the closure of small and medium-sized enterprises as a result of this economic strangulation, and the refusal to supply raw materials and intermediate products, were deplorable occurrences.

In Venezuela, there is no government policy of repression directed against workers or employers. The situations referred to confirm the will of the Government to pursue anti-monopolistic and anti-oligopolistic policies and restore the public-spirited and humanistic dimension of economic and social relations. The structure of the Venezuelan State, and its institutions and mechanisms for regulating the power of the State by encouraging direct citizens' participation as an indispensable element, preclude any policy of repression of the fundamental rights and freedoms.

[21] See the Committee's conclusion in para. 1062 of its 334th Report.

[22] On 20 November 2002, the Supreme Court of Justice (Constitutional Chamber) declared null and void sections 89 and 90 of the Act respecting land and agrarian development, following an application from the National Federation of Stockbreeders of Venezuela (FEDENAGA).

[23] This evolution in the position of the executive board of FEDECAMARAS can be traced from the communiqué *El Manifiesto* of 30 August 2004 to the document entitled *Los Caminos del Diálogo Social* produced by the National Council on 29 November 2004. The reader is invited to explore the site www.fedecamaras.org.ve . Press notes on the dialogue initiative are attached, as well as a copy of the communication of 8 November 2004 (invitation to a meeting on the reform of the Organic Labour Act).

[24] See attached copy of the communication of 8 November 2004 from the Deputy Minister of Labour to the President of FEDECAMARAS.

[25] In December 2001, when the political destabilization formally began with a one-day employers' stoppage, unemployment stood at 11 per cent. By the end of the employers' lockout directed by FEDECAMARAS in February 2003, unemployment had risen to 20.7 per cent, i.e. almost 10 percentage points more.

2. Objections brought before the Credentials Committee

At the same time, the complainants indicate that the Credentials Committee of the Conference has regularly examined objections concerning the composition of the Venezuelan delegation, but make no reference to the substance or outcome of those representations, and fail to indicate that the Committee has never denied accreditation to a delegation proposed by the Government.

These representations have been intended to secure a degree of exclusivity in Venezuelan representation at the ILO, to the exclusion of other workers' and employers' associations, without even complying with basic legal requirements regarding accreditation of representative status, as the Supreme Court of Justice has indicated. Such a claim to be exclusively representative purports to exclude employers' organizations that have existed for decades and play an important role in the life of the country.

3. Complaints to the Conference Committee on the Application of Standards

The complainants also refer to situations brought *by workers* to the attention of the Committee on the Application of Standards. These cases have already been or are in the process of being resolved, [26] and the Government of Venezuela has shown its willingness to collaborate in the implementation of the Committee's recommendations.

It should be borne in mind here that the last direct contacts mission took place between 13 and 15 October 2004 and was the second such mission in only 29 months. Until such time as a first report is submitted to the Committee of Experts, and later to the Committee on the Application of Standards at the next session of the Conference which instigated the mission, the examination procedures under way before the supervisory bodies should be suspended in accordance with paragraph 86(d) of the *Handbook of procedures relating to international labour Conventions and Recommendations*, [27] as was stated at the last session of the Governing Body and endorsed by the Group of Latin American and Caribbean States (GRULAC) (see appendix).

The National Assembly has the political will to ensure that the proposed amendments to the Organic Labour Act are adopted within the current six-month period, and to make progress with other legislative reforms to ensure that the majority of the population will enjoy the benefits of democratic and participative development.

(d) A commission of inquiry is unnecessary and irrelevant because the context and situation of Venezuela have changed since the employers presented the complaint in June 2004

The application was made by a number of delegates at the last session of the Conference before the direct contacts mission took place, in a political context that did not reckon with the presidential referendum demanded by the political opposition, of which the FEDECAMARAS leadership was an active part.

Nevertheless, President Hugo Chávez Frías, who is committed to the popular process of democratic change which he leads, consulted the voters on his mandate through the referendum. The results – the President won a 20 per cent margin over the opposition (60 per cent versus 40 per cent of the votes) – were observed by the international community, in particular the Organization of American States, the Carter Center, representatives of individual countries, human rights NGOs and workers' organizations, all of whom rejected allegations of "electronic fraud" as unfounded and false. Two and a half months later, on 31 October 2004, in a similar process at the regional and

[26] Questions relating to the sworn statement of assets by trade union officials have been resolved, and draft legislation on trade union rights and guarantees and the democratization of trade union organizations has been shelved. The substantive issue still outstanding concerns labour law reform and dates from 1991.

[27] "While direct contacts are taking place, the supervisory bodies will suspend their examination of the matters in question for a period not normally exceeding one year, so as to be able to take account of the outcome."

municipal levels, the President's policies won even greater support, winning 20 out of 22 districts and 270 out of 340 municipal or local authorities. The broad support that has grown out of the plebiscites of 2004 has confirmed the results obtained since 1998, a year which marked the beginning of a period of successive victories for the President over an opposition that chose violence and a non-democratic path.

In this context of peace and democratic encounter, those who had once distanced themselves from the constructive and broad-based dialogue promoted by the Government and its institutions are now actively getting involved in it, and this is a positive development. That is why the Government, after its resounding victory in the constitutional referendum of 15 August 2004, which confirmed the President's legitimacy, [28] immediately set about broadening social dialogue to include all representative employers' associations including FEDECAMARAS and its affiliated organizations (see information in the appendix), despite the fact that the current President of FEDECAMARAS initially tried to direct that dialogue and was prevented from doing so by the other members of the employers' umbrella organization. This initiative has been promoted, as previously indicated, by the Executive Vice-President of the Republic, with the participation of the Ministries of Labour and Finance.

There is thus no policy of persecution directed against leaders of workers' or employers' organizations or against the exercise of freedom of association and collective bargaining. On the contrary, Venezuela has shown that it wishes to solve its domestic political problems in an exemplary manner, peacefully, democratically and through the ballot box, especially those problems that have resulted from the *coup d'état* and the lockouts of 2002 and 2003 instigated by the opposition, including the leadership of FEDECAMARAS.

This new and favourable climate in political and social relations was attested by the members of the direct contacts mission who visited the country last October, although they have not yet published their report.

(e) It would be inappropriate to set up a commission of inquiry because it would lead to procedural duplication and adversely affect the efficiency of the ILO's working methods

The Government has constantly kept the Committee on Freedom of Association informed with regard to current cases, and many of its arguments have yet to be examined and assessed by the Committee. It has also repeatedly asked to be informed of procedural criteria applied unilaterally (regarding mutually exclusive complaints and representations, failure to assess information, etc.). No reply on these has ever been received according to officials of the Ministry of Labour, as was recently recalled by the Minister of Foreign Affairs in connection with the lack of any response from the ILO's Legal Adviser to a number of previous requests.

In all cases in which the Committee invites the Governing Body to adopt certain recommendations addressed to a government, the Committee invites the Government in question to indicate, once a period deemed reasonable in the light of circumstances has elapsed, the effect it has been able to give to any of the recommendations.

In Case No. 2254, the Committee published an interim, non-definitive report in June 2004 (seven months ago). The preliminary nature of its conclusions was confirmed by the request for information from the Government [see 335th Report of the Committee on Freedom of Association, para. 6, adopted on 16 November 2004 by the Governing Body]. This acknowledges the Government's right to present new information regarding the interim conclusions and recommendations.

[28] See appendix containing the results of the referendum held in accordance with the agreement concluded on 29 May 2003 between the political and economic opposition including FEDECAMARAS and the legitimate Government facilitated by the Carter Center, the Organization of American States (OAS) and the United Nations Development Programme (UNDP).

Furthermore, as already indicated, a direct contacts mission is under way and its report has not yet been made available to the Government. This also makes any additional procedure unnecessary.

(f) Setting up a commission of inquiry would be a distortion of the ILO's objectives and would serve only political and publicity purposes

In view of the technical assistance procedures that are currently under way, as well as the sustained improvements that have taken place in Venezuela's political climate, it would be inappropriate for the ILO to remain a political forum for resolving domestic problems that have already been resolved through the electoral process – the presidential referendum and regional and local elections.

The IOE adopted, in the past, a position regarding the use of the representation and complaints procedures under the ILO Constitution in order to achieve publicity and political ends. The complainants, in the FEDECAMARAS complaint, contradict the IOE statement in 2000, that "Articles 24 and 26 of the ILO Constitution are sometimes abused in that conflicts are brought to an international forum for publicity reasons. Means to limit this practice, perhaps by limiting the receivability criteria or introducing a filter mechanism, should be considered to prevent automatic discussion of a receivable complaint. The way in which articles 24 and 26 procedures complement the regular supervisory machinery should also be considered in order to prevent overlapping and provide more coherence." [29]

For all these reasons, the complaint should be ruled irreceivable, as the procedure would be disproportionate by comparison with other situations elsewhere in the world that are deemed by the international community to be very serious.

III. Conclusions

1. The complainants' allegations have been shown to be **without foundation**. No complaints currently before the ILO supervisory bodies would warrant the establishment of a commission of inquiry under the terms of article 26 of the ILO Constitution.
2. It has been shown that it would be **unnecessary** and inappropriate to set up a commission of inquiry, in view of the changed conditions that have prevailed in Venezuela since the presidential referendum in August 2004.
3. It has been shown that overlapping and duplication with procedures still under way in relation to the same subjects or situations would be **inappropriate**.
4. Lastly, it has been shown that using the complaints procedure for publicity and political ends would be a **distortion** of the ILO's objectives.

[29] IOE: *ILO Standards*, position paper adopted by the General Council of the IOE, Geneva, 9 June 2000, available at http://www.ioe-emp.org/ioe_emp/papers_statement/ioe_position_papers.htm .

IV. Petition

The Government of the Bolivarian Republic of Venezuela requests that the complaint be declared irreceivable and closed.

Geneva, 11 March 2005. *(Signed)* Professor Paul van der Heijden, Chairperson.

Points for decision: Paragraph 178; Paragraph 193; Paragraph 213; Paragraph 232; Paragraph 284; Paragraph 326; Paragraph 359; Paragraph 386; Paragraph 404; Paragraph 430; Paragraph 465; Paragraph 478; Paragraph 497; Paragraph 539; Paragraph 554; Paragraph 575; Paragraph 604; Paragraph 630; Paragraph 654; Paragraph 685; Paragraph 705; Paragraph 721; Paragraph 777; Paragraph 797; Paragraph 812; Paragraph 823; Paragraph 843; Paragraph 865; Paragraph 890; Paragraph 914; Paragraph 918.