



SEVENTH ITEM ON THE AGENDA

Reports of the Committee on Freedom of Association**338th Report of the Committee on Freedom of Association***Contents*

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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 November 2005, under the chairmanship of Professor Paul van der Heijden.
2. The members of Argentinian, Australian, Chilean, Guatemalan and Bolivarian Republic of Venezuelan nationality were not present during the examination of the cases relating to Argentina (Cases Nos. 2302, 2373 and 2377), Australia (Case No. 2326), Chile (Cases Nos. 2352 and 2392), Guatemala (Cases Nos. 2298, 2341 and 2361), Pakistan (Case No. 2399) and the Bolivarian Republic of Venezuela (article 26 complaint), respectively.

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3. Currently, there are 128 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 40 cases on the merits, reaching definitive conclusions in 28 cases and interim conclusions in 12 cases; the remaining cases were adjourned for the reasons set out in the following paragraphs.

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

4. The Committee considers it necessary to draw the special attention of the Governing Body to Case No. 2374 (Cambodia) 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. 2425 (Burundi), 2426 (Burundi), 2427 (Brazil), 2430 (Canada), 2432 (Nigeria), 2434 (Colombia), 2436 (Denmark), 2437 (United Kingdom), 2438 (Argentina), 2440 (Argentina), 2441 (Indonesia), 2442 (Mexico), 2443 (Cambodia), 2444 (Mexico), 2445 (Guatemala), 2446 (Mexico), 2447 (Malta), 2448 (Colombia), 2449 (Eritrea) and 2450 (Djibouti), 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. 2262 (Cambodia), 2265 (Switzerland), 2313 (Zimbabwe), 2318 (Cambodia), 2321 (Haiti), 2323 (Islamic Republic of Iran), 2337 (Chile), 2365 (Zimbabwe), 2408 (Cape Verde), 2420 (Argentina), 2421 (Guatemala) and 2422 (Bolivarian Republic of Venezuela).

Observations requested from governments and complainants

7. The Committee is still awaiting observations or information from the government and the complainant in the following case: No. 2292 (United States).

Partial information received from governments

8. In Cases Nos. 2177 (Japan), 2183 (Japan), 2203 (Guatemala), 2245 (Guatemala), 2254 (Bolivarian Republic of Venezuela), 2279 (Peru), 2295 (Guatemala), 2355 (Colombia), 2372 (Panama), 2388 (Ukraine), 2390 (Guatemala), 2400 (Peru) and 2423 (El Salvador), 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. 1865 (Republic of Korea), 2241 (Guatemala), 2259 (Guatemala), 2268 (Myanmar), 2317 (Republic of Moldova), 2319 (Japan), 2339 (Guatemala), 2351 (Turkey), 2354 (Nicaragua), 2356 (Colombia), 2362 (Colombia), 2368 (El Salvador), 2380 (Sri Lanka), 2393 (Mexico), 2396 (El Salvador), 2405 (Canada), 2406 (South Africa), 2409 (Costa Rica), 2411 (Bolivarian Republic of Venezuela), 2412 (Nepal), 2413 (Guatemala), 2414 (Argentina), 2415 (Serbia and Montenegro), 2416 (Morocco), 2417 (Argentina), 2418 (El Salvador), 2419 (Sri Lanka), 2424 (Colombia), 2428 (Bolivarian Republic of Venezuela), 2429 (Niger), 2431 (Equatorial Guinea), 2433 (Bahrain), 2435 (El Salvador), 2439 (Cameroon) and 2451 (Indonesia), the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting.
10. The Committee took note of the Government's reply in Case No. 1787 (Colombia), which it intended to examine at its next meeting, as well as of the oral report provided by the President of the Committee on Freedom of Association on the high-level tripartite visit that took place in Colombia at the invitation of the Government, from 24 to 29 October 2005, with the participation of the Worker and Employer Vice-Chairpersons of the Committee on the Application of Standards. The visit centred around the question of impunity, in particular in the framework of Case No. 1787 and matters relating more generally to labour relations in the country. At the end of their visit, the members made a number of recommendations, which were set out in a public statement made in Bogotá on 29 October 2005. The President would provide a full report on this visit to the Committee for its consideration, when examining Case No. 1787 at its next meeting.

Urgent appeals

11. As regards Cases Nos. 2270 (Uruguay), 2314 (Canada), 2333 (Canada), 2394 (Nicaragua) and 2397 (Guatemala), 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.

Receivability of complaints

12. The Committee deemed irreceivable a communication dated 10 January 2005 by the National Union of Press Workers of Venezuela (SNTP) alleging violations of freedom of association in Venezuela by the Government of France.
13. The Government of Mexico challenged the receivability of the matters raised in a communication dated 8 August 2005 by the Revolutionary Confederation of Workers and Peasants (CROC). The Committee will examine this question at its meeting in March 2006.

Closure of cases

14. The Committee notes that despite its requests to the complainant on four separate occasions for elements supporting the receivability of its complaint in Case No. 2322 (Bolivarian Republic of Venezuela), no information has been provided. The complainant in Case No. 2379 (Netherlands) has indicated that the one remaining point for which it had requested that the complaint be suspended has now been resolved. The Committee therefore considers that these cases do not call for further examination.

Transmission of cases to the Committee of Experts

15. The Committee draws the legislative aspects of the following cases to the attention of the Committee of Experts on the Application of Conventions and Recommendations: Fiji (Case No. 2316), Pakistan (Case No. 2229) and Ukraine (Case No. 2038).

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

Case No. 2256 (Argentina)

16. The Committee last examined this case at its November 2004 meeting [see 335th Report, paras. 20-22]. On that occasion, on examining allegations regarding the failure of the Directorate General of Schools (DGE) of the Province of Mendoza since 1999 to appoint its representatives to continue to negotiate a collective agreement for the sector with the United Union of Education Workers of Mendoza (SUTE), the Committee expressed the hope that a collective agreement would soon be concluded for the sector. Moreover, the Committee requested the Government to keep it informed of the final decision handed down by the judicial authority with respect to the participation by a new trade union organization, the Union of Argentine Teachers (UDA), in the renegotiation of Joint Accord No. 1 of 1999 concluded between the SUTE and the DGE.
17. In a communication dated 18 April 2005, the Government stated that on 22 December 2004, the DGE and SUTE concluded a collective agreement on the wage structure for teachers and union contributions. This agreement was endorsed by the Executive Authority in Decree No. 955/04. The Government also stated that there was still no decision with regard to the action for the protection of constitutional rights presented by the UDA to the First District Third Civil Court of the Province of Mendoza.
18. *The Committee notes with interest the agreement concluded between the DGE and the trade union organization SUTE. The Committee requests the Government to keep it*

informed of the final decision on the action for the protection of constitutional rights presented by the UDA.

Case No. 2283 (Argentina)

19. The Committee last examined this case at its November 2004 meeting [see 335th Report, paras. 209-227] and on that occasion made the following recommendations:

The Committee requests the Government to keep it informed of the outcome of any judicial action initiated by the dismissed or suspended trade unionists mentioned in the complaint in the Alberdi S.A. (COMODIN Supermarkets) enterprise and expects that, if the dismissals and suspension of these trade unionists are found to be anti-union in nature, they will be reinstated without loss of pay and without delay and, if reinstatement is not possible, that they will be adequately compensated.

The Committee firmly expects that, as soon as the Si.Tra.M. trade union organization has complied with the necessary legal requirements, the administrative authority will grant it trade union registration as it requested. The Committee requests the Government to keep it informed in this respect.

20. In a communication dated 18 April 2005, the Government referred to the status of the judicial actions undertaken by the trade unionists dismissed by the Alberdi S.A. enterprise mentioned in the complaint. Specifically, it states that, of the dismissed workers mentioned, Mr. Andrés Ricardo Guanuco and Mr. Diego Ramir Yomar made an application for the protection of constitutional rights to the First Chamber of the Labour Court of the City of San Salvador de Jujuy. This application was rejected by the Court, which led to their filing an appeal for cassation and unconstitutionality. The latter was favourably decided by the Higher Court of Justice, which ordered the First Chamber of the Labour Court to have jurisdiction over the case. Currently, the proceedings are awaiting decision. Moreover, it states that Mr. Ricardo Gramajo filed a claim for unfair dismissal and trade union protection, from which the parties have been summoned to a conciliation hearing that has not yet taken place. There is currently no record of any judicial action with regard to the worker Mr. Ezequiel Eduardo López (suspended).
21. *The Committee notes this information. The Committee hopes that the judicial authorities will hand down their decision soon and requests the Government to keep it informed of the outcome of the legal proceedings under way. Moreover, the Committee requests the Government to keep it informed of the situation with regard to the trade union registration of the trade union organization Si.Tra.M.*

Case No. 2344 (Argentina)

22. The Committee examined this case relating to acts of anti-union discrimination against the complainant organization's assistant secretary at its March 2005 meeting [see 336th Report, paras. 179-193]. On that occasion it made the following recommendation:

Observing that: (1) the judicial authority rejected the National Institute of Social Services for Persons Receiving Retirement Benefits and Pensions' application for the lifting of trade union protection and the authorization of dismissal against trade union official Mr. Praino, in particular noting in the judgment 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.

23. In a communication dated 9 June 2005, the complainant organization, the National Coordination of State Workers (CONATE) refers to the lawsuit "National Institute of

Social Services for Persons Receiving Retirement Benefits and Pensions v Praino Raúl, Lifting of Trade Union Protection” currently before the Federal Court of the Republic of Argentina, and states that the decision of the Court of Second Instance confirms that of the Federal Court of First Instance which decided in favour of Raúl Praino, noting anti-union discrimination and treatment against the assistant secretary of CONATE. The complainant organization states that, with the decision by the Court of Appeal not only to uphold the decision to reject the withdrawal of trade union privileges and subsequent dismissal of Mr. Praino, but also to uphold the reasons on which this decision was based, it is imperative that the Committee express an opinion on the matter, calling attention to the anti-union conduct shown, and urge the Argentinean Government to take steps to prevent such conduct occurring in situations similar to those that gave rise to the complaint.

24. In communications dated 14 July and October 2005, the Government states that it has been informed that the decision of the Second Instance of the Federal Court of Appeal of the City of Rosario – Province of Santa Fe – upheld the decision of the Court of First Instance and that the plaintiff has filed the appropriate extraordinary appeal.
25. *The Committee recalls that no person should be discriminated against in his or her employment as a result of his or her legitimate trade union activities or membership, whether present or past. The Committee notes this information and, in particular, that the judicial authority of the second instance upheld the decision that rejected the request for the lifting of trade union privileges and authorization for dismissal filed by the National Institute of Social Services for Persons Receiving Retirement Benefits and Pensions against the trade union official Praino Raúl. In this respect, the Committee requests the Government to keep it informed of the outcome of the extraordinary appeal filed in relation to the judicial decision of the Court of Second Instance.*

Case No. 2370 (Argentina)

26. The Committee examined this case at its March 2005 meeting and on that occasion made the following recommendations [see 336th Report, para. 232]:

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.

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.

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.

27. In its communication of 10 August 2005, the Government refers to the Committee’s recommendation in which it stated that it trusted that wage increases in the public sector will be subject to prior consultation with the workers’ organizations concerned and had attached Act No. 875 of 20 July 2005, which approves the Act of Agreement between representatives of the State and the trade union organizations UPCN and ATE, under which, in the framework of equality of collective bargaining in the public sector, a decision was reached jointly on wage increases for workers in the public administration.
28. *The Committee notes this information with interest.*

Case No. 2047 (Bulgaria)

29. The Committee last examined this case at its March 2005 meeting when it noted with interest the efforts made by the Government to clarify to the Association of Democratic Trade Unions (ADS) and the National Trade Union (NTU) the procedure that may be followed to request recognition of their representative status at the national level, and expressed the hope that the ADS and the NTU would 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. The Committee requested the Government to keep it informed of any developments in this respect and further requested the Government to keep it informed of the outcome of the appeal made by the Confederation of Labour “Podkrepa” and the Confederation of Independent Trade Unions in Bulgaria (CITUB) in respect of the recognition of the Association of Trade Unions to “Promyana” Alliance (hereinafter the Promyana Alliance) and to furnish a copy of the Supreme Administrative Court judgement [see 336th Report, approved by the Governing Body at its 292nd Session, paras. 14-18].
30. In a communication dated 30 May 2005, the Government indicated with regard to the appeal lodged by the Confederation of Labour “Podkrepa” in respect of the recognition of the Promyana Alliance, that by Ruling No. 418 passed on 14 January 2005, the Supreme Administrative Court declared the complaint inadmissible (ruling attached). Pursuant to an appeal by the Confederation of Labour “Podkrepa”, the Supreme Administrative Court issued Ruling No. 1699 on 23 February 2005 by which it affirmed Ruling No. 418 of 14 January 2005. Ruling No. 1699 was final and could not be appealed. Thus, the Promyana Alliance remained a representative workers’ organization at the national level. Finally, the Government indicated that the ADS and the NTU had not requested recognition as representative at the national level despite the fact that article 36 of the Labour Code and the ordinance issued on the basis of the Labour Code enabled every employers’ and workers’ organizations to apply for recognition as representative at national level.
31. *The Committee takes note of this information.*

Case No. 2182 (Canada/Ontario)

32. The Committee last examined this case, which concerns legislative provisions that encouraged decertification of workers’ organizations, at its May-June 2005 meeting, where it noted with interest that a legislative amendment (Bill 144) would repeal the impugned provisions. It requested the Government to keep it informed of developments and to provide a copy of the Act once adopted [see 337th Report, paras. 27-29].
33. In a communication of 6 July 2005, the Government of Ontario informed the Committee that Bill 144 was passed and given Royal Assent on 13 June 2005 (C. 15, Statutes of Ontario, 2005, attached to the Government’s communication). In addition to repealing the requirement to post and distribute information about trade union decertification, the Act: eliminates the requirement that unions disclose the name, salary and benefits of all directors, officers and employees earning more than a certain amount a year; it also restores the power of the Ontario Labour Relations Board (OLRB) to remedy serious labour relations conduct during organizing drives, and to make interim orders regarding reinstatement of workers alleging that they have been fired or disciplined for exercising their rights during a certification campaign.
34. *The Committee notes this information with satisfaction.*

Case No. 2305 (Canada/Ontario)

35. The Committee last examined this case at its May-June 2005 session, where it noted with interest from the information provided by the Government that social dialogue had apparently resumed and was being pursued in the education sector. The Committee requested the Government to continue to keep it informed of developments, in particular as regards results achieved at the Education Partnership Table, including as concerns the establishment of a voluntary and effective dispute-prevention and resolution mechanism [see 337th Report, para. 32].
36. In a communication dated 6 July 2005, the Government of Ontario states that it continues to work with education stakeholders to bring peace and stability to the sector. According to the Government, there is a changed atmosphere evidenced by the more engaged and frank dialogue between unions and the new Minister of Education. For the first time in the sector's history, there are now approximately 16 four-year collective agreements with teachers, and there have been no strikes during this administration. The Ministry has successfully replaced a confrontational environment with a collaborative one between the Government and teachers.
37. *Whilst noting with interest the information provided by the Government in the present case, the Committee cannot but express its concern that a new complaint has been brought in the meantime by the National Union of Public and General Employees (NUPGE, Case No. 2430) in connection with the education sector in Ontario, which does not fully corroborate the Government's vision of the state of industrial relations. The Committee requests the Government to pursue its best efforts to maintain a stable and harmonious labour relations atmosphere in the education sector, and to continue to keep it informed of results achieved at the Education Partnership Table, including as regards the establishment of a voluntary and effective dispute-prevention and resolution mechanism.*

Case No. 2141 (Chile)

38. At its March 2005 meeting, the Committee requested the Government to send a copy of the ruling handed down in the criminal proceeding relating to the death of Mr. Luis Lagos and the serious injuries sustained by Mr. Donaldo Zamora during the strike at the FABISA S.A. enterprise in May 2001 [see 336th Report, para. 22].
39. In its communication of 28 April 2005, the Government stated that the Labour Directorate did not have any information regarding the action brought by Mr. Luis Lagos' widow before the 18th Criminal Court of Santiago (No. 1086-3), about which his widow had reported.
40. *The Committee recalls that in its previous response the Government had reported the content of the criminal ruling in this case, also indicating the amount of the compensation that was due to the family of Luis Lagos, and it again requests that the Government send the ruling handed down in respect of the aforementioned acts of violence.*

Case No. 2172 (Chile)

41. At its March 2004 meeting, the Committee requested the Government to inform it of the decision handed down with regard to the dismissal of seven pilots and to keep it informed of the result of the judicial proceedings for anti-union practices filed against Lan Chile S.A. by a former member of the union [see 333rd Report, para. 319].

42. In its communication dated 28 April 2005, the Government states that the court of first instance rejected the motion for anti-union practices on the basis of prescription and because the former member who had made the claim did not have the legal interest. Also, the court fined the enterprise (80 “*unidades tributarias*”) for not having fully discounted the union dues; this ruling was confirmed by the Court of Appeal of Santiago.
43. *The Committee takes note of this information. The Committee again requests the Government to inform it of the decision handed down with regard to the dismissal of seven unionized pilots from the Lan Chile enterprise.*

Case No. 2186 (China/Hong Kong Special Administrative Region)

44. The Committee last examined this case, which concerns allegations that Cathay Pacific Airways dismissed the Hong Kong Aircrew Officer’s Association (HKAOA) members and officers by reason of their trade union activities, refused to enter into meaningful negotiations, tried to break up the union and committed other acts of intimidation and harassment, at its March 2004 meeting and formulated the following recommendations on which it requested to be kept informed of developments [see 333rd Report, approved by the Governing Body at its 289th Session, para. 362]:
- (a) The Committee notes with concern that the civil action for unreasonable and unlawful dismissal brought before the High Court by several pilots of Cathay Pacific Airways, has been pending since June 2002 without a date for a hearing having been fixed yet. It therefore requests the Government to take all necessary measures as soon as possible to end the dispute through a negotiated settlement which may be considered by both parties as fair and equitable. In the absence of such settlement, the Committee requests the Government to intercede with the parties with a view to promoting interim measures preventing irreparable damage for the dismissed pilots pending final judgement on this case. It also reiterates its previous request to the Government to communicate the High Court ruling once rendered.
 - (b) The Committee notes that the Government has been working on a legislative amendment to empower the Labour Tribunal to make an order of reinstatement/re-engagement in cases of unreasonable and unlawful dismissal without the need to secure the employer’s consent and requests the Government to keep it informed of developments in this respect.
 - (c) The Committee requests the Government to take all necessary measures, in consultation with the social partners, so as to consider the adoption of appropriate machinery geared to prevent and redress acts of anti-union discrimination, given that the generally applicable (criminal and civil) procedures for unjustified and unlawful dismissal do not seem to be sufficiently effective in affording protection against acts of anti-union discrimination, as required by Article 1 of Convention No. 98.
 - (d) The Committee recalls that it is incumbent on the authorities to ensure the application of Article 2 of Convention No. 98 and therefore requests the Government to take all necessary measures as soon as possible with a view to adopting legislative provisions prohibiting acts of interference in the establishment, functioning and administration of workers’ organizations and establishing efficient procedures coupled with sufficiently dissuasive sanctions so as to ensure their implementation in practice.
 - (e) The Committee expects that relations between HKAOA and Cathay Pacific Airways will improve, and requests the Government to renew its efforts for the effective promotion of bipartite collective bargaining, both in general and between the parties, and to take all necessary measures so as to ensure that negotiations are genuine and meaningful.
45. In a communication dated 11 May 2005, the Government provided information on the above recommendations. In particular, the Government indicated with regard to recommendation (a) above that, when the dispute came to light in 2001, the Labour

Department (LD) of the HKSAR Government actively mediated between the two parties to help resolve their differences and made strenuous efforts with a view to bringing the dispute to a negotiated settlement which would be agreeable to both parties. These conciliation efforts did not, however, yield the desired results. After the dismissal of the pilots in July 2001, the LD promptly advised HKAOA of the relevant provisions of the Employment Ordinance (EO) and the channels available for pilots to seek redress should they feel aggrieved. A complaint by nine of the pilots that the termination of their employment constituted a contravention of anti-union discrimination provisions in the EO was promptly investigated. Statements from the pilots and a submission from Cathay Pacific Airways were submitted to the Department of Justice (DoJ), which subsequently advised that there was insufficient evidence to establish an offence under the EO. In 2002, the LD was approached by 21 of the pilots to assist in the filing of claims for civil remedies before the Labour Tribunal. Prompt action was taken in this regard, but the Labour Tribunal ruled that, since civil action had been initiated in the High Court in 2001, the matter should be dealt with by the High Court. The Government added that as some of the dismissed pilots had resorted to civil action to seek legal redress against Cathay Pacific Airways, it remained a decision of the Court to award remedies to the aggrieved party for any damage incurred should the Court find the dismissal unreasonable and unlawful. Given the independence of the judiciary, the HKSAR Government was not in a position to intervene in the judicial process or exert any influence on the parties in litigation. At present, litigation was in progress at the High Court.

46. The Government further indicated, with regard to recommendation (b) above, that the HKSAR Government had been working on a draft amendment bill which sought to empower the LT to make an order for reinstatement/re-engagement in cases of unreasonable and unlawful dismissal (including dismissals on the ground of anti-union discrimination), without the need to secure the employer's consent if the LT considered it appropriate and reasonably practicable. As the bill was rather complex, more time was needed to complete the legal drafting process.
47. The Government added with regard to recommendation (c) above, that the HKSAR Government subscribed fully to the requirement under Article 1 of Convention No. 98 and that adequate protection against acts of anti-union discrimination was guaranteed by the basic law, the Hong Kong Bill of Rights Ordinance and section 21B and Part VIA of the Employment Ordinance. Notwithstanding the existing legislative protection against anti-union discrimination, the HKSAR Government had been working on the abovementioned draft amendment bill concerning reinstatement/re-engagement.
48. With regard to recommendation (d) above, the Government indicated that the HKSAR Government subscribed fully to the requirement under Article 2 of Convention No. 98 to protect workers' and employers' organizations against interference by each other and measures had been put in place to give effect to the Article. In particular, under section 36 of the Trade Unions Ordinance (TUO), all registered trade unions in the HKSAR were required to submit to the Registry of Trade Unions (RTU) their annual audited statements of account on the receipts and payments in the financial year and the assets and liabilities of the unions. Contributions from employers and employers' organizations, if any, must be highlighted in these accounts. Section 37 of the TUO further provided that the account books of a registered trade union should be open to inspection by members of the union and the RTU. Through regular examination of the audited annual statements and accounts books of the unions, the RTU ensured that no employer could gain domination over an employees' organization through the provision of financial support. The RTU also conducted inspection visits to trade unions and employers' organizations to provide advice and assistance on the management of their organizations and to ensure that employees and employers were free from acts of interference by each other in the establishment, functioning or administration of their organizations. The above measures had worked well

to give effect to Article 2 of Convention No. 98. There had been no report or complaint from employees' unions, including the HKAOA, about acts of interference from their employers or employers' organizations. The full application of Article 2 would continue to be ensured.

- 49.** The Government indicated, moreover, with regard to the Committee's statement in paragraph 357 of the 333rd Report to the effect that managements could hinder the activities of a trade union as a dismissed trade union leader would have to resign his trade union post by law, that the TUO does not require an officer to resign from his trade union post when he is dismissed by the employer. In particular, under section 17(2) of the TUO, a person who is or has been engaged or employed in a trade, industry or occupation with which the trade union is directly concerned, can be an officer of a trade union. Thus, even when dismissed, the officer should have been engaged in the trade with which the trade union is directly concerned. The employer can in no case make use of the provisions of the TUO to force the resignation of a trade union officer by dismissing him. As such, the relevant legislative provisions are not contrary to Article 2 of Convention No. 98. The rules of some trade unions, including the HKAOA, stipulate that their trade union officers should be voting members of the trade unions. In these cases, a trade union officer who ceases to be a voting member of the trade union after his dismissal would be required to resign from his trade union post. Restrictions of this kind are imposed by the trade unions themselves, and not by the TUO. Indeed, it would be up to the trade unions to modify their own union rules should they see a need to do so.
- 50.** With regard to recommendation (e) above, the Government indicated that the HKAOA and Cathay Pacific Airways had put in place a longstanding, sophisticated and efficient collective bargaining machinery. Although communication between the two parties had ceased for some time after the 2001 dispute, towards the end of 2003 a new executive committee of the HKAOA renewed its dialogue with Cathay Pacific Airways and collective bargaining between the two parties had since achieved good results in resolving the outstanding issues. In 2004, the two sides reached an agreement on a new rostering arrangement, which was put into effect in January 2005. This signified not only an end to the protracted dispute on rostering practices but also an improved relationship between the HKAOA and Cathay Pacific Airways. There were positive signs that the two parties would continue to engage in constructive and meaningful discussions to resolve the other outstanding issues by bipartite collective bargaining.
- 51.** The Government emphasized the firm belief of the HKSAR Government that the employer and employees of an enterprise were in the best position to deal with matters of mutual concern by direct negotiation. The Labour Department stood ready to render conciliation services to the parties concerned when direct negotiation failed. It would also spare no effort in promoting voluntary negotiation between employers and employees and their respective organizations, for instance, by encouraging employers to maintain effective communication with their employees or their unions and to consult them on matters pertaining to employment through a wide range of promotional activities, such as seminars and talks regularly organized for employers, employees and human resource professionals and a variety of promotional materials on related topics for free distribution to the public (e.g. guidebook titled "Guide to Workplace Cooperation", VCD titled "Break the barrier, be communicative" and VCD titled "Key to Business Success: Workplace Cooperation"). In 2004, the publicity activities of the Labour Department focused on promoting the message of "partnership between employers and employees at work", considering that this partnership spirit was crucial to the success of effective communication and cooperation between employers and employees. To inculcate this partnership spirit in the community, the Labour Department had launched a new television announcement of public interest (API) on "Success through Partnership", a "Good People Management Award", and an informal survey on the mode of labour-management communication in 110 establishments

employing 500 people and above. The findings revealed that about 26 per cent of the establishments surveyed had formed joint consultative committees at the enterprise level for the purpose of labour-management communication and consultation. These establishments employed about 133,515 employees (or 49 per cent of the total number of employees in the 110 establishments surveyed). The survey illustrated that a considerable proportion of sizeable enterprises in the HKSAR were already engaged in some form of voluntary negotiation with their employees on terms and conditions of employment through the machinery of joint consultative committees.

52. *The Committee notes the information provided by the Government. The Committee notes with concern that the civil action for unreasonable and unlawful dismissal brought before the High Court by several pilots of Cathay Pacific Airways in November 2001 is still pending. The Committee further recalls from the last examination of this case that the dismissed pilots were subject to a legal requirement to fly at least one trip per month to maintain recency [see 333rd Report, para. 350]. Thus, in the light of the delay in the judicial proceedings, the Committee had requested the Government (see under (a) above, to take measures so as to end the dispute through a negotiated settlement or, in the absence of such settlement, to intercede with the parties with a view to promoting interim measures preventing irreparable damage for the dismissed pilots pending final judgement on this case.*
53. *Against this background, the Committee observes that the Government has confined itself to reiterating previously submitted information and states, in particular, that it is not in a position to intervene in the judicial process or exert any influence on the parties in litigation, while it does not provide any indication as to the current stage of the proceedings or the approximate time when a final ruling could be rendered by the High Court. The Committee recalls once again that justice delayed is justice denied and that the basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 56 and 739]. The Committee regrets that the Government has not taken any measure to end the dispute through a negotiated settlement which may be considered by both parties as fair and equitable and requests the Government to take such measures without delay given that the proceedings before the High Court are still pending, four years after the lodging of a complaint by several pilots of Cathay Pacific Airways for unreasonable and unlawful dismissal. The Committee also requests the Government to inform it of the actual stage of the proceedings before the High Court.*
54. *With regard to the recommendation made under (b) above on a possible amendment to the Employment Ordinance concerning the issue of reinstatement/re-engagement, the Committee notes that, according to the Government, more time is needed to complete the legal drafting process. The Committee recalls that the amendment in question has been approved by the Labour Advisory Board which has an equal number of employer and employee representatives [see 326th Report, para. 44, and 333rd Report, para. 351] and emphasizes once again the conclusions it reached in Case No. 1942 concerning Hong Kong SAR (China), wherein it considered that it would be difficult to envisage that the requirement of prior mutual consent to reinstatement would be easily forthcoming if the true reason for a dismissal was based on anti-union motives [see 311th Report, paras. 235-271, and 333rd Report, para. 351]. The Committee requests the Government to keep it informed of the progress made in amending the Employment Ordinance.*
55. *With regard to the recommendations made under (c) above on the adoption of appropriate machinery geared to prevent and redress acts of anti-union discrimination, the Committee takes due note of the existing provisions enumerated by the Government in this respect, but*

also observes that in the particular case before it, the 50 dismissed HKAOA members and officers have not had an opportunity to effectively voice their grievances, due to various procedural reasons. In particular, the Department of Justice considered that there was insufficient proof to establish an offence under the Employment Ordinance because the requisite standard of evidence for acts of anti-union discrimination is very high and the relevant proceedings are criminal ones, every element having to be proven beyond reasonable doubt; the Labour Tribunal moreover considered that the case was not receivable because a civil action had been previously initiated before the High Court. The Committee also observes that the proceedings currently pending before the High Court for unreasonable and unlawful dismissal tend to be time-consuming and might perhaps not be sufficiently focused on the specific issue of anti-union discrimination. The Committee further recalls from its previous examination of this case that 50 out of 51 dismissed pilots were trade union members including eight officers and three members of the union negotiating team. The dismissals took place immediately following the staging of lawful industrial action. The grounds put forward for the dismissals included disciplinary warnings for reasons which could be seen as closely related to trade union membership and activities, and other generic reasons such as “unhelpful and uncooperative” attitude. The Committee recalls that in a similar case, the Committee found it difficult to accept, as a coincidence unrelated to trade union activity, that heads of departments should have decided, immediately after a strike, to convene disciplinary boards which, on the basis of service records, ordered the dismissal not only of a number of strikers, but also of the seven members of their union committee [see *Digest*, op. cit., para. 717].

56. The Committee regrets that workers who consider themselves prejudiced because of their trade union activities could not find access to appropriate machinery for the prompt investigation and settlement of their grievances. It recalls that respect for the principles of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress, which are expeditious, inexpensive and fully impartial [see *Digest*, op. cit., para. 741]. It also notes that, although the possibility of criminal prosecution against acts of anti-union discrimination might appear in theory to afford a very high level of protection to the workers, in the particular circumstances of this case it is likely to be ineffective due to the inhibitory effect of the high standard of proof required in criminal proceedings and the difficulties involved in proving beyond a reasonable doubt that the dismissal was by reason of trade union activities. The Committee therefore once again requests the Government to take all necessary measures in consultation with the social partners, so as to consider the adoption of appropriate machinery geared to prevent and redress acts of anti-union discrimination. The Committee requests to be kept informed in this respect.
57. With regard to the recommendations made under (d) on the issue of interference, the Committee takes due note of the measures taken by the Trade Unions Registry pursuant to sections 36 and 37 of the Trade Unions Ordinance so as to prevent acts of interference such as the establishment of workers’ organizations under the domination of employers’ organizations or support for workers’ organizations by financial or other means with the object of placing such organizations under the control of employers or employers’ organizations, as required by Article 2(2) of Convention No. 98. However, the Committee also notes from the Government’s observations that there is no explicit prohibition of acts of interference in the law or any prompt and effective mechanism of examination of relevant complaints. The Committee observes that acts of interference are not limited to financial domination and that the dismissal of a large number of trade union members, including the leadership of the trade union in question, in the context of a collective dispute, might possibly aim at weakening the trade union and influencing its negotiating power and strategy. The Committee regrets that there is no prompt mechanism in place to investigate such grievances. The Committee recalls that legislation must make express provision for appeals and establish sufficiently dissuasive sanctions against acts of

*interference by employers against workers and workers' organizations to ensure the practical application of Article 2 of Convention No. 98 [see **Digest**, op. cit., para. 764]. It once again requests the Government to adopt legislative provisions prohibiting acts of interference coupled with efficient appeal procedures and sufficiently dissuasive sanctions. The Committee requests to be kept informed in this respect.*

- 58.** *While noting that the relationship between HKAOA and Cathay Pacific Airways has improved and that a new rostering agreement was reached in 2004, thus ending a longstanding dispute on this issue, the Committee also notes that the initiative for the new round of negotiations appears to have come from HKAOA and regrets that the Government does not indicate any initiatives by the Labour Department to assist the parties in bringing an end to their dispute, as requested by the Committee (see under (e) above). The Committee hopes that the Government will give consideration to more proactive measures in the future in the context of promoting negotiated solutions to collective disputes, in conformity with Article 4 of Convention No. 98.*
- 59.** *Finally, while taking due note of the information provided by the Government on various promotional activities, the Committee must observe that joint consultative committees are not negotiating bodies in the meaning of Article 4 of Convention No. 98 since they seem to play a merely advisory role and that effective communication between the management and workers does not amount to negotiations. The Committee requests the Government to renew its efforts for the effective promotion of bipartite collective bargaining and to take all necessary measures, including appropriate protection against anti-union discrimination and interference, so as to ensure that negotiations are genuine and meaningful.*

Case No. 2253 (China/Hong Kong Special Administrative Region)

- 60.** The Committee last examined this case, which concerns allegations that by enacting the Public Officers Pay Adjustment Ordinance in 2002, the Government unilaterally reduced civil service pay without proper negotiations with civil service unions and refused to settle the dispute over pay adjustment through continued dialogue or through a committee of inquiry, as provided in the 1968 Agreement between the Government and the main staff associations, at its November 2004 meeting and formulated the following recommendations [see 334th Report, approved by the Governing Body at its 290th Session, para. 320]:
- (a) The Committee requests the Government to engage in consultations with the staff sides of the central consultative councils without delay with a view to taking the appropriate legislative measures so as to establish a collective bargaining mechanism allowing public employees who are not engaged in the administration of the State to negotiate collectively their terms and conditions of employment in accordance with Article 4 of Convention No. 98, applicable in the territory of China/Hong Kong Special Administrative Region without modifications. The Committee requests to be kept informed of developments in this respect.
 - (b) The Committee expects that the staff sides of the central consultative councils will be allowed in the future to engage in full and frank consultations with the Government over the terms and conditions of employment of public employees who are engaged in the administration of the State in accordance with Article 7 of Convention No. 151, applicable in the territory of China/Hong Kong Special Administrative Region without modifications.
 - (c) The Committee expects that the authorities will accept in the future the appointment of the committee of inquiry provided in the 1968 Agreement between the Government and

the main staff associations in case of dispute over the determination of the terms and conditions of employment of public employees.

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

- 61.** In a communication dated 13 June 2005, the Government made some observations in the first place, with regard to the comments made by the Committee in its 334th Report, paragraph 320, to the effect that “the consultations which took place during the 2002 civil service pay adjustment exercise seemed to be perfunctory” and the comments made in the 334th Report, paragraph 318, to the effect that “by not bringing this dispute before the committee of inquiry in accordance with the 1968 Agreement, the Government avoided the procedure in place for the settlement of disputes, putting a unilateral end to it, in violation of Article 8 of Convention No. 151 and Article 4 of Convention No. 98”. The Government stressed that, in the 2002 pay adjustment exercise, it had spared no effort in consulting the staff sides fully and frankly so as to settle the dispute in the most effective and equitable manner, taking into careful consideration the arrangements under the 1968 Agreement and striking a proper balance between the interests of civil servants and those of society at large.
- 62.** With regard to the staff consultation arrangements for the 2002 civil service pay adjustment exercise [334th Report, para. 314], the Government indicated that the annual civil service pay adjustment mechanism, adopted since the 1970s, functioned on the basis of an inevitably tight timetable given the need to: (i) take account of the latest pay trend data in the private sector up to 1 April of the adjustment year, which were available to the Pay Trend Survey Committee for validation only in early May of the adjustment year; and (ii) seek the necessary funding/legislative approval from the Legislative Council before its summer recess, commencing in mid-July of the adjustment year so that the pay adjustment could be implemented in a timely manner. Accordingly, it was the normal practice of the Government to make a decision on the annual civil service pay adjustment, after considering the staff sides’ pay claims and their comments on the Government’s pay offer, by around end-May to early June every year in order to allow time for the Legislative Council to consider the Government’s proposal. In respect of the 2002 civil service pay adjustment exercise, after considering the pay claims from the staff sides, the Government made a pay offer to the staff sides on 22 May 2002. It then took a decision on the 2002 pay adjustment on 28 May 2002, after taking account of the comments of the staff sides on the pay offer and other relevant factors.
- 63.** There were ample opportunities for the staff representatives to participate in the 2002 civil service pay adjustment exercise and to put forward their views which were given very careful consideration by the Government of the HKSAR in deciding on the pay reduction effective from 1 October 2002 and taken into account by the Legislative Council in approving the legislation that gave effect to the pay reduction. In particular: (i) the staff sides of the four central consultative councils participated in the 2002 civil service pay adjustment exercise from September 2001 (i.e. the year preceding the adjustment year) when the Pay Trend Survey Committee (PTSC) proceeded to review the methodology and the survey field of the Pay Trend Survey to be adopted for that pay adjustment exercise. After the PTSC had finalized the methodology and the survey field of the Pay Trend Survey in December 2002, it commissioned the Pay Survey and Research Unit (PSRU), which was established under the Standing Commission on Civil Service Salaries and Conditions of Service, to carry out the survey field work. Following the submission of the survey findings by the PSRU to the PTSC on 6 May 2002, the latter discussed and validated the findings on 13 May 2002; (ii) to enable the staff sides to take account of the net pay trend indicators in making their pay claims to the Government, the Government of

the HKSAR normally invites the staff sides in end-April to early May of the adjustment year to submit their pay claims by mid-May, by which time the Pay Trend Survey results will have been validated by the PTSC. In the 2002 civil service pay adjustment exercise, the Government followed the usual procedures by inviting the staff sides on 29 April 2002 to submit their pay claims by 15 May 2002; (iii) the annual civil service pay adjustment is not a matter to be determined solely between the Government of the HKSAR as the employer and the staff sides of the central consultative councils as the employee representatives. As pointed out above, necessary funding/legislative approval has to be sought from the Legislative Council. It is also noteworthy that the participation of the staff sides in the 2002 pay adjustment exercise did not end with the Government's decision on the pay adjustment – they continued to be involved in the deliberations of the Legislative Council on the proposal concerning the 2002 civil service pay adjustment until the Legislative Council passed the Public Officers Pay Adjustment Bill on 11 July 2002. In this connection, before the Government of the HKSAR made a decision on the 2002 civil service pay adjustment, the Legislative Council Panel on Public Service discussed the matter and invited the staff sides of the four central consultative councils as well as the four major service-wide staff unions to present their views before the Panel on 23 May 2002 (i.e. the day after the Government had made the pay offer to the staff sides); (iv) after the Government had introduced the Public Officers Pay Adjustment Bill into the Legislative Council, the Bills Committee established under the Legislative Council to scrutinize the Bill also invited the staff sides of the four central consultative councils and the four major service-wide staff unions to attend a meeting held on 18 June 2002 to make representation. The staff representatives' views and comments were thus fully reflected to the Legislative Council which, in turn, had examined them and taken them fully into account before passing the Bill on 11 July 2002.

64. The Government added that, under the established civil service pay adjustment mechanism, in reaching the decision of the 2002 civil service pay adjustment, the Government of the HKSAR had taken full account of six factors, namely, the net pay trend indicators derived from the private sector Pay Trend Survey, the state of the economy, budgetary considerations, changes in the cost of living, the staff sides' pay claims and the civil service morale. All factors other than the staff sides' pay claim and civil service morale pointed clearly to the direction of a civil service pay reduction. Having considered all the relevant factors, including the pay claims from the staff sides for a pay freeze, the Government had eventually decided on a fairly moderate pay reduction for 2002 ranging from 1.58 per cent to 4.42 per cent, depending on the salary bands, in line with the net pay trend indicators. Whilst recognizing the staff sides' interests and the importance of staff morale, the Government found it difficult to accede to the staff sides' suggestion at the expense of public interests. The proposed moderate pay reduction was supported by a majority of the Members of the Legislative Council, which passed the Public Officers Pay Adjustment Bill on 11 July 2002 to implement the pay reduction. It is noteworthy that, during the resumption of the Second Reading Debate on the Bill, some Members of the Legislative Council criticized the proposed magnitude of pay reduction as too moderate because, in their view, civil service pay level was already substantially higher than that in the private sector.
65. The Government of the HKSAR was duty bound to implement the annual civil service pay adjustment, irrespective of whether it was an increase or a reduction, in a timely manner. For the 2002 civil service pay adjustment exercise, in view of the negative net pay trend indicators derived from the Pay Trend Survey, it was incumbent upon the Government of the HKSAR to make early preparation for the necessary legislative work in case a final decision was made to implement a pay reduction. Accordingly, the Government of the HKSAR sought the urgent preparation of a draft bill (without specifying any pay adjustment percentages) and the agreement in principle of the Chief Executive in Council on 22 May 2002 (i.e. the date when the Chief Executive in Council considered the pay

offer to be made to the staff sides). Following the Executive Council's agreement, the Government informed the staff sides of the pay offer of a pay reduction and sent them a copy of the draft bill for comment. The preparation of the draft bill served two purposes. First, it gave the staff sides a clear idea of how the pay reduction as offered would be implemented. Second, it provided a basis for consultation with the staff sides on the precise means to implement a pay reduction, if so decided, before the legislative proposal was put forward to the Legislative Council for consideration. As the draft bill presented to the staff sides did not contain any pay reduction percentages, which remained a subject for consultation with the staff sides, there was no question that the preparation of the draft bill had in any way pre-empted the discussion between the Government and the staff sides on the pay adjustment for 2002.

- 66.** With regard to the issue of the committee of inquiry [334th Report of the Committee on Freedom of Association, para. 318], the Government indicated in respect of the annual civil service pay adjustment, it was a matter of settled policy that the established pay adjustment mechanism (see paragraphs 5-9 of the Representation) should be followed in determining the size of each year's civil service pay adjustment. For the 2002 civil service pay adjustment exercise, that adjustment mechanism had been followed in an entirely consistent manner. Hence, in accordance with the 1968 Agreement setting out the procedures and criteria for appointing a committee of inquiry, the Chief Executive of the HKSAR concluded that the 2002 civil service pay adjustment was a matter of settled policy and accordingly decided not to appoint a committee of inquiry. The Government of the HKSAR had acted in full compliance with the relevant provisions of the 1968 Agreement and had not avoided the procedures in place so as to end the dispute unilaterally.
- 67.** Procedural consideration apart, the Government did not consider it appropriate to bring the issue before the committee of inquiry. The primary reason underlying the staff sides' request for appointing a committee of inquiry was that a pay reduction implemented by legislation was unprecedented and concern was raised as to whether such an approach was lawful. In this connection, the Government of the HKSAR pointed out that the decision to implement the 2002 civil service pay adjustment by way of legislation was to ensure smooth implementation of a settled policy. Whether the decision could have been implemented without legislation or whether the proposed legislation was constitutional were questions of law which a committee of inquiry would not be able to resolve.
- 68.** In deciding on the 2002 civil service pay adjustment, the Government of the HKSAR had followed the prevailing annual pay adjustment mechanism, which had functioned effectively for some 30 years and provided for voluntary negotiation between the Government of the HKSAR and the staff sides. The staff consultation procedures built into the civil service pay adjustment mechanism were measures appropriate to the conditions of the HKSAR adopted by the Government of the HKSAR, in compliance with Articles 7 and 8 of Convention No. 151, to promote the utilization of machinery for negotiation of the annual civil service pay adjustment between the Government and the staff sides. The mere fact that an agreement could not be reached between the Government and the staff sides over the 2002 civil service pay adjustment after this thorough consultation process should not be taken to mean that the staff consultative mechanism was not in compliance with Articles 7 and 8. Indeed, given the need for the Government of the HKSAR to be accountable for public expenditure and to take account of the overall interests of the community as a whole in dealing with civil service pay, as well as the fact that any adjustments to the civil service pay scales were subject to necessary funding/legislative scrutiny and approval by the Legislative Council, it could not be taken for granted that any agreement reached between the Government and staff representatives on the annual civil service pay adjustment must be implemented without any modification.

69. With regard to recommendation (a) above concerning the establishment of a collective bargaining mechanism for those public employees who are not engaged in the administration of the State, the Government indicated that, in line with its general policy to take measures appropriate to local conditions to encourage and promote negotiations between employers and employees or their respective organizations on a voluntary basis, the Government of the HKSAR had established within the civil service an elaborate staff consultative machinery which encouraged effective communication between management and staff on matters concerning the terms and conditions of employment and allowed participation of staff representatives in the determination of such matters (including making demands for and putting forward counter proposals in response to the offers made by the Government of the HKSAR). This staff consultative machinery in the civil service, which allowed for staff participation in the determination of their terms and conditions of employment effectively, provided for voluntary negotiation of terms and conditions of service. It was complemented by independent arbitration by a committee of inquiry which may be set up under certain conditions prescribed in the 1968 Agreement to consider matters on which agreement could not be reached between the Government of the HKSAR and the staff sides.
70. Although there was no legislation providing for collective bargaining in the civil service, nor was such a legislative approach appropriate to the local conditions of the HKSAR, the staff consultative machinery in the civil service of the HKSAR was consistent with many of the principles underlying collective bargaining (e.g. the voluntary nature of negotiation, the principle of good faith and the objective of regulating the terms and conditions of employment by means of agreement). In accordance with the 1968 Agreement signed between the Government of the HKSAR and three main staff associations, the Government of the HKSAR undertook to discuss with the staff sides, in a spirit of good will, any matters concerning the conditions of service which affected a substantial part of the civil service as a whole, or of the members of one or more of these staff associations. The Government of the HKSAR also undertook not to make any considerable change in conditions of service of civil servants without prior consultation with the staff sides. This undertaking was consistent with the principle of good faith laid down by the Committee on Freedom of Association. Both the Government of the HKSAR and the staff sides sought to reach agreement if possible through such consultation, and undertook to be bound by any agreement reached. In the event that agreement could not be reached after full staff consultation and after exhausting other existing administrative channels, the matter might be referred to an independent committee of inquiry, subject to conditions laid down in the Agreement. The recommendations of the committee of inquiry were binding on both the official side and the staff side provided that certain conditions were met. Reinforcing the staff consultative machinery were various independent bodies which provided impartial advice to the Government of the HKSAR on matters concerning the pay and conditions of employment for the civil service. In general, these bodies took into account the views expressed by staff and management before tendering their advice to the Government of the HKSAR.
71. Given the particular context of the HKSAR, the terms and conditions of employment of the civil service could not be determined solely by the executive arm of the Government of the HKSAR and the staff sides. Specifically, the executive arm of the Government of the HKSAR formulated policy proposals on matters concerning the terms and conditions of employment of the civil service, after consulting the staff sides, for consideration and decision by the Chief Executive in Council. The policy decisions of the Chief Executive in Council were subject to the scrutiny of the Legislative Council, which was vested with the powers and functions, among others, to make laws to implement the policy decisions, where necessary, and to approve public expenditure. In scrutinizing the proposals from the executive arm of the Government of the HKSAR, Members of the Legislative Council offered their independent advice on the matters under deliberation and might, where

necessary and appropriate, invite the staff sides of the central consultative councils and other staff representatives to make representations to them directly, as was the case for the 2002 civil service pay adjustment exercise. The views of the staff sides were fully reflected and carefully considered by the Legislative Council before the latter passed the legislation to implement the pay reduction decision.

- 72.** The Government added that, over the past 30 years or so, the established annual civil service pay adjustment mechanism had effectively engaged staff in discussing and determining the civil service pay adjustments, as reflected by the fact that staff were generally in agreement with such pay adjustments until the 2002 civil service pay adjustment exercise which is the subject of the present submission. In the light of the experience of the 2002 civil service pay adjustment exercise, the Government of the HKSAR had sought to further enhance the procedures for staff consultation in taking forward the 2003 civil service pay adjustment process. Well ahead of the usual timetable for staff consultation on the annual civil service pay adjustment the Government of the HKSAR had engaged the staff sides of the central consultative councils and the four major service-wide staff unions in discussions on the 2003 civil service pay adjustment since August 2002 through a dedicated working group. The discussions in the working group culminated in a consensus over the pay adjustments for the 2003 civil service pay adjustment exercise. The Government of the HKSAR was also working closely with staff on the development of an improved civil service pay adjustment mechanism to underpin the established policy of maintaining civil service pay at a level broadly comparable to that of the private sector. To this end, in April 2003, the Government of the HKSAR set up a consultative group on which the staff sides of the four central consultative councils and the four major service-wide staff unions were represented as a regular forum for intensive discussions between the management and staff representatives on a broad range of issues related to the exercise. Since its establishment, the consultative group had held 22 meetings/discussion sessions and would continue its deliberations until the improved mechanism was drawn up.
- 73.** It has been the understanding of the Government of the HKSAR that Article 4 of Convention No. 98 does not place an obligation on any ratified countries/territories to establish a collective bargaining mechanism or to adopt legislative measures for the purpose of establishing such a mechanism. The mechanism for determining the terms and conditions of employment of the civil service in the HKSAR, which comprised voluntary negotiation through an elaborate staff consultative machinery, impartial advice by independent bodies to the Government and the Legislative Council's scrutiny of proposals from the executive arm of the Government, had been adopted in the light of the HKSAR's particular circumstances. This well-tried and long-established mechanism operated in compliance with the spirit and principles of Article 4 of Convention No. 98.
- 74.** With regard to recommendation (b) above, the Government indicated that there was already in existence within the civil service of the HKSAR an elaborate three-level staff consultation mechanism which operated in compliance with the spirit and principles of Article 4 of Convention No. 98 and Article 7 of Convention No. 151 for consultation between management and staff on various issues of concern to civil servants. These issues included the terms and conditions of employment of public employees, regardless of whether they were engaged in the administration of the State. The Government of the HKSAR would build on the established staff consultation machinery and put in place customized procedures or forums to engage staff representatives in more intensive consultation on the terms and conditions of employment of civil servants.
- 75.** With regard to recommendation (c) above, the Government indicated that it would continue to observe the 1968 Agreement and, in the event of a dispute over the determination of terms and conditions of employment of civil servants in the future,

consider appointing a committee of inquiry, where appropriate and necessary, in accordance with the relevant provisions of the 1968 Agreement.

76. With regard to recommendation (d) above, the Government of the HKSAR assured the Committee on Freedom of Association that the HKSAR was fully committed to complying with freedom of association standards and principles and would continue its efforts in this respect. The Government of the HKSAR was appreciative of the offer of the International Labour Office's technical assistance and would consider seeking such assistance as and when necessary.
77. In conclusion the Government of the HKSAR had put in place effective measures appropriate to the conditions of the civil service in Hong Kong in compliance with the relevant Articles of the international labour Conventions that were applicable to the HKSAR. The existing staff consultative machinery in the civil service, which allowed for staff participation in the determination of their terms and conditions of employment effectively provided for voluntary negotiation of the terms and conditions of employment between staff and the management. The Government of the HKSAR would continue to monitor closely the operation of the staff consultative machinery within the civil service in the HKSAR and make improvements where necessary and appropriate to enhance the effectiveness of consultation with its staff on matters affecting their terms and conditions of employment.
78. Finally, the Government indicated that a number of applications for judicial review of the Public Officers Pay Adjustment Ordinance which were dismissed by the Court of First Instance in June 2003 were subsequently appealed and the appeals would be heard before the Court of Final Appeal in June 2005. An update would be provided after the conclusion of the relevant judicial review proceedings.
79. *The Committee takes note of this information. The Committee recalls that it had requested the Government to keep it informed of developments only with regard to point (a) above, on the establishment of a collective bargaining mechanism allowing public employees who are not engaged in the administration of the State to negotiate collectively their terms and conditions of employment in accordance with Article 4 of Convention No. 98.*
80. *Nevertheless, the Committee takes due note of the information provided by the Government on improvements in the mechanism for the determination of civil service pay, in particular, the fact that the 2003 civil service pay adjustment exercise commenced well ahead of the usual timetable for staff consultation and culminated in a consensus over the pay adjustments. The Committee also takes note of the establishment of a consultative group, with the participation of the staff sides of the four central consultative councils and the four major service-wide staff unions, as a regular forum for intensive discussions with a view to developing an improved civil service pay adjustment mechanism. Finally, the Committee notes that the Government is planning to build on the established staff consultation machinery and put in place customized procedures or forums to engage staff representatives in more intensive consultation on the terms and conditions of employment of civil servants.*
81. *With regard to the right to collective bargaining of public employees who are not engaged in the administration of the State, the Committee notes that according to the Government, an elaborate three-level mechanism is already in existence for consultation between management and staff on various issues including terms and conditions of employment of public employees, regardless of whether they are engaged in the administration of the State. The mechanism comprises voluntary negotiation through elaborate staff consultative machinery, impartial advice by independent bodies and the Legislative Council's scrutiny of proposals. It has been adopted according to the Government, in light of HKSAR's*

particular circumstances and operates in compliance with the spirit and principles of Article 4 of Convention No. 98, which does not place an obligation on governments to establish a collective bargaining mechanism or adopt legislative measures for the purpose of establishing such a mechanism.

82. The Committee wishes to underscore that although nothing in Article 4 of Convention No. 98 places a duty on the Government to enforce collective bargaining by compulsory means with a given organization, as such an intervention would clearly alter the voluntary nature of collective bargaining, this does not mean that governments should abstain from any measure whatsoever aiming to establish a collective bargaining mechanism. On the contrary, the Committee has previously recalled that measures should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements [**Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 781]. This is required by Article 4 of Convention No. 98, which is applicable in the territory of China/Hong Kong Special Administrative Region without modifications.
83. The Committee also recalls from the previous examination of this case the complainant's suggestion that measures to promote collective bargaining could include objective procedures for determining the representative status of civil service unions taking into account that in Case No. 1942 the Committee had requested the Government to give serious consideration to the adoption of legislative provisions laying down objective procedures for determining the representative status of trade unions for collective bargaining purposes which respect freedom of association principles [334th Report, para. 312].
84. With regard to public servants in particular, the Committee recalls that a distinction must be drawn between, on the one hand, public servants who by their functions are directly engaged in the administration of the State (that is, civil servants employed in government ministries and other comparable bodies), as well as officials acting as supporting elements in these activities and, on the other hand, persons employed by the Government, by public undertakings or by autonomous public institutions. Only the former category can be excluded from the scope of Convention No. 98. Consequently, all public service workers other than those engaged in the administration of the State should enjoy collective bargaining rights, and priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of terms and conditions of employment in the public service [**Digest**, op. cit., paras. 793 and 794]. Legislation should therefore contain specific provisions clearly and explicitly recognizing the right of organizations of public employees and officials who are not acting in the capacity of agents of the state administration to conclude collective agreements.
85. The Committee once again requests the Government to examine, possibly within the framework of the recently established consultative group with the participation of the staff sides of the four central consultative councils and the four major service-wide staff unions, the possibility of establishing a collective bargaining mechanism allowing public employees who are not engaged in the administration of the State to negotiate collectively their terms and conditions of employment in accordance with Article 4 of Convention No. 98, applicable in the territory of China/Hong Kong Special Administrative Region without modifications.
86. The Committee takes note of the Government's statement that it will consider seeking technical assistance from the Office as and when necessary and reiterates that such assistance is at the Government's disposal if it so wishes.

Case No. 1916 (Colombia)

87. The Committee has examined this case, which concerns the dismissal of trade union leaders and workers for organizing a strike in 1993 at Medellín Municipal Enterprises on two occasions [see 309th Report, paras. 92-105, and 313th Report, paras. 19-26]. The Committee urged the Government to take all necessary measures to reinstate in their posts the trade union leaders, members and workers who had been dismissed for participating in a strike at the undertaking in 1993 (specifically in the refuse collection sector), or, if that were not possible, to ensure that they received full compensation. Similarly, the Committee requested the Government to take measures to ensure that in future, declarations on the legal status of strikes would be made by an independent body and not by the administrative authority, and that amendments would be made to the provisions of the Substantive Labour Code which prohibit strikes in a wide range of services which cannot be considered to be essential services in the strict sense of the term.
88. In a communication of June 2004, the complainant organization states that Medellín Municipal Enterprises are partially complying with the recommendations of the Committee on Freedom of Association and the ruling of the constitutional court, indicating that: 161 workers were reinstated from 27 December 1991 onwards; seven died during the period between their dismissal and the date on which their reinstatement took effect; five were retired by the company during the period between their dismissal and reinstatement; two expressly and voluntarily waived their entitlement to reinstatement; one was reinstated in the company by a judicial ruling of 13 May 1997; and 29 workers were not reinstated on the grounds that their jobs pertained to agricultural management, which did not match the social purposes of the company.
89. In a communication of 15 April 2005, the Government indicates that the constitutional court's protection ruling (*sentencia de tutela*) No. 568 of 1999 contains the following in section 2 of its decision clause:

Medellín Municipal Enterprises [are ordered] within three months following notification of this review to reinstate the 209 workers dismissed in connection with the events that led to these proceedings, and to acknowledge the arrears of wages and benefits owed to them, on the understanding that they have not been in continuous employment with the company. In the event that it is not possible to reinstate any one of the workers concerned, provided that this is confirmed by the Antioquía Administrative Court, the corporation shall determine the compensation which Medellín Municipal Enterprises shall be required to pay to workers who do not resume their former post for said reason.

The Government states that the company complied with this ruling. As regards the specific case of the 29 workers employed in agricultural services, it compensated them, which is in accordance with the decision clause of the court ruling. The trade union organization alleged two cases of contempt, but it was found that the company had not failed to comply with any judicial ruling. Reinstatement of the workers engaged in agricultural services was physically and legally impossible, given that under the terms of Act No. 142, the Medellín Municipal Council in Agreement No. 0198 of 1998 transformed Medellín Municipal Enterprises into a state industrial and commercial undertaking under municipal authority with the sole aim of providing public cleansing and related services, which does not cover agricultural services.

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

Case No. 2046 (Colombia)

91. The Committee last examined this case in March 2005 [see 336th Report, paras. 285-326]. At that time, the Committee formulated 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.

- 92.** In a communication dated 11 May 2005, the Single Confederation of Workers of Colombia (CUT), in connection with the allegations presented by the Trade Union of Workers of the National Coffee Growers Federation of Colombia and Almacenes Generales de Deposito de Café S.A. (SINTRAFEC), states that the ordinary check-off of union dues is still not been made for workers who are not members of SINTRAFEC but benefit from the collective agreement concluded. According to the complainant, regardless of the Committee's recommendations following earlier examination of the case requesting the Government to carry out an investigation, no information on the subject has as yet been received. The complainant adds that several workers have been dismissed, whose names appear in an appended list, including Alba Lucia Riós Mora, José Horacio Rivera Posada and Jaime Enrique Angulo, who were dismissed on the same day that notification was given that they had joined the trade union, and Luz Adriana Marquez Velasquez and Carlos Odilio Perala Ospina were dismissed eight days after joining. In addition, the National Coffee Federation regularly uses the associated labour cooperatives to replace workers on indefinite contracts, despite the fact that this is banned in the collective labour agreement.
- 93.** In a communication dated 8 June 2005, the National Trade Union of Workers in the Industry for the Production, Manufacture and Processing of Food and Dairy Products (SINALTRAPROAL) reports that the Council of State rejected the trade union's complaint against the Ministry of Labour and Social Security's resolution refusing to register the members elected to the Board of SINTRANOEL and also to register the change of status whereby the company-based union SINTRANOEL became an industry union (SINALTRAPROAL), both dated 23 May 1999, refusing furthermore to register the new members of the SINTRANOEL Board approved by the assembly on 6 June 1999. According to the Council of State, following the division of the company Industrias Alimenticias Noel to form two separate companies: Compania Galletas Noel S.A. and Industrias Alimenticias Noel S.A., workers in the employ of one of the companies could not sit on the board of the trade union of the other company and that there were no grounds for changing the company trade union organization into an industry organization because this occurred after the company had been divided into two separate companies.
- 94.** In its communication dated 12 August 2005, the Government states that, in regard to the alleged dismissals and sanctions against workers belonging to SINALTRABAVARIA for participating in a stoppage in the company on 31 August 1999, the cases in question are still before the labour court. To date, the Bavaria company has been found guilty of dismissal without cause, but it is not obliged to reinstate or pay either a retirement benefit or compensation to Mr. Luis Alfredo Quintero Velasquez; it was ordered to pay compensation to Mr. Alfonso Maigal Valdez and Mr. José Luis Salazar, on 4 February 2005. The Government adds that both the company and the workers have appealed, and these cases are currently ongoing.
- 95.** In regard to the dismissal of trade union officers of the Caja de Credito Agrario, in disregard of trade union immunity and in contravention of the rulings ordering the reinstatement of a number of these officers, the Government states that, of the total 34 court cases, 18 have been completed (13 acquittals and five convictions) and the

remaining 16 are ongoing. In the cases culminating in convictions, the Caja de Credito Agrario in Liquidation has issued an administrative notice stating that it is physically and legally unable to effect reinstatement, and ordering the liquidation and payment of wages and benefits in arrears from the time the posts were abolished until the notification of the act stating that reinstatement was not possible.

- 96.** As regards the refusal to register the trade union organizations USITAC, SINALTRABET and UNITAS, the Government states that all the administrative remedies initiated by the trade union organizations have been exhausted and that judicial remedies are available but that, to date, no judicial proceedings have been initiated.
- 97.** As regards the actions taken by the enterprise 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 withdrawn its application for suspension of trade union immunity for Messrs. Puerta, Rodas and Ruiz in light of the fact that they never had trade union immunity since the South Itagui directorate to which they belonged failed to meet the minimum qualifying requirements. The Government adds that their dismissals were justified by their refusal to attend training sessions. The Government further states that, with regard to Mr. Puerta Cano, the Superior Court of Medellín ruled that he did not qualify for trade union immunity; the cases of Messrs. Rodas and Ruiz are still before the ordinary court.
- 98.** In regard to the alleged subsequent dismissal without cause of SINALTRAINBEC officials and of founders of the Trade Union of Workers of the Beverages and Foodstuffs Industry (USTIBEA), including William de Jesús Puerta Cano, together with Luis Fernando Viana Patiño, Edgar Dario Castrillón Munera and Alberto de Jesús Bedoya Riós, on the grounds of serious disciplinary offences, the Government states that the Ministry for Social Protection does not have competence to initiate investigations into dismissals without cause, since this can only be performed by a judge. The Government states that it is up to workers to initiate proceedings for dismissal without cause and undertakes to inform the Committee of any legal proceedings that are initiated in this connection.
- 99.** As regards the contention that it is not legally possible to establish industry unions composed of members in the employ of different types of industries, as in the case of SINALTRAINBEC and USTIBEA, which have been refused registration, the Government states that this decision is based on public health and sanitary considerations in that this trade union organization would include workers from the food and alcoholic beverages industries, and denies that the decision is motivated in any way by anti-union discrimination policy.
- 100.** As regards the dismissals of workers belonging to the complainant organization SINALTRAINBEC, and the early retirement schemes adopted by the company and which were taken up by some members, the Government states that no legal proceedings have as yet been initiated.
- 101.** As regards the closure of the COLENVASES plant, leading to the dismissal of 42 employees and seven trade union leaders without suspending their trade union immunity and without complying with the Ministry of Labour's resolution authorizing the closure but ordering prior compliance with clauses 14 and 51 of the collective agreement in force, the Government states that a verdict is awaited from the Administrative Dispute Tribunal and that the Committee will be informed as soon as it is handed down. The Government adds that the Ministry of Labour and Social Security issued resolution No. 2169 on 7 September 1999 ordering the company to comply with clauses 7 and 14, but that the subsequent resolution No. 2627 omits the word "prior". These resolutions were confirmed by resolution No. 2938 of 20 December 1999.

102. As regards the allegations presented by SINALTRABAVARIA concerning the pressure on workers to resign from the trade union, the Government states that no company has at any time brought pressure to bear on workers to relinquish trade union membership.
103. As regards allegations presented by SINALTRABAVARIA concerning the denial of trade union leave, in connection with which the Committee requests information from the Government as to whether proceedings had been brought against the company in this connection and, if so, whether the outcome was in favour of the employer, the Government states that the employer has not been found guilty of denying trade union leave.
104. *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 takes note of the decisions adopted to date, and further notes that the appeals launched both by the workers and by the company are ongoing. The Committee affirms that dismissing workers in connection with a legitimate strike constitutes grave discrimination in employment for exercising lawful trade union activity, contrary to Convention No. 98 [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 591] and requests the Government to continue to take the necessary measures to expedite the ongoing judicial proceedings and to keep it informed of the outcome of the proceedings and remedies initiated.*
105. *With regard to the dismissal of trade union officers at the Caja de Credito Agrario, in disregard of trade union immunity and in contravention of the rulings ordering the reinstatement of a number of these officers, the Committee notes that the Government states that of the total 34 court cases, 18 have been completed (13 acquittals and five convictions) and the remaining 16 are ongoing. In the cases culminating in convictions, the Caja de Credito Agrario in Liquidation has issued an administrative notice stating that it is physically and legally unable to effect reinstatement, and ordering the liquidation and payment of wages and benefits in arrears from the time the posts were abolished until the notification of the act stating that reinstatement was not possible. The Committee requests the Government to keep it informed of the outcome of the 16 remaining cases.*
106. *As regards the refusal to register the trade union organizations USITAC, SINALTRABET and UNITAS, the Government states that all the administrative remedies initiated by the trade union organizations have been exhausted and that judicial remedies are available but that, to date, no judicial proceedings have been initiated. The Committee again reminds the Government that Convention No 87, Article 2, ratified by Colombia, provides that “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.”, and that “although the founders of trade unions 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]. Consequently, the Committee requests the Government to guarantee compliance with these principles and to take measures to ensure that as soon as the minimum legal requirements are met, the authorities indeed proceed to enrol the trade union organizations USITAC, SINALTRABET and UNITAS on the trade union register.*
107. *As regards the actions taken by the enterprise to suspend the trade union immunity of William de Jesús Puerta Cano, José Everardo Rodas, Alberto Ruiz and Jorge William Restrepo, the Committee notes that, with regard to Mr. Puerta Cano, the Superior Court of Medellín ruled that he did not qualify for trade union immunity; the cases of Messrs. Rodas and Ruiz are still before the ordinary court. The Committee requests the Government to keep it informed of the final outcome of these remedies.*

- 108.** *In regard to the alleged subsequent dismissal without cause of SINALTRAINBEC officials and of founders of the Trade Union of Workers of the Beverages and Foodstuffs Industry (USTIBEA), including William de Jesús Puerta Cano, together with Luis Fernando Viana Patiño, Edgar Dario Castrillón Munera and Alberto de Jesús Bedoya Riós, on the grounds of serious disciplinary offences, the Committee notes that the Government has stated that the Ministry for Social Protection does not have competence to initiate investigations, and this can only be performed by a judge, and that it will forward information on any remedies initiated by the workers involved. In the context of the protection of rights of trade union officers with immunity under national legislation (articles 485 and following of the Substantive Labour Code on supervision and monitoring), the Committee is of the view that the administrative authorities hold particular investigative powers, potentially culminating in sanctions, without prejudice to the right of the parties involved to initiate the relevant judicial remedies. This is not a question of declaring individual rights or settling disputes, but of carrying out an investigation into events in order to prevent any infringement of legal provisions (in this specific case, the dismissal of a trade union officer with trade union immunity in the absence of any corresponding judicial authorization) and to punish potential offenders, thereby allowing the parties to apply to the judicial authorities. In these circumstances, the Committee renews its request to the Government to carry out an investigation into this matter and to keep it informed.*
- 109.** *As regards the contention that it is not legally possible to establish industry unions composed of members in the employ of different types of industries, as in the case of SINALTRAINBEC and USTIBE, which have been refused registration, the Committee notes that, according to the Government, this decision is based on public health and sanitary considerations in that this trade union organization would include workers from the food and alcoholic beverages industries, and denies that the decision is motivated in any way by anti-union discrimination policy. The Committee refers once more to Convention No 87, Article 2, which embodies the right of workers to establish organizations of their own choosing and requests the Government to take the measures necessary to ensure that this principle is fully enforced.*
- 110.** *As regards the dismissals of workers belonging to the complainant organization SINALTRAINBEC, and the early retirement schemes adopted by the company and which were taken up by some members, the Committee takes note of the Government's information that no legal proceedings have as yet been initiated.*
- 111.** *As regards the closure of the COLENVASES plant, leading to the dismissal of 42 employees and seven trade union leaders without suspending their trade union immunity and without complying with the Ministry of Labour's resolution authorizing the closure but ordering prior compliance with clauses 14 and 51 of the collective agreement in force, the Committee takes note that the Government states that a verdict is awaited from the Administrative Dispute Tribunal, and that the Committee will be informed as soon as it is handed down.*
- 112.** *As regards the allegations presented by SINALTRABAVARIA concerning the pressure on workers to resign from the trade union, the Committee takes note that, according to the Government, no company has at any time brought pressure to bear on workers to relinquish trade union membership. The Committee requests the Government to take the measures necessary to carry out an investigation into the matter within the company and to keep it informed.*
- 113.** *As regards allegations presented by SINALTRABAVARIA concerning the denial of trade union leave, the Committee takes note that the Government states that the employer has not been found guilty of denying trade union leave.*

- 114.** *As regards the allegations presented by the Single Confederation of Workers of Colombia (CUT), in connection with the allegations that the ordinary discount of the union dues has still not been made by the National Federation of Coffee Growers of Colombia for workers who are not members of the Trade Union of Workers of the National Federation of Coffee Growers of Colombia and Almacenes Generales de Deposito de Café S.A. (SINTRAFEC) but who benefit from the collective employment agreement concluded, regardless of the Committee's recommendations following earlier examination of the case [see 322nd and 324th Reports, paras. 139 and 353, respectively] requesting the Government to carry out an investigation; the dismissal of several workers on account of their trade union membership; and the use of labour cooperatives to replace workers on indefinite contracts, despite the fact that this is banned in the collective labour agreement, the Committee regrets that the Government has failed to forward its comments. The Committee requests the Government to take the necessary steps promptly to ensure that the discount for union dues for benefits under the agreement is effected for non-union members in the National Federation of Coffee Growers of Colombia, for SINFRATEC, and to carry out an investigation into the dismissal of several workers on account of their trade union membership; and the use of labour cooperatives to replace workers on indefinite contracts, despite the fact that this is banned in the collective labour agreement and to keep it informed on these matters.*
- 115.** *In regard to the allegations presented by the National Trade Union of Workers in the Industry for the Production, Manufacture and Processing of Food and Dairy Products (SINALTRAPROAL) regarding the refusal to register the members elected to the board of SINTRANOEL and also to register the change of status whereby the company-based union SINTRANOEL became an industry union (SINALTRAPROAL), and the refusal furthermore to register the new members of the SINTRANOEL board following the division of the company Industrias Alimenticias Noel to form two separate companies: Compania Galletas Noel S.A. and Industrias Alimenticias Noel S.A., on the grounds that, according to the Council of State, workers in the employ of one of the companies could not sit on the board of the trade union of the other company and that there were no grounds for changing the company trade union organization into an industry organization because this had occurred after the company had been divided into two separate companies, the Committee regrets that the Government has failed to forward its observations. The Committee repeats its request to the Government to take measures to ensure full application of Convention No. 87, Article 2, in keeping with the abovementioned principles.*

Case No. 2151 (Colombia)

- 116.** The Committee last examined this case at its March 2005 meeting [see 336th Report, paras. 23-29]. On that occasion, the Committee made the following recommendations regarding the issues that remained outstanding.

Dismissal of trade union officials

- 117.** As regards the allegations relating to the dismissals of officials of SINTRABENEFICIENCIAS for having formed a trade union organization in the Cundinamarca district, the Committee took 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-dated the notification given to that public body regarding the constitution of SINTRABENEFICIENCIAS, and that the dismissed trade union officials had been paid compensation in accordance with the collective agreement in force at the time. The Committee took note of the fact that the majority of the judicial proceedings initiated by the dismissed officials had been concluded with rulings favourable to the public body. The Committee took 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 recalled 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. Noting that the Government had sent no observations on that matter, the Committee once again requested the Government to provide a copy of the ruling in question.

118. In a communication dated 4 May 2005, the Government states that upon learning of the complaint submitted by UNES against the charitable institution of Cundinamarca regarding the dismissal of workers with trade union immunity, it requested that an inquiry be initiated against the abovementioned body in accordance with the content of the complaint filed by UNES. Once the facts had been analysed by the Coordination Office for Inspection and Surveillance of the Territorial Directorate of Cundinamarca, it was concluded that given the period of time that had elapsed, the action was time-barred, as the national legislation in force lays down time limits within which workers can claim their rights that were allegedly infringed – this period being three years, pursuant to article 151 of the Code of Labour Procedure. The Government adds that the Ministry of Social Protection (formerly the Ministry of Labour and Social Security) is not competent to initiate inquiries into the dismissal of workers who have trade union immunity, and that this task falls within the competence of labour judges. The Government requested information from the charitable institution of Cundinamarca on the dismissal of workers with trade union immunity, asking it to indicate whether their respective immunity had been lifted in order to carry out the dismissals. The director of the charitable institution of Cundinamarca indicated that procedures for lifting their trade union immunity had not been initiated, but that statutory payments had been made and that compensation had been recognized and paid in accordance with the collective labour agreement. According to the Government, trade union immunity constitutes a guarantee of freedom of association, rather than protection of the labour rights of unionized workers, since this guarantee protects trade union organizations and therefore does not have financial significance, as the trade union organization claims; thus, when a worker with trade union immunity is dismissed, what is recognized is entitlement to compensation for unfair dismissal.

119. *In this regard, the Committee observes that sections 405 and 408 of the Substantive Labour Code provide for the following in relation to trade union immunity:*

*Section 405. **Definition.** “Trade union immunity” is the guarantee enjoyed by certain workers that they will not be dismissed or penalized in terms of their conditions of employment, or be transferred to other establishments within the same enterprise or to a different municipality, without just cause previously certified by a labour judge; and section 408. **Content of the decision.** The judge will deny an employer’s request for authorization to dismiss a worker protected by trade union immunity, or to penalize or transfer that worker, unless he establishes the existence of just cause. If, in the case referred to in the first paragraph of section 118 of the Labour Procedural Code, it is ascertained that a worker has been dismissed without complying with the provisions governing trade union immunity, he must be reinstated and the employer will be ordered to pay him, by way of compensation, the wages he failed to receive owing to his dismissal. Furthermore, in the cases referred to in the third paragraph of the same section, an order shall be issued for reinstatement of the worker in his previous post or with the same conditions of employment, and the employer shall be ordered to pay him the compensation due.*

Under these circumstances, taking into account the fact that the Government has informed the Committee that the dismissal of officials of SINTRABENEFICIENCIAS was carried out in breach of the provisions of the Labour Code, the Committee requests that the Government take the necessary measures to reinstate these officials, without any loss of wages.

Collective bargaining in the public sector

- 120.** The Committee requested that the Government provide information on progress made with regard to collective bargaining in the public sector in the Capital District.
- 121.** The Government indicates that Decree No. 137 of 2004 has been adopted, establishing the District Committee on Labour Dialogue and Coordination and the Subcommittees on Wages, the Public Administration and Trade Union Guarantees, with the participation of the District's trade union organizations. Within the framework of the abovementioned subcommittees, a number of agreements have been concluded, for example, an agreement regarding the wage increase applicable to all public servants in the Capital District. Furthermore, the Subcommittee on the Public Administration has held numerous meetings, in which agreements were concluded on mechanisms for applying Act No. 909 of 2002 on the public administration. One of these agreements relates to the procedure for electing workers' representatives on staff committees – such elections will take place on the same date in all the administrations of the Capital District; this contributes to strengthen democratic processes and the participation of workers in matters which directly concern them. The Subcommittee on Trade Union Guarantees has been responsible for the granting of trade union leave and other matters relating to the protection of the right to organize and freedom of association.
- 122.** *The Committee takes note of this information.*

Pending judicial decisions

- 123.** The Committee requested that the Government provide information on the outcome of the proceedings pending before the Council of State concerning the legality of Decree No. 1919 which suspended certain advantages in respect of wages and benefits required under the terms of collective agreements.
- 124.** The Government states that no ruling has been handed down yet.
- 125.** *The Committee takes note of this information and requests that the Government keep it informed of any rulings handed down.*

Failure to consult

- 126.** The Committee requested that the Government provide information on 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.
- 127.** The Government states that section 4 of by-law No. 14 of 2004, issued by the Cundinamarca Assembly, provides for the establishment of a monitoring committee made up of the following: two members representing the Assembly and appointed by its officers; two members representing officials of the public administration and official employees, of which at least one must belong to a trade union organization; and two representing the departmental government and designated by the Governor. In order to ensure the democratic participation of all departmental public servants, and given that by-law No. 14 did not provide mechanisms for the election of members of the committee, the Governor of the Department issued, on 23 September 2004, Circular No. 7 which established the procedures for doing so. Once the election had taken place, the public servants failed to designate their representative, and therefore the department complied with the obligation to promote democratic participation, in accordance with the procedures set forth in Circular

No. 7 of 2004. Given that blank ballot papers were submitted in the said election, an alternative mechanism of electing the committee was sought, and in Circular No. 08 of 3 December 2004 a new procedure was established with a view to ensuring the participation of public officials in the Support and Monitoring Committee. In compliance with Circular No. 08, elections were held and Mr. Wilson López Sánchez, in his capacity as member of SINTRAGOBERNACIONES (Bogotá branch), was unanimously elected as representative of the official workers. At the time of his election, Mr. Wilson López Sánchez was a member of the trade union organization's Complainants Committee. Also elected was Mr. Fernando Ernesto Fierro Barragán, who is an expert from the Departmental Institute of Community Action and an official listed in the public register of the public administration. The trade union executive committee subsequently removed Mr. Wilson López Sánchez immediately and arbitrarily from the Claims Committee, thus "penalizing" the fact that a unionized worker was a member of the Support and Monitoring Committee established under by-law No. 14 of 2004. The Government adds that on 14 December 2004, the departmental administration, with a view to providing information on progress made in the restructuring process, held a meeting with the heads of the trade union organizations of the departments, at which they were informed of the methodology adopted, in order to dispel any misgivings they may have had in that regard. The Government indicates that the departmental government of Cundinamarca is implementing procedures to liaise with trade union organizations as to ensure that they can participate in the restructuring process.

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

Case No. 2226 (Colombia)

129. The Committee last examined this case at its November 2004 meeting [see 355th Report, paras. 751-762]. On that occasion, it formulated the following recommendations:

- (a) With regard to the dismissal of the executive committee of ANTHOC without the judicial authorization required by Colombian legislation, in the framework of the mass dismissals that took place at the San Vicente de Paul Hospital, considering that according to the Government's statement there has not been a request to lift the trade union immunity of the dismissed trade union officials, the Committee reiterates its previous recommendation and requests the Government to take steps without delay to reinstate them without loss of pay and to keep it informed in this respect.

[...]

- (c) With regard to the allegations relating to the default on the collective agreement as regards the payment of travel expenses and the withholding of trade union dues owed to SINDICIENAGA by the authorities of the Institute of Traffic and Municipal Transport of Ciénaga in the department of Magdalena, the Committee requests the Government to keep it informed of the outcome of the appeal lodged with the territorial directorate against the administrative decision and expects that steps will be taken to guarantee compliance with the collective agreement in respect of the withholding of trade union dues and the payment of travel expenses to trade union officials.
- (d) With regard to the allegations submitted by UTRADEC concerning the anti-union harassment against María Teresa Romero Constante, president of SINDICIENAGA, by the authorities of the Institute of Traffic and Municipal Transport of Ciénaga, who refused to negotiate with her in particular, and issued threats to make her leave the trade union, the Committee once again requests the Government to keep it informed of the outcome of the administrative investigation referred to in its previous examination of the case.

130. In a communication dated 5 September 2005, the Government states, with regard to the dismissal of the executive committee of ANTHOC without prior judicial authorization, that the judgements handed down by the Itagui Labour Court found that it was not

necessary to lift trade union immunity in the restructuring process at the San Vicente de Paul Hospital in Caldas, Antioquia, as this was not a case of wrongful dismissal, but of dismissal for just cause, i.e. the elimination of a post following administrative restructuring of the state body, based on articles 150(16), 300(7), and 313(6) of the Constitution. Moreover, judgements handed down by the Court of Medellín on 5 and 12 March 2005 found that the workers covered by trade union immunity who had been dismissed from the San Vicente de Paul Hospital in Caldas, Antioquia, should not be reinstated, as the general interest prevails over the individual interest, according to constitutional court ruling T-729 of 1998.

- 131.** With regard to the allegations concerning the default on the collective agreement as regards the payment of travel expenses and the withholding of trade union dues owed to SINDICIENAGA, and the anti-union harassment against María Teresa Romero Constante, president of SINDICIENAGA, by the authorities of the Institute of Traffic and Municipal Transport of Ciénaga, who refused to negotiate with her, the Government states that following the investigation initiated by the Territorial Directorate of Magdalena, Inspectorate of Ciénaga, Decision No. 0010/04 of 9 December 2004 was handed down, which exonerated the legal representative of Ciénaga, in view of the fact that an agreement had been reached between the latter and the trade union. The decision became enforceable, in the absence of any appeal provided for by law. The Government adds that María Teresa Romero Constante, president of SINDICIENAGA, played an active part in that process.
- 132.** *With regard to the allegation concerning the dismissal of the executive committee of ANTHOC without prior judicial authorization, on the grounds of restructuring at the San Vicente de Paul Hospital in Caldas, Antioquia, the Committee recalls that in its previous examination of the case it had requested the Government to take steps without delay to reinstate the dismissed trade union officials. The Committee notes the information provided by the Government to the effect that the judicial authority found that it was not necessary to lift trade union immunity as this was not a case of wrongful dismissal, but of dismissal on legal grounds of elimination of posts following administrative restructuring. The Committee regrets the failure to take into account the principle contained in the Workers' Representatives Recommendation, 1971 (No. 143), which mentions amongst the measures to be taken to ensure effective protection to these workers, that recognition of a priority should be given to workers' representatives with regard to their retention in employment in case of reduction of the workforce (Paragraph 6(2)(f)), and the principle that rationalization and staff reduction processes should involve consultations or attempts to reach agreement with the trade union organizations, without giving preference to proceeding by decree and ministerial decision [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 960 and 936, respectively].*
- 133.** *With regard to the allegations relating to the default on the collective agreement as regards the payment of travel expenses and the withholding of trade union dues owed to SINDICIENAGA and the anti-union harassment against María Teresa Romero Constante, president of SINDICIENAGA, the Committee notes the information provided by the Government to the effect that an agreement was reached on the default on the collective agreement and the payment of travel expenses and withholding of trade union dues between the trade union and the legal representative of Ciénaga, with the participation of María Teresa Romero Constante.*

Case No. 2239 (Colombia)

- 134.** The Committee last examined this case, relating to the collective dismissal of workers and their replacement by labour cooperatives whose workers do not enjoy the right to trade union membership, anti-union dismissal of workers and the signing of a collective accord

with negative consequences for trade union members at its March 2005 meeting [see 336th Report, paras. 327-359]. On that occasion, the Committee made 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 SINALTRADIHITEXCO 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 Colmotores, 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.

135. In its communication received in March and May 2005, the National Union of Workers in the Weaving, Textiles and Clothing Industry (SINALTRADIHITEXCO) supplies additional information to that considered during previous examination of the case, concerning the merger between Fabricato and Tejicondor and the unilateral decision adopted by the company to apply to all workers a collective agreement signed at Fabricato by the SINDELHATO trade union prior to the merger, despite the fact that according to the complainant, the collective agreement signed in Tejicondor with SINALTRADIHITEXCO had been in place longer and afforded greater benefits to workers. The trade union adds that in March 2003, Fabricato Tejicondor increased Tejicondor workers' wages on the condition that they resigned from

SINALTRADIHITEXCO, being subsequently obliged to join SINDELHATO, the primary trade union at Fabricato, although this union attracted the membership of only half the combined workforce of the two merged companies. The complainant states that SINDELHATO has now presented a new list of demands and that the company has threatened not to renew the contracts of those workers who are members of SINALTRADIHITEXCO. For this reason, the remaining workers resigned from SINALTRADIHITEXCO and joined SINDELHATO.

- 136.** In its communications dated 24 February (received on 17 March), 13 June and 12 August 2005, the Government states that with regard to 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 allegations, do not enjoy the rights to freedom of association and collective bargaining, 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.
- 137.** With regard to allegations concerning the unilateral annulment by Tejicondor of the signed collective agreement following the merger of this company with Fabricato, the Government states that the convention signed between Tejicondor and SINALTRADIHITEXCO was valid until 31 July 2003, and that it was observed until that date. From then on, the agreement signed by Fabricato and SINDELHATO became applicable to all workers from the merged Fabricato-Tejicondor company. This agreement applied between 5 April 2002 and 4 April 2005. The Government adds that the majority trade union is SINDELHATO, representing 56 per cent of company workers, whilst SINALTRADIHITEXCO represents only 17 per cent.
- 138.** With regard to the request by SINALTRADIHITEXCO to convene an arbitration tribunal, the Government states that this request was refused on the grounds of failure to comply with article 444 of the Substantive Labour Code with respect to the time limit for the direct settlement stage between the parties.
- 139.** With regard to the allegations made by SINALTRADIHITEXCO concerning the dismissal of Mr. Carlos Mario Cadavid and the suspension of the union official, Mr. José Angel López, the Government states that the appeals lodged by the complainant and the company, against the resolution issued by the Territorial Directorate of Antioquia of the Ministry of Social Protection ruling that it was not competent to examine the dismissal of Mr. Cadavid and the suspension of Mr. López, were quashed through resolutions Nos. 2354, dated 17 September 2004, and 3461, dated 22 December 2004. The Government adds that the parties have the option to bring legal proceedings before the labour courts.
- 140.** 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 Colmotores, 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 Government states that current legislation allows companies to enter into collective accords (*pactos colectivos*) unless a trade union exists representing more than one-third of the workers at a company, in which case the company in question is not permitted to enter into collective accords. The Government underlines the fact that in this case, SINTRAIME does not represent more than one-third of the workers.
- 141.** The Government adds that in 2003, those workers who were not members of a trade union lodged a list of demands, since they were not covered by the collective agreement

concluded with the company (the Government encloses 600 declarations from workers who entered into the collective accord, stating that they did so of their own free will). The workers entering into the collective accord were not members of a trade union. By virtue of this accord, a committee was formed comprising two workers who had entered into the accord and two company representatives tasked with approving or rejecting membership of workers, union members or otherwise. With regard to the allegations concerning automatic resignation from the trade union by those members who had entered into the collective accord, the Government points out that this procedure is not possible, either under current legislation or in practice.

- 142.** The Government states that the trade union brought legal proceedings before the labour courts, requesting the annulment of the collective accord, which are currently being heard by the Third Labour Court of the Bogotá Circuit. Furthermore, the Government states that the Regional Directorate of Cundinamarca conducted an administrative labour investigation into possible irregularities within GM Colmotores and resolved not to take measures through resolution No. 4570 dated 23 November 2004. Appeals were launched against this resolution. The first was quashed and the second is being heard.
- 143.** With regard to the allegations concerning the murder of Mr. Luis Alberto Toro Colorado, a member of the national executive committee of SINALTRADIHITEXCO, the Government states that the Attorney-General's office began an investigation assigned to the public prosecutor of the Bello district and that, according to the attestation dating from March 2005, the perpetrators of the act have yet to be identified.
- 144.** *Regarding the dismissal of more than 100 workers belonging to SINALTRADIHITEXCO from Tejicondor and the subsequent contracting of workers through associated labour cooperatives who do not enjoy the rights to freedom of association and collective bargaining, the Committee notes that once again, the Government states that 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. The Committee once again reiterates in general terms that under Article 2 of Convention No. 87, ratified by Colombia, workers, without distinction whatsoever, have the right to establish and join organizations of their own choosing. At the same time, recalling the Promotion of Cooperatives Recommendation, 2002 (No. 193), which calls on governments to ensure that cooperatives are not set up or used for non-compliance with labour law or used to establish disguised employment relationships, the Committee recalls that "although ... 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 ... and considers that such workers should enjoy the right to join or form trade unions in order to defend those interests". The Committee requests the Government to take all of these principles into account and reminds the Government that the technical assistance of the Office is at its disposal.*
- 145.** *With regard to the allegations concerning the unilateral annulment by Tejicondor of the signed collective agreement following the merger with Fabricato, the Committee takes note of the information provided by the Government according to which the agreement signed by workers from Tejicondor was applied to these workers until its expiry date, after which the collective agreement signed between Fabricato and SINDELHATO, currently covering 56 per cent of workers in the company, was extended to them. With regard to the alleged pressure exerted on SINALTRADIHITEXCO members to resign from the trade union and the threat not to renew the contracts of those workers who are members of SINALTRADIHITEXCO, the Committee notes that the Government does not supply any observations relating to this question. The Committee requests the Government to take*

steps to conduct an investigation in order to determine the true facts, and to guarantee to those workers who are members of SINALTRADIHITEXCO their trade union rights without prejudicial consequences for their employment contracts.

- 146.** *With regard to the allegations made by SINALTRADIHITEXCO concerning the dismissal of Mr. Carlos Mario Cadavid and the suspension of the union official Mr José Angel López, the Committee takes note of the fact that the administrative appeals being heard were quashed and that the parties have the option to bring legal proceedings before the administrative dispute courts.*
- 147.** *With regard to the allegations presented by the WFTU concerning the forced signing of a collective accord (pacto colectivo) with member and non-member workers at GM Colmotores, 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), the Committee takes note of the information provided by the Government according to which no forced signing took place (the Committee takes note of the statements made by workers to the effect that signing of the collective accord was done on a voluntary basis); that SINTRAIME does not cover more than one-third of workers and that as a result, the company can enter into a collective accord with non-trade union members and that the automatic resignation alleged by the complainant is not possible in Colombia, either under current legislation or in practice. At the same time, the Committee notes that the appeal lodged against the resolution of the Territorial Directorate of Cundinamarca concerning its lack of competence regarding the suspected irregularities at GM Colmotores is still being considered. Nevertheless, the Committee recalls “that the principles of collective bargaining must be respected taking into account the provisions of Article 4 of Convention No. 98, and that the 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 keep it informed of the final outcome of the appeal that has been lodged.*
- 148.** *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 takes note of the ongoing investigation by the Attorney-General’s office assigned to the public prosecutor of the Bello district and requests the Government to continue doing all within its power to establish the identity of the murderers so that they may be duly punished, and to keep it informed of any developments related to the case.*

Case No. 2316 (Fiji)

- 149.** The Committee last examined this case, which concerns the Government’s alleged failure to enforce a Compulsory Recognition Order (CRO) for the recognition of the National Union of Hotel, Catering and Tourism Industry Employees (NUHCTIE) by Turtle Island Resort, and counter attempts by the employer to avoid recognition of the complainant, notably through delaying tactics, as well as anti-union dismissals and interference, at its March 2005 meeting [see 336th Report approved by the Governing Body at its 292nd Session, paras. 45-58]. On that occasion, the Committee expressed regret at the withdrawal of the complainant’s recognition as representative union and requested the Government to exercise greater vigilance in the future when it came to ensuring protection against acts of anti-union discrimination and interference and – taking into account the recent ratification of Convention No. 87 as well as steps taken to enact industrial relations legislation – to take all necessary measures to ensure that an expeditious and effective mechanism was put in place to prevent and remedy such acts. The Committee also requested the Government to take all necessary measures so as to ensure that trade unions, including the complainant, enjoyed 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.

- 150.** In communications dated 15 May and 14 September 2005, the Government indicated that the NUHCTIE had applied to the Ministry of Labour, Industrial Relations and Productivity for a CRO on 7 November 2002, after it had failed to receive any response from the employer on this issue. A special visit was made by officers of the Ministry to the island to conduct a determination exercise and establish whether the majority of workers had joined the union. As a result, a CRO was issued on 22 January 2003. The NUHCTIE appeared, however, not to have taken any action for five months after the CRO was issued. The workers had obviously lost interest in continuing with the membership of the union. The employer applied for derecognition on 19 June 2003 and following a determination exercise, the NUHCTIE was found to have nil membership. As a result, the union was informed through a notice by the Chief Executive Officer of the Ministry that it had ceased to be entitled for recognition by the Turtle Island Resort and that the CRO could not be legally imposed on the company.
- 151.** The Government added that it became aware of the complainant's allegations of anti-union dismissals only in August 2004 when the complainant communicated a fax highlighting the conclusions and recommendations of the Committee in this case and emphasizing that more than 60 workers remained dismissed by the management of Turtle Island Resort (the Government attached a copy of the fax dated July 2004). By then, the recognition of the complainant had already been withdrawn. The Government sent labour inspectors after the Committee's report was published in the local media, but they could not ascertain the allegations, as there were no union members then. As the complainant did not represent any workers at the resort, any investigation on anti-union discrimination and interference was a non-issue.
- 152.** As for the progress made in the adoption of a bill on industrial relations, the Government indicated that the Employment Relations Bill was listed to be tabled at the next sitting of Parliament, which commenced on 19 September 2005. Section 77 of the Bill guaranteed protection against acts of anti-union discrimination and interference. Section 125(f) allowed for the refusal of registration of a trade union which was under the domination or control of the employer and that section 145 of the Bill stated that no suit or other legal proceedings may be instituted and maintained in a court of law against a registered trade union or an officer or member of the trade union in respect of an act done in contemplation or in furtherance of a dispute. A worker may pursue an employment grievance like unfair dismissal under Part 13 of the Bill either personally or through a representative, the Mediation Service or the Employment Dispute (Part 17). If the grievance remained unsettled, it could be referred to the tribunal.
- 153.** The Government added that the Trade Union Recognition Act would be amended by removing a reference to trade union recognition so that any registered trade union could visit the workplace in order to discuss union business and recruit members. In particular, section 145 of the Employment Relations Bill provided that a representative of a registered trade union had the right to enter a workplace for purposes related to the union's business without disrupting the work in order to: (a) discuss union business with the members; (b) recruit workers as union members; or (c) provide information on the union and its membership to any worker on the premises. Upon enactment of the Bill, unions would be entitled access to any workplace. A delay in the enactment of the Bill was due to the extensive consultations carried out among the Government, the social partners and other stakeholders. This included the ILO's views on the requirements of the relevant Conventions, which had been taken on board.

154. With regard to the particular case at hand, the Government indicated that the management had been required, due to the initial recognition of the complainant, to negotiate with the complainant with a view to concluding a collective agreement. The collective agreement should include a procedure agreed by both parties for the union's access to the workplace so as to meet their members. However, before any arrangement was made to meet and negotiate with management, the complainant had demanded access to the workplace to meet the members without due consideration to the operation of the undertaking, hence the refusal by management. Section 147 of the Bill was put in place to allow unions' access to the workplace in the exercise of their functions.
155. *The Committee notes with interest that according to the Government, the Employment Relations Bill was listed to be tabled in Parliament for enactment and contained provisions on protection against acts of anti-union discrimination and interference, as well as on the right of all registered trade unions to visit the workplace, communicate with management, recruit members and provide information on the union, regardless of their recognition as representative. The Committee refers the legislative aspects of this case to the Committee of Experts on the Application of Conventions and Recommendations.*

Case No. 2187 (Guyana)

156. The Committee last examined this case, which concerns various alleged attempts by the Government to weaken the Guyana Public Service Union (GPSU), at its November 2004 meeting [see 335th Report, approved by the Governing Body at its 291st Session, paras. 110-116]. At that time, the Committee had noted that it expected to be kept informed of developments on the outcome of a number of judicial proceedings concerning the enforceability of the 1999 Memorandum of Agreement on arbitration, the dismissal of 12 trade union officers and members on anti-union grounds, the certification of the majority union in the Guyana Forestry Commission and the deduction of trade union dues in the Guyana Fire Service. It further requested the Government to provide detailed and full information concerning improvements to the current check-off system through the adoption of adequate safeguards against interference, the forwarding to the complainant Guyana Public Service Union (GPSU) of any contributions made in June and July 2000 which had been retained, and the institution of an independent inquiry into the reasons for the dismissal of Barbara Moore.
157. In a communication dated 9 July 2005, the Government provided new information on this case. With regard to the issue of the enforceability of the 1999 Memorandum of Agreement, the Government indicated that the court case on this question was still pending. With regard to the Committee's suggestion that in rendering a decision on this case, full account should be taken of the principles according to which agreements should be binding on the parties and the harmonious development of labour relations would be facilitated if the public authorities, when dealing with the problems concerning the workers' loss of purchasing power, adopted solutions which did not involve modifications of agreements without the consent of both parties, the Government indicated that it had no control of the proceedings and could not determine what would be taken into account, as this would depend on the submission of the parties.
158. *The Committee observes that the judicial proceedings concerning the enforceability of a Memorandum of Agreement adopted in 1999, are still pending before the courts. Recalling that justice delayed is justice denied, the Committee requests the Government to provide specific information in its next report on the current stage of the proceedings and to do all within its power to facilitate an acceleration of the proceedings and to keep it informed in this respect.*

- 159.** With regard to the Committee's recommendation that the Government ensure the exercise of great restraint in relation to any form of interference which might occur in the context of the collection of trade union dues, and undertake consultations with representative trade unions as soon as possible in order to consider improvements to the current check-off system through the adoption of adequate safeguards against interference, the Government indicated that it did not interfere with the collection of union dues. Just like a private sector employer, it facilitated unions by deducting union dues, but behaved unions to assist such facilitation by having their members issue the necessary authority to deduct. Unions must understand that they did not have a legal right to cause employers to deduct union dues. This was done by mutual agreement and the Government encouraged such agreement. Recently, 42 employees from the Ministry of Public Works wrote to the Permanent Secretary advising that they were withdrawing from their union, the NUPSE, and requested that the Ministry stop the deduction of union dues from their salaries. The Permanent Secretary rightly advised them that they had to submit the necessary cancellation of authority to deduct forms to be obtained from the union.
- 160.** *The Committee observes that the Government does not provide any information on any consultations with representative trade unions in order to consider improvements to the current check-off system through the adoption of adequate safeguards against interference. It requests the Government to undertake such consultations without delay and keep it informed of developments.*
- 161.** With regard to the implementation by both the Government and the GPSU of the High Court ruling of July 2000 by, on the one hand, providing written authorizations for the deduction of trade union dues and, on the other, ensuring that such deductions and their payment to the GPSU are carried out promptly and in full, the Government indicated that the High Court ruling of July 2000 had been implemented. The ruling was consistent with what the Government had been requesting the union to do. Although the dues for June and July 2000 had not been transmitted in a timely manner by a few ministries, as indicated during the previous examination of this case, all outstanding dues had since been forwarded to the union.
- 162.** *The Committee notes from the Government's report that the High Court ruling of July 2000 has been implemented and all outstanding dues have been forwarded to the GPSU.*
- 163.** With regard to the cases concerning the dismissals of 12 trade union officers and members, the Government had advised in an earlier response that the court had not found that the workers had been dismissed on anti-union grounds. The matter had been appealed and the Court of Appeal ruled that some be reinstated and others be paid terminal benefits (copy of decision and clarification of judgement attached). In keeping with the decision, William Pyle and Anthony Joseph would be reinstated in parallel positions in the public service, William Blackman had sought and been granted early pension and Cheryl Scotland had been reinstated in a parallel position but had challenged her posting in the courts. The others had been paid all benefits as ordered by the court.
- 164.** *The Committee notes that pursuant to a decision by the court of second instance ordering that some of the 12 dismissed trade union officers and members be reinstated and others be paid terminal benefits, William Pyle and Anthony Joseph would be reinstated in parallel positions in the public service; William Blackman had sought and been granted early pension; Cheryl Scotland had been reinstated in a parallel position but had challenged her posting in the courts; they and the other GPSU officers and members (Cheryl Scotland, William Blackman, Marcia Oxford, William Pyle, Yutse Thomas, Anthony Joseph, Niobe Lucius, and Odetta Cadogan) had been paid all benefits as ordered by the court. The Committee requests the Government to keep it informed of the steps taken to carry out the reinstatement of William Pyle and Anthony Joseph in a post corresponding*

to their previous functions and the progress of the court proceedings concerning the reinstatement of Cheryl Scotland in a post corresponding to her previous functions. The Committee also requests the Government to specify the outcome of the judicial proceedings under way with regard to Leyland Paul, Bridgette Crawford, Karen Vansluytman and Yvette Collins whose names do not appear on the text of the judgement appended by the Government to its response.

- 165.** With regard to the reasons for the dismissal of Barbara Moore, the Government indicated that the Guyana Forestry Commission was managed by a board of directors and Ms. Moore was among a number of persons made redundant. The others had accepted their terminal benefits and the union had not made their termination an issue. Ms. Moore was paid all her entitlements provided by law and the collective agreement. This was therefore a non-issue.
- 166.** *The Committee observes that Barbara Moore has not challenged her dismissal in court and will therefore not proceed any further with the examination of this matter.*
- 167.** With regard to the judicial proceedings concerning the certification of the majority trade union in the Guyana Forestry Commission, the Government indicated that the GPSU had lost a poll called by the Trade Union Recognition and Certification Board and that the matter was engaging the attention of the court.
- 168.** *Recalling once again that the facts of this case date as far back as 1999 and that justice delayed is justice denied, the Committee requests the Government to keep it informed of the progress of judicial proceedings on the issue of the certification of the majority trade union in the Guyana Forestry Commission and to do everything within its power to facilitate an acceleration of the proceedings.*
- 169.** With regard to the case concerning the Guyana Fire Service, the Government indicated that it was still pending before the courts and the decision would be sent to the Committee when available. With regard to the Committee's recommendation that the Government take all necessary measures to ensure that this case is heard in court as soon as possible, and that in rendering a decision on this issue, full account should be taken of Article 2 of Convention No. 87, ratified by Guyana, pursuant to which firemen, like all other workers, have the right to establish and join organizations of their own choosing, the Government indicated that the judiciary was independent and judges were appointed by the Judicial Service Commission, i.e. a constitutional body. The Government, therefore, had no control as to the time of the hearing or what would be taken into account.
- 170.** *Recalling once again that justice delayed is justice denied and that firemen, like all other workers, have the right to establish and join organizations of their own choosing, the Committee requests the Government to keep it informed of the progress of judicial proceedings on the issue of pressure to quit the GPSU brought to bear in the Guyana Fire Service and once again requests the Government to do everything within its power to facilitate an acceleration of the proceedings.*
- 171.** The Government finally indicated that it was conscious of its responsibility under the Constitution of the ILO and fully respected the principles of freedom of association which were protected by the Constitution of Guyana. The Government still considered the action of the union in some instances as an abuse of the process, but at no time had it said that it would not cooperate with the Committee on the current issues. The Government moreover indicated that in its last response it had requested the Committee to advise whether certain actions were permitted during a strike and as regards compulsory contributions to an organization by employees and reminded the Committee of its request.

172. *The Committee has not identified in the Government's previous communications any request on permissible actions during a strike and the issue of compulsory contributions made to an organization of employees. The Committee invites the Government to resubmit such a request, if it so wishes.*

Case No. 2330 (Honduras)

173. At its June 2005 meeting, the Committee requested the Government to communicate the result of the lawsuit filed by the Minister of Education against the official, Nelson Edgardo Cáliz, for slander, libel and defamation, and the result of the application for the protection of constitutional rights entered by the complainant organizations against the judgments, which, it is alleged, deny the right of these organizations to represent their members. Also, while the Committee noted with interest the settlement reached on 10 July 2004 between the Government and the complainant organizations, and in particular the clauses on salaries and the deduction of trade union dues, the Committee requested the Government to indicate whether by virtue of that non-reprisal clause the sanctions (fines) on the president of COPEMH and against COPEMH and COPRUMH and the application for suspension of these organizations' legal personality have been abandoned or set aside [see 337th Report, paras. 80-82].
174. In its communication of 25 July 2005, the Government states that the Office of the Attorney-General of the Republic has abandoned the lawsuit begun to suspend the legal personality of COPEMH and COPRUMH. With regard to the fines of 500 lempira imposed on these organizations by the administrative authority, the judicial authority has still not handed down a decision, the trade union officials having ignored the invitation of the Attorney-General's Office to come to an amicable arrangement and thereby to be able to eliminate the fine; according to the Government, these fines are to do with social anarchy and disorder by the education trade union officials. Moreover, the Supreme Court of Justice has not handed down a decision on the appeal for cassation filed by the Ministry of Education personally against the decision that would acquit trade union official Nelson Edgardo Cáliz of slander, libel and defamation. Also, the Supreme Court confirmed the other decisions appealed by the complainant organizations through application for protection of constitutional rights and has confirmed the legal decisions that found lack of legitimacy of the organizations to represent the personal rights of their members.
175. *The Committee notes this information and notes with interest that the authorities have abandoned a lawsuit intended to suspend the legal personality of the complainant organizations. The Committee requests the Government to keep it informed of any new decisions in relation to this case. The Committee invites the Government and the trade union organizations to find a negotiated solution to the unresolved issues before the judicial authority based on the non-reprisal clause arising out of the conciliation settlement of 10 July 2004 [see 335th Report, para. 878] and on Conventions Nos. 87 and 98, ratified by Honduras and applied fully to teaching staff, according to which the complainant organizations should be able to represent their members without any problem whatsoever. The Committee requests the Government to keep it informed in this respect.*

Case No. 1890 (India)

176. The Committee last examined this case, which concerns the dismissal of Mr. Laxman Malwankar, President of the Fort Aguada Beach Resort Employees' Union (FABREU), the suspension of 15 FABREU members following a strike, and the employer's refusal to recognize the most representative union for collective bargaining purposes, at its March 2004 session where the Committee requested the Government to rapidly take all

appropriate measures to ensure that these pending issues are resolved, in particular as regards Mr. Malwankar's dismissal [see 333rd Report, paras. 77-79].

- 177.** In a communication dated 27 April 2005, the Government informed that Mr. Mukund Parulekar had been under suspension pending inquiry against him and he was receiving subsistence allowance. Initially, he participated in the inquiry, but then he abstained himself from the proceedings and the inquiry was conducted *ex parte*. The findings of the inquiry are still awaited. In the case of the inquiry against Mr. Sitaran Rathod concerning his misconduct while on duty, disobeying the transfer order and absence from work, the inquiry was completed and the report on the findings of the inquiry was awaited. The Government further indicated that there were two inquiries against Mr. Sham Kerkar: one for his misconduct while on duty and another for disobeying the transfer order and his absence from duty. Both inquiries had been concluded and the findings of the second inquiry were awaited from the inquiry officer. The management of the enterprise had filed an application for permission before the Industrial Tribunal (No. IT-18/99); this case was still pending and the Government could not interfere in the judicial process. Since Mr. Kerkar had not reported to the place of his transfer, he was not entitled to wages for the period of absence. He was free to report to the place of transfer, as his services were not terminated. As concerns Mr. Ambrose D'Souza, the Government submitted that he had resigned and was accordingly paid his dues. No dispute of any nature was pending in this respect. Finally, the Government stated that it had advised the enterprise management to complete the inquiry proceedings within the shortest possible time.
- 178.** By a communication of 6 September 2005, the Government forwarded a copy of the award passed by the Industrial Tribunal on 4 April 2005 concerning a dismissal of Mr. Malwankar. The award ratified a settlement reached by Mr. Malwankar and the management of the Fort Aguada Beach Resort.
- 179.** *The Committee notes the statement of the dispute concerning Mr. Malwankar's dismissal. As concerns other pending issues of this case, while noting the information provided by the Government, the Committee deeply regrets that nine years after the complaint was filed, the issue of dismissal and suspension of trade unionists has not been resolved and findings from various inquiries are still being awaited. The Committee recalls that cases concerning anti-union discrimination should be examined rapidly so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination, and in particular lengthy delay in concluding the proceedings concerning 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 further considers that, in this case, the absence of judgements and excessive delays in dealing with the issues of dismissals and suspensions created a situation of denial of justice, which is extremely damaging to the exercise of trade union rights. The Committee further 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 [see **Digest**, op. cit., para. 10]. It therefore once again urges the Government to take the necessary measures in order to ensure a rapid conclusion of all the pending issues of this case in conformity with freedom of association principles and requests the Government to keep it informed of all developments.*

Case No. 2158 (India)

- 180.** The Committee last examined this case at its March 2004 meeting [see 333rd Report, paras. 80-84]. On that occasion, it requested the Government to take all necessary measures so as to ensure that an independent judicial inquiry into the murder of trade union

leader, Ashique Hossain, is concluded rapidly, to keep the Committee informed of the grounds on which two apprentices were dismissed from the Pataka Biri Co. and of the progress of proceedings for anti-union discrimination pending before the Calcutta High Court.

- 181.** In its communication of 27 April 2005, the Government indicated that the Home Department of the State Government had examined the Committee's request to institute a judicial inquiry into the circumstances leading to the murder of Mr. Hossain and decided that, since a police case had already been opened and that it was expected that the charges would soon be brought, there was no need for further judicial inquiry.
- 182.** As regards the circumstances under which two apprentices were dismissed, the Government indicated that these two persons were hired as "trainees" and, after expiry of their training period, management decided not to hire them as regular employees. The Appellate Authority under the Beedi and Cigar Workers' (Conditions of Employment) Act, 1966, rejected their appeal as both persons were only trainees and could not be qualified as "employees". This decision of the Appellate Authority was now pending a review.
- 183.** As concerned the investigation into the allegations of serious acts of anti-union discrimination, the Government once again indicated that the complainant union had presented a list of demands which included requests to establish a works committee and to resolve such issues as conditions of appointment, service and overtime wages. The Government indicated that the local labour authorities requested the enterprise management to take steps in order to establish a works committee and to settle outstanding issues. Regarding other allegations, such as discrimination, harassment of workers, etc., according to the Government, the union had failed to furnish particulars of specific cases along with concrete evidence to the Labour Directorate despite several requests made to them in this regard.
- 184.** Finally, with regard to the proceedings before the Calcutta High Court concerning anti-union discrimination, the Government indicated that the Writ Petition No. WP-4449(W) of 2000 in the matter of *Mozammel Hague and Others v. State of West Bengal* was still pending. The State Government's counsel had already been requested to move the hearing to an earlier date.
- 185.** *The Committee notes the information provided by the Government. With regard to the murder of trade union leader, Mr. Ashique Hossain, the Committee once again recalls that the killing of trade union leaders and trade unionists requires the institution of independent judicial inquiries in order to shed light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 51]. The Committee trusts that, following the police investigation referred to by the Government, charges will be rapidly brought against those suspected of the murder of Mr. Hossain, and the guilty persons will be punished. It requests the Government to keep it informed of the progress made in this regard.*
- 186.** *As for the previous request of the Committee to inform it of the circumstances under which two apprentices were dismissed, while noting the Government's argument that these persons were not victims of a dismissal but rather were not hired at the end of their traineeship, the Committee considers that this does not exclude the possibility that these two persons were victims of anti-union discrimination at the hiring stage. It considers furthermore that the legislation should allow the possibility to appeal against discrimination in hiring, i.e. even before the workers could be qualified as "employees". The Committee therefore requests the Government to conduct an independent investigation*

into the allegations of anti-union discrimination made by these two apprentices and to keep it informed of the outcome.

187. *Finally, the Committee requests the Government to continue to keep it informed of the progress of proceedings of anti-union discrimination pending before the Calcutta High Court.*

Case No. 2228 (India)

188. The Committee examined this case at its November 2004 meeting [see 335th Report, paras. 881-908] and on that occasion it formulated the following recommendations:

- (a) Referring to its recommendation concerning the dismissal of 14 workers at Worldwide Diamonds Manufacturers Ltd, the Committee requests to be kept informed of the progress of the cases brought by those workers alleging anti-union discrimination resulting in dismissals.
- (b) The Committee requests the Government to ensure that the principle that complaints of anti-union discrimination are examined in the framework of national procedures which are prompt, impartial and considered as such by the parties concerned, is observed in the cases of the workers suspended or fined and, if it is confirmed that the imposition of the suspensions and fines were linked with the legitimate trade union activities of the workers, to take measures to ensure that the workers concerned are appropriately compensated.
- (c) The Committee requests the Government to take all necessary steps urgently to ensure that an independent and thorough investigation, with the cooperation of the complainant organization, is carried out in relation to the allegations concerning the brutal suppression of the strike, the detention of hundreds of striking workers and a trade union officer by the police, the prohibition of meetings in the complainant's local office, excessive police violence (caning and chaining of workers), and the visit of police officers to workers' homes in order to threaten them so that they return to work. The Committee requests to be kept informed of the investigation's conclusions and, if the allegations are established to be well founded, the measures proposed to be taken in response so as to determine responsibility, punish those responsible and prevent the repetition of such acts.
- (d) The Committee requests the Government to keep it informed of the progress of the criminal cases brought by the police against the workers arrested during the strike in January 2002.
- (e) The Committee requests the Government to ensure that the CITU Visakhapatnam Export Processing Workers' Union be allowed to take part in negotiations, if it represents a sufficient number of the workers at Worldwide Diamonds Manufacturers Ltd and requests the Government to ensure that all workers in export processing zones have the right to form and join trade unions of their own choosing for the purposes of collective bargaining. The Committee requests to be kept informed in this regard.
- (f) The Committee once again requests the Government to ensure that the roles of GRO and DDC are carried out by different persons or bodies.
- (g) The Committee requests the Government to confirm that workers and trade unions are able to approach the Court directly without being referred by the state government, and to indicate the ways in which the legislation, and in particular the Industrial Disputes Act 1947, has been amended accordingly.

189. In its communication of 4 December 2004, enclosing comments and observations from the Visakhapatnam Export Processing Workers' Union and a letter addressed to the Minister of Labour, the complainant organization, the Centre of Indian Trade Unions (CITU), stated that no progress was made in implementation of the Committee's recommendations. In addition, the complainant organization contested the Government's previous statement that

Mr. Sudhakar was dismissed on the grounds of his poor performance during his traineeship. According to the union, he was dismissed for his trade union activities.

- 190.** As regards criminal cases, the complainant stated that one case (CC No. 257/2002 on charges under sections 506, 352 and 188 of the Indian Penal Code (IPC)) was withdrawn on 24 April 2004, two others (on charges under sections 144 and 151 of the IPC) were still pending. The complainant further submitted that, contrary to the previous statement made by the Government, at no point in time did the workers indulge in violent acts. The complainant explained that, when the government representative from New Delhi visited the VEPZ, workers, through their union representatives, tried to submit a memorandum to him but were refused and told to submit the memorandum outside the VEPZ premises, at Kurmannapalem Junction, 5 kms away from the VEPZ. Once there, the workers were told to go to Srinagar Junction, 1 km away. At Srinagar Junction, police proceeded with arrests under section 144 of the IPC, which made any gathering of workers within the area of 20 km around VEPZ illegal.
- 191.** The complainant also alleged that the suppression of freedom of association was still continuing in all units of the VEPZ. The complainant referred to numerous cases of termination and suspension. More specifically, in the Synergies Dooray Automotive Ltd., an industrial unit of the VEPZ, six workers were dismissed and four were suspended; the right to five sick days per year was also withdrawn. Following the closing of the Madras Knitwear (P) Ltd., another unit of the VEPZ, about 280 workers were left without jobs without any compensation being paid. According to the complainant, in order to avoid the payment of benefits due to the dismissed employees, the company transferred all workers to the Chennai unit. Furthermore, in August 2004, when workers of the Worldwide Diamonds Manufacturing Ltd. demanded payment of July wages, the management locked out the company for three days from 1 to 3 September.
- 192.** In its communication of 28 April 2005, the Government of India forwarded the following observations of the Government of Andhra Pradesh:
- As regards recommendation (a), the cases filed before the Industrial Tribunal against dismissal of 14 workers were at different stages of hearing, in which the Government could not intervene.
 - As regards recommendation (b), the management of the Worldwide Diamonds Manufacturing Ltd. contended that workers were suspended or fined due to their poor performance. Mr. Sudhakar was dismissed on the grounds of his poor performance during his traineeship. He lodged a case before the Labour Court, which is now pending.
 - As regards recommendation (c), workers in any industry employing 100 or more workers were required to issue a strike notice before resorting to a strike. In the present case, workers went on strike without producing such a notice. Furthermore, the allegations regarding brutal suppression of a strike by excessive police violence were not true. The police had intervened to maintain law and order. However, an independent and thorough investigation, with the cooperation of the complainant organization, would be initiated and if the allegations were found to be true, appropriate action would be taken against those responsible.
 - As regards recommendation (d), the Government repeated the circumstances of the arrests.
 - As regards recommendation (e), there were no restrictions on the right to collective bargaining imposed on the VEPZ workers. Worldwide Diamonds Manufacturing Ltd. had been instructed to allow the trade union to participate in the negotiation process.

A meeting leading to resolving the disputes and the lifting of the lockout was held on 3 September 2004. The Government stated that the minutes of this meeting were annexed; however they have not been received.

- As regards recommendation (f), the role of the Grievance Redressal Officer (GRO) had been preformed by the Deputy Development Commissioner (DDC) of the zone with the view that most of the differences between the management and the workers could be resolved through dialogue and conciliation. However, an individual person or body, in coordination with the State Government, would be entrusted to look after the grievance of the workers, as recommended by the Committee.
- As regards recommendation (g), a new subsection (2) was inserted to section 2A of the Industrial Disputes Act, 1947. It read as follows: “(2) Notwithstanding anything in section 10, any such workman as is specified in subsection (1) may make an application in the prescribed manner direct to the Labour Court for adjudication of the dispute referred to therein; and on receipt of such application, the Labour Court shall have jurisdiction to adjudicate upon any matter in the dispute, as if it were a dispute referred to or pending before it in accordance with the provisions of the Act; and accordingly all the provisions of the Act, shall apply in relation to such dispute as they apply in relation to any other industrial dispute.” (A.P. Act 32 of 1987). Therefore, disputes relating to discharge, dismissal, retrenchment or otherwise termination of services of an individual worker, such worker may make an application directly to the Labour Court for adjudication of this dispute. The collective disputes were required to be raised first before a conciliation officer (section 4 of the Industrial Disputes Act) and the appropriate Government could refer such disputes for adjudication or arbitration under section 10 and 10A of the same Act.

193. Concerning the complainant’s allegation that the Worldwide Diamonds Manufacturing Ltd. resorted to a lockout, the Government indicated that the workers went on a go-slow strike from 28 April 2004 demanding a revision of the incentive scheme and the management locked out the company as from 1 September 2004. The DDC held a joint meeting with the management and the workers’ representatives on 3 September 2004. As a result of negotiations, the lockout was lifted.

194. The Government further contested the complainant’s allegation concerning the dismissals at Synergies Dooray Automotive Ltd. According to the Government, no worker was terminated or suspended illegally. As concerns the closing of the Madras Knitwear (P) Ltd., the Government indicated that the management had decided to shift the operation from the VEPZ to Chennai due to the lack of sufficient export orders. However, the salaries and bonuses were paid to the workers concerned. The company was holding negotiations with the workers for a better compensation package before the Deputy Commissioner of Labour.

195. *The Committee notes the information provided by the complainant and the Government. It regrets that, three years after the complaint was filed, the issue of the alleged cases of anti-union discrimination resulting in imposition of fines, dismissals and suspensions of trade unionists have not been resolved. The Committee recalls in this respect that cases concerning anti-union discrimination should be examined rapidly so that the necessary remedies can be really effective [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 749]. The Committee requests the Government to take all necessary measures so as to ensure that the alleged cases of anti-union discrimination are examined promptly and, if it is confirmed that the imposition of the dismissals, suspensions and fines were linked with the legitimate trade union activities of the workers, to take measures to ensure that the dismissed workers are reinstated in their jobs without loss of pay and, if reinstatement is not possible and in cases of*

suspensions and fines, to ensure that adequate compensation so as to constitute sufficiently dissuasive sanctions is paid to the workers. The Committee requests the Government to keep it informed of any developments in this regard.

- 196.** *The Committee also regrets that, despite its numerous requests, no independent and thorough investigation, with the cooperation of the complainant organization, had yet been carried out in relation to the allegations concerning the brutal suppression of the strike, the detention of hundreds of striking workers and a trade union officer by the police, the prohibition of meetings in the complainant's local office, excessive police violence (caning and chaining of workers), and the visit of police officers to workers' homes in order to threaten them so that they return to work. The Committee notes, however, the Government's commitment in its latest reply to undertake an independent and thorough investigation and requests the Government to keep it informed of the outcome.*
- 197.** *The Committee regrets that no new information was provided by the Government in respect of the progress of the criminal cases brought by the police against the workers arrested during the strike in January 2002. It further notes that one of the three cases was withdrawn. The Committee therefore once again requests the Government to provide information thereof.*
- 198.** *The Committee notes the contradictory information received from the complainant and the Government as to the right to collective bargaining of the VEPZ workers and the right of the CITU Visakhapatnam Export Processing Workers' Union to take part in negotiations with the management of the Worldwide Diamonds Manufacturers Ltd. The Committee requests the Government to provide the minutes of the negotiations which, according to the Government, took place in September 2004.*
- 199.** *Noting the Government's indication that an individual person or body would be entrusted to look after the grievances of the workers, the Committee requests the Government to keep it informed of the measures taken and the progress made in ensuring that the roles of GRO and DDC are carried out by different persons or bodies.*
- 200.** *The Committee notes the information provided by the Government in respect of the amendment to the Industrial Disputes Act of 1947. The Committee notes, however, that firstly, the right to approach the court directly, without being referred by the State Government, is not conferred on suspended workers and, secondly, that such right is still not conferred on trade unions. The Committee therefore requests the Government to take all necessary measures, including the amendment of the Industrial Disputes Act of 1947, so as to ensure that suspended workers as well as trade unions could approach the court directly.*
- 201.** *As regards the recent allegations of the complainant, the Committee notes that, following the negotiations between the management and the workers' representatives, the lockout at the Worldwide Diamonds Manufacturing Ltd. was lifted. The Committee further notes the contradictory information on the alleged dismissals and suspensions at the Synergies Dooray Automotive Ltd. The Committee therefore requests the Government to conduct an independent inquiry to thoroughly and promptly consider this allegation and, if it appears that the dismissals and suspensions occurred as a result of involvement by the workers concerned in the activities of a union, to ensure that those workers are reinstated in their jobs without loss of pay. If the independent inquiry finds that reinstatement is not possible, the Committee requests the Government to ensure that adequate compensation, so as to constitute sufficiently dissuasive sanctions, is paid to the workers. The Committee requests the Government to keep it informed of any developments in this regard. Finally, the Committee requests the Government to keep it informed of the result of the negotiations*

held with the workers of the Madras Knitwear (P) Ltd. before the Deputy Commissioner of Labour.

Case No. 2139 (Japan)

- 202.** The Committee last examined this case at its March 2003 meeting. It concerns allegations of preferential treatment granted to certain workers' organizations in the appointment of nominees to the central and prefectural labour relations commissions (PLRC), and various other central and local councils. The Committee noted with interest that the number of worker members coming from trade unions affiliated with the complainant organization and appointed to the PLRCs had been raised, but noted with regret that this had not been the case as regards appointments to the Central Labour Relations Commission (CLRC). The Committee expressed the hope that the Government would take remedial measures in that respect for the 28th term of the CLRC, or before that, should worker member positions become vacant in the meantime. It requested the Government to keep it informed of developments [see 330th Report, para. 122].
- 203.** In its communication dated 27 February 2003, the complainant, the National Confederation of Trade Unions (ZENROREN), recalled that no ZENROREN members were appointed for the 27th term of the CLRC and that the Government stated at the time that it had chosen "persons suitable to represent the interests of workers in general ... taking various criteria into consideration" while ignoring the Committee's recommendations. This showed that the Government had not changed its attitude and failed to take objective criteria into account.
- 204.** In its communication of 17 March 2005, ZENROREN states that, along with the National Liaison Council of Trade Unions (ZENROKYO), they nominated two candidates for the 28th term of CLRC, but all workers appointed on 16 November 2004 were from RENGO ranks, thereby excluding ZENROREN candidates. According to the complainant, the Government stated: that those "more fit for representing the interests of workers in general" are selected and appointed on the basis of a comprehensive evaluation of various factors; that the final decision rests with the Prime Minister; and that the criteria would remain unchanged for the 29th term of the CLRC. The Government also cited the 5.9 to 1 ratio between RENGO and ZENROREN memberships. ZENROREN filed a lawsuit in Tokyo district against workers' appointments for the 28th term of CLRC.
- 205.** In its communications of 6 January and 28 April 2005, the Government replies that as regards workers' appointments for the 28th term of the CLRC, the competent persons to represent workers' interests in general were appointed by the Prime Minister, based on recommendations made by trade unions, by taking various factors into comprehensive consideration, including the organizational situation of each trade union. As a result all 15 workers appointed for the 28th term were RENGO affiliates. The Government points out that some figures provided by the complainant in their March 2005 communication are not appropriate because they take into account public employees in the non-operational sector, whereas organizations established by public employees in the non-operational sector cannot recommend any candidates as CLRC labour members. As regards the lawsuit filed by ZENROREN, the Government states that neither this union nor KOKKOREN (Japan Federation of National Public Employees Union) notified a recommendation on the nomination of candidates. The Government also denies that the competent ministry stated that the criteria would remain unchanged for the 29th term of the CLRC; the actual answer was that it would depend on the situation at the time. As for PLRCs, the Government states that ZENROREN now has affiliates in eight prefectures; two more than at the end of 2002.
- 206.** *The Committee notes from the information provided by the complainant and the Government that no ZENROREN affiliate was appointed as worker member for the*

28th term of the CLRC, contrary to the hope expressed by the Committee in its 330th Report. The Committee recalls the rationale of its previous recommendation in this context, i.e. the necessity to afford fair and equal treatment to all representative organizations, with a view to restoring the confidence of all workers in the fairness of the composition of labour relations commissions and other similar councils, that exercise extremely important functions from a labour relations perspective [328th Report, paras. 444-447]. The Committee therefore urges the Government to take these principles into consideration when appointing worker members for the 29th term of the Central Labour Relations Commission (CLRC), to keep it informed of developments in this respect, and to provide it with the decision of the Tokyo District Court as soon as it is issued.

Case No. 2304 (Japan)

207. The Committee last examined this case at its November 2004 meeting [see 335th Report, paras. 972-1019]. On that occasion the Committee made the following recommendations:

- (a) The Committee takes note of the fact that the seven trade union officers and members accused of coercion have been released while their trial is pending at the Tokyo District Court. It requests the Government to keep it informed of the progress of the judicial proceedings and to communicate the final judgement once rendered.
- (b) Noting that the searches and confiscations against the complainant trade union and its members have apparently ceased, the Committee requests the Government to take all necessary measures in order to ensure that any remaining confiscated items which do not have a direct connection to the facts of the case are immediately returned to the complainant and to keep it informed in this respect. It also requests the Government to ensure that the judicial procedures under way do not interfere in the free exercise of trade union activities.
- (c) The Committee considers that the police should abstain from any declaration which might damage the reputation of a trade union as long as the matters in question have not been confirmed by the judicial authorities.

208. In its communication dated 23 February 2005, the complainant, Japan Confederation of Railway Workers' Unions (JRU), submitted additional information on this case. According to the complainant, the Government's reply to the complaint, which was submitted to the Committee for examination at its November 2004 session, involved serious misstatements and false statements which have been brought to the attention of the Tokyo District Public Prosecutor's Office. In particular, the complainant alleged that the Government referred in its response to the prosecution's case as if it were a proven fact, although the incidents were still under investigation and had not been confirmed by the judicial authorities. Furthermore, the Government had given a different description from the one given by the victim and the police in court regarding the time when the investigation of the Urawa Electric Train Depot Incident (coercion case) started. The Government had stated that the investigation had started after the submission of the incident report whereas the Tokyo Metropolitan Police Department had in reality begun an investigation the previous year and the police had "encouraged" the victim to submit the incident report. The complainant further alleged that, after the Government failed to reply to its protests on the above, it decided to file charges against an unidentified government official on 29 November 2004 for violation of article 156 of the Penal Code (forgery, etc. of official documents) and article 158 (uttering etc., of forged official documents). The Tokyo District Public Prosecutor's Office duly received the indictment on 13 December 2004. Finally, the complainant further alleged that the Government explained to the MPs of the Democratic Party of Japan (DPJ) that, after the National Police Agency had written the document, the Health, Labour and Welfare Ministry had modified it and had submitted it to the ILO via the Foreign Ministry, without cabinet approval or a final decision of the ministers in charge.

- 209.** The complainant further stated that the National Police Agency, which was designated by the Government as in charge of the implementation of the Committee's recommendations, had not responded to its request for an immediate implementation of the Committee's recommendations. Although an official of the Health, Labour and Welfare Ministry had indicated to the members of parliament of the Democratic Party of Japan that: "We respect the recommendations and plan to implement what we can now", the officials of the Justice Ministry and the National Police Agency made it clear that they had no intention of returning any more confiscated items, stating that: "We have returned the remaining unneeded confiscated items" and that "We have returned the confiscated items which have no connection to the investigation"; they also said that, regardless of the Committee's recommendations, they were the ones to decide how the confiscated items would be handled; finally, they were not sure whether the Justice Ministry and the National Police Agency were officially informed of the Committee's recommendations. The complainant attached a report by a member of parliament of the House of Representatives on the hearings by concerned government ministries on the Committee's recommendations.
- 210.** According to the complainant, the Tokyo District Public Prosecutor's Office returned 124 items regarding the case of coercion on 19 January 2005 after a claim made on 15 December 2004. The Metropolitan Police Department returned one of the confiscated items regarding the case of violation of the Law on Punishment against Violent and Other Acts on 15 December 2004, after a claim made on 7 December 2004. The unreturned confiscated items regarding the case of coercion are 1,190 out of 1,870 and 136 out of 1,039 for the case of violation of the Law on Punishment against Violent and Other Acts. These unreturned items for the case of coercion include, according to the complainant: a subscribers' list for the union magazine in the JR Urawa Electric Train Depot; an address list of the JTUC-Rengo Urawa district members; an address list of the JREU Omiya District Office officials; a list of union members; the 2002 JRU Executive Committee constituents and role sharing; a list of the first graduates of the JNR Central Railway Technical Training Centre; four copies of the *JREU Regulation and Rule Book*, 2002 edition; and a copy of labour agreements of April 2002. The unreturned items for the case of violation of the Law on Punishment against Violent and Other Acts include: a passbook of ordinary deposit in the Fuji Bank (fund for international exchange); documents of the ninth general shareholders' meeting of Satsuki Planning, Ltd.; an auditor's report for Satsuki Planning, Ltd. of 2002; and a list of officials and staff of Satsuki Planning, Ltd. of 2003.
- 211.** Regarding the proceedings in the case of violation of the Law on Punishment against Violent and Other Acts, the complainant stated that, on 29 January 2004, the JRU launched a legal action for state liability for compensation against unreasonable search and confiscation. The trial was ongoing at the Tokyo District Court. On 26 January 2005 the Public Safety Department of the Metropolitan Police Department sent the file concerning three officials of the JRU to the Tokyo District Prosecutor's Office alleging violation of the Law on Punishment against Violent and Other Acts. The Tokyo District Prosecutor's Office summoned the three officials for interrogation. The prosecutor said it would take about a month to reach a conclusion on whether they would be prosecuted or not.
- 212.** As for the status of the proceedings in the coercion case, the complainant stated that 29 public hearings had been held from 25 February 2003 to 16 February 2005. During this period three judges were replaced (the first associate judge in the 18th hearing on 23 April 2004, the presiding judge in the 22nd hearing on 27 August 2004, and the second associate judge in the 29th hearing on 16 February 2005). The complainant stated that it was unusual to have all the judges in a case replaced during the trial, especially as there were now no judges who had actually examined the alleged victim in the court hearings. The complainant was concerned that this could influence the fairness of the trial.

- 213.** In its communication dated 7 March 2005, the Government indicated with regard to the coercion case that the trial was still in progress and currently the defence counsel was examining the defendants. The trial was progressing with considerable attention to the rights of the persons involved in the case. The seized items in this case were being returned. As indicated during the initial examination of the case, the Metropolitan Police Department had returned 113 seized items to their original possessors and the Tokyo District Public Prosecutor's Office had returned 443 seized items in April 2004. Moreover, in January 2005, after the Committee's recommendations, the Tokyo District Public Prosecutor's Office returned 124 seized items to their original possessors. Thus, out of 1,870 goods and documents seized after a strict judicial examination by a judge, a total of 680 items had already been returned. The Government indicated that it would, as it had in the past, keep returning promptly to their original possessors the seized items that became less important for proving the case, and would keep informing the Committee of the progress of the judicial proceedings. The Government finally indicated that it would transmit its response on the allegations of the complainant in an additional document.
- 214.** In a communication dated 17 May 2005, the Government provided its response with regard to the allegations contained in the complainant's communication dated 23 February 2005. The Government indicated that, in its initial observations on this case, it had obviously not described the facts as confirmed by the judicial authorities but rather the result of the investigation of the Tokyo Metropolitan Police Department. Regarding the time when the investigation of the Urawa Electric Train Depot Incident (coercion case) started, the Government indicated that the police was not restricted in law or in practice from carrying out the necessary investigation on the incident, notably by asking the victim to explain the circumstances of the incident, before the victim's submission of an incident report in writing to the police. In fact, the Government had never mentioned in its observations submitted to the ILO that the investigation had started only after the submission of an incident report to the police. With regard to the allegations concerning the lack of cabinet approval of the observations before they were sent to the Committee, the Government explained that, in Japan, the ministers divided among themselves the administrative affairs and were in charge of their respective share as competent minister based on the Cabinet Law and the National Government Organization Law. The Ministries of Justice, Foreign Affairs, Health, Labour and Welfare and the National Police Agency had drafted and finalized the observations to the ILO, in accordance with their responsibilities and procedures. Therefore, the observations submitted to the ILO on 25 May 2004 were the official observations of the Japanese Government.
- 215.** With regard to the return of the confiscated items, the Government indicated that it had returned and would continue to return the items promptly to their original possessors when they were deemed to be less important for proving a case. With regard to the Urawa Electric Train Depot Incident (coercion case), the Tokyo District Public Prosecutor's Office had returned 332 items to their original possessors on 31 March 2005. Therefore, out of the 1,870 goods and documents seized, a total of 1,013 items had been returned. As for the other seized items, the Tokyo District Public Prosecutor's Office would return them as and when it was found appropriate to do so, in the process of the criminal trial. With regard to the Tokyo Station Incident (case of violation of the Law on Punishment against Violent and Other Acts), the Government indicated that, out of 1,039 seized goods and documents, 1,005 had already been returned to their original possessors. Out of the 34 remaining items, 22 goods and documents had been seized again by the Metropolitan Police Department because of their necessity in the investigation of another case, conducted after strict judicial examination in accordance with the relevant provisions of the Code of Criminal Procedure. The other 12 goods and documents could not be returned, because their original possessors refused the offer of return. Finally, all the 1,251 goods and documents seized in relation to the case of trespassing had been returned to their original possessors.

- 216.** Finally, the Government indicated that the Tokyo District Public Prosecutor's Office had decided on 16 March 2005 to suspend the prosecution of the three suspects for the Tokyo Station Incident (case of violation of the Law on Punishment against Violent and Other Acts). With regard to the legal action launched by the complainant JRU for state liability and compensation, the Government indicated that the case was currently being heard at the Tokyo District Court. As for the replacement of three judges in charge of the coercion case, the Government indicated that, in accordance with the Code of Criminal Procedure, where judges were changed subsequent to the commencement of a public trial, the procedure should be handed over to the new judges in order to continue. In this case as well, the procedure was continued with new judges in accordance with the provisions of the Code of Criminal Procedure.
- 217.** *The Committee notes with interest from the Government's communication of 17 May 2005 that the Tokyo District Public Prosecutor's Office decided on 16 March 2005 to suspend the prosecution of the three suspects for the Tokyo Station Incident (case of violation of the Law on Punishment against Violent and Other Acts). Earlier on in the year, on 26 January 2005, the Tokyo Metropolitan Police Department had sent a file concerning these officials to the Prosecutor's Office, for violation of the Law on Punishment against Violent and Other Acts. The Committee requests the Government to clarify the exact scope of the suspension of the prosecution and in particular, to indicate whether all charges against the three suspects have been dropped.*
- 218.** *With regard to the progress of the proceedings concerning seven trade union officers and members accused of coercion (see recommendation (a) above), the Committee requests the Government to continue to keep it informed of the progress of the judicial proceedings and to communicate the final judgement on this case once rendered.*
- 219.** *With regard to the return of the confiscated items (see recommendation (b) above), the Committee first notes with interest from the Government's communication of 17 May 2005 that all the 1,251 goods and documents seized in relation to the case of trespassing have been returned to their original possessors. The Committee further notes however, that the Tokyo District Public Prosecutor's Office still retains several items and in particular: (i) 857 items linked to the coercion case which will eventually be returned according to the Government, as the proceedings continue and the items become less important for proving the case; and (ii) 34 items in relation to the case of violation of the Law on Punishment against Violent and Other Acts, 22 of which were seized again by the Metropolitan Police Department because of their necessity in the investigation of another case, conducted after strict judicial examination in accordance with the relevant provisions of the Code of Criminal Procedure; the other 12 goods and documents cannot be returned, according to the Government, because their original possessors refuse the offer of return.*
- 220.** *The Committee requests the Government to ensure that all items confiscated in relation to the cases of coercion and violation of the Law on Punishment against Violent and Other Acts be returned in their entirety at the earliest possible moment and to continue to keep it informed of progress made in this respect. The Committee further requests the Government to provide details on the "other case" in relation to which 22 items which had been initially seized in the framework of the investigation of the Tokyo Station incident (case of violation of the Law on Punishment against Violent and Other Acts), had to be confiscated once again.*
- 221.** *The Committee also notes from the Government's report that the proceedings initiated by the complainant JRU for state liability and compensation for unreasonable search and confiscation are currently under way at the Tokyo District Court. The Committee requests the Government to keep it informed of developments in this respect and to communicate the court's judgement once rendered.*

Case No. 2266 (Lithuania)

222. The Committee last examined this case concerning allegations of government interference in the organizational activities of trade unions, and more specifically the distribution of trade union assets in the context of a transition from a trade union monopoly regime to a situation of trade union pluralism at its November 2004 meeting [see 335th Report, paras. 124-126]. On that occasion, it urged the Government, once again, to rapidly hold further discussions with all interested parties with a view to finding a satisfactory solution for all concerned and to keep it informed of developments.
223. In a communication dated 23 August 2005, the Government informed that civil cases concerning trade union property brought by the Office of the Prosecutor-General had been dropped and the distraints cancelled. The Government therefore considered that the complaint of the Lithuanian Trade Union Confederation lost its ground and purpose.
224. *The Committee notes this information with satisfaction.*

Case No. 2381 (Lithuania)

225. The Committee last examined this case at its March 2005 meeting [see 336th Report, paras. 555-575]. On that occasion, it invited the Government to engage in consultations with the trade union organizations concerned in order to settle the question of the assignment of property so that while some of the assets could be recovered by the Government or their original owners, affected trade union organizations were guaranteed the possibility of effectively exercising their activities in a fully independent manner. It requested the Government to provide information on the development of the situation and, in particular, on any agreement reached in this respect. Furthermore, considering that consultations should be held with all appropriate trade unions on any draft legislation on the nationalization of trade union assets prior to the introduction, the Committee requested the Government to provide a copy of any such new legislation.
226. In its communication of 19 April 2005, the complainant organization, the Lithuanian Trade Union (LTU) "Solidarumas", stated that by the court decision of 11 April 2005, its assets in Druskininkai (sanatorium "Nemunas") were seized by the State Property Fund (the successor of the Special Fund for support of the existing and new trade unions). The complainant indicated that the sanatorium was transferred to the union on 17 September 2004 by the Special Fund in accordance with the regulation of the Fund and the law in force. In winter 2004-05, the union had organized an activity in the sanatorium "Nemunas" concerning its heating and maintenance. Works for renovation of the sanatorium were scheduled and a planning for rehabilitation of employees' health was prepared. Therefore, the LTU "Solidarumas" considered that the action of the State Property Fund, a public authority, was an intervention in trade union activities.
227. The complainant further alleged the lack of reaction on behalf of the Government following a fire that took place on 2 December 2004, which destroyed half of the building of the Cultural Palace of Trade Unions in Vilnius and interrupted the activities of the union. The complainant indicated that the International Confederation of Free Trade Unions (ICFTU), having evaluated the destruction of the trade union's working premises, had addressed the Prime Minister and requested him to take the necessary measures so as to ensure that the trade union movement was protected from criminal offences. Instead, the investigation of the criminal case has been protracted, the damage made to the trade union has not been addressed and the union has been denied the support it had requested for the liquidation of the consequences of the fire.

228. Finally, the LTU “Solidarumas” alleged that the Vilnius District Prosecutor had brought two cases against the union on the ground of “protection of the public interest”. According to the complainant, that was done in an attempt to split the trade union from the inside.
229. In its communication of 23 August 2005, the Government explained that the Special Fund for support of the existing and new trade unions established in 1993 was liquidated by the resolution of the Seimas of the Republic of Lithuania No. IX-2441 of 14 September 2004, whereby the Government or an institution authorized by it was appointed to perform the functions of liquidator of the Fund. The State Property Fund became the successor of the Special Fund by the Government’s resolution No. 98 of 26 January 2005. During a review of the documents taken over, it had been noted that the Council of the Special Fund decided, at its meeting held on 7 June 2004 (minutes No. 128), to recognize the sanatorium Nemunas and the Druskininkai centre for therapeutic physical culture as the property of the LTU “Solidarumas”. The property was handed over on 17 September 2004; a certificate to this effect was issued on the same day.
230. The Government pointed out, however, that following the decision of 30 September 2003 by the Constitutional Court, the Council of the Special Fund was neither entitled to make any decision recognizing the real estate held by it as property of the LTU “Solidarumas”, nor to transfer such property. Indeed, this court judgement held that assets that had been managed, before the restoration of Lithuania’s independence, by state trade unions, which were acting in Lithuania as part of the trade union system of the USSR, was property of the Lithuanian State. In order to carry out their constitutional functions, trade unions may hold assets by the right of ownership, however, trade unions were not economic entities and their purpose did not include economic activities or public administration, therefore state institutions may not transfer state-owned assets to the ownership of trade unions. Therefore, the court recognized 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” of 8 June 1995, under which Nemunas sanatorium and the Druskininkai centre for therapeutic physical culture had been transferred to the Special Fund, was in contravention with the Constitution. On the basis of such circumstances, the State Property Fund, in order to protect the interests of the State, had filed an application with the Vilnius District Court for invalidation of the decision adopted by the Council of the Special Fund on 7 June 2004 and of the real estate transfer transaction. Therefore, in the Government’s opinion, these actions by the State Property Fund could not be interpreted as unlawful or as hindering trade union activities.
231. *The Committee notes this information. It regrets, however, that the Government did not provide any information with respect to its previous recommendation to engage in consultations with the trade union organizations concerned in order to settle the question of the assignment of property. The Committee recalls that it made the above recommendation after a substantive examination of the issues involved in this complaint, while taking into account the particular circumstances of the case and the importance of preserving harmonious industrial relations in the country. The Committee notes that the issue of assignment of property continues to raise conflicts. The Committee therefore urges the Government, once again, to rapidly hold discussions with all trade union organizations concerned with a view to finding a satisfactory solution for all concerned and to keep it informed of developments.*

Case No. 2109 (Morocco)

232. The Committee last examined this case, which concerns dismissals of eight trade unionists at the Fruit of the Loom company as well as acts of anti-union repression following the creation of a trade union office, at its November 2004 meeting [see 335th Report, paras. 136-139]. On that occasion, the Committee noted the information with regard to the

four workers who were dismissed, requesting the Government to keep it informed of the situation regarding the two other dismissed workers. It also requested the Government to keep it informed of the status of the proceedings regarding the records entered by the Labour Inspectorate against the company, as well as the final decisions of the proceedings brought by Mr. Abdellah Sainane and Mr. Lahcen Toufik.

- 233.** In a communication dated 3 February 2005, the Government stated that with regard to the records entered by the Labour Inspectorate concerning the collective dismissal of workers belonging to the trade union, the Appeal Court of Rabat presented the case for decision on 27 January 2005. As this concerns unauthorized collective dismissal, the Royal Gendarmerie is currently carrying out an inquiry. With regard to the decisions concerning Mr. Abdellah Sainane and Mr. Lahcen Toufik, the Government states that the Court of First Instance in Salé has handed down decisions in their favour and sends copies of these.
- 234.** *The Committee notes with interest the information provided by the Government and hopes that the decisions concerning Mr. Abdellah Sainane and Mr. Lahcen Toufik will be implemented promptly. It notes, however, that the information regarding two of the eight dismissed workers has not been provided. In this regard, the Committee urges the Government to provide the information relating to the situation of the two missing workers.*
- 235.** *Furthermore, the Committee hopes that the decision of the Court of Appeal of Rabat regarding the records entered by the Labour Inspectorate will be sent to it as soon as possible. As this regards unauthorized dismissal, the Committee also requests the Government to keep it informed of the outcome of the inquiry being carried out by the Royal Gendarmerie.*

Case No. 2164 (Morocco)

- 236.** The Committee last examined this case, which concerns measures taken by the Caisse Nationale du Crédit Agricole (CNCA) against several workers represented by the National Union of Bank Employees (SNB/CDT) for having exercised trade union activities or taken part in a strike, at its November 2004 meeting [see 335th Report, paras. 140-143]. At that time, the Committee requested the Government to submit to it: (1) the decision of the Court of First Instance concerning the case filed against the CNCA by 34 temporary workers; (2) the decision of the disciplinary council concerning the dismissal of Mr. Chatri Abdelkader; and (3) the two judicial decisions concerning the complaints filed against the CNCA by the same Mr. Abdelkader. The Committee again requested the Government to ensure that inquiries were opened promptly to determine whether the striking workers, including the members of the trade union executive committee named by the complainant organization (namely, Mr. Jamal Boudina, Mr. Ahmed Arrout, Mr Abdessamad Mammad, Mr. Mustapha Hafidi, Mr. Mustapha Kounech, Mr. Mahjoubé Ennaj, Mr. Said Benjamae, Mr. Lahcem Chkha, Ms. Naja Mimouni and Ms. Ouafae Chmaou) were sanctioned for their participation in the strike of 13 and 14 June 2001. If the anti-trade union nature of those measures – or of some of them – was demonstrated, the Committee requested the Government to take steps to ensure that the workers concerned were immediately reinstated to their positions of employment with payment of the salaries owing, or, if reinstatement was not possible, that adequate compensation should be paid to the workers concerned.
- 237.** In a communication dated 11 May 2005, the Government transmitted a letter from the Director-General of the CNCA, dated 28 April 2005. This letter states that the Crédit Agricole acted favourably to the requests for compensation of 27 of the 34 workers and they were paid a total amount of 890,000 dirham. With regard to the situation of Mr. Chatri Abdelkader, the Government sent a copy of the decision on his dismissal, as

well as copies in Arabic of the verdicts of the Administrative Division of the Supreme Court (27 June 2002), the Administrative Court of Rabat (10 October 2002), the Court of First Instance of Rabat (25 March 2004) and the Court of Appeal of Rabat (24 August 2004).

- 238.** The letter also states again that the transfers of the 10 workers mentioned above are not a result of sanctions for their participation in the strike, but a result of decisions taken with regard to the requirements of the department, and that the transfers had, in three cases, been accompanied by promotions. It stated that other transfers had taken place within the same province or the same city and, in one case, at the request of the person involved. It also mentioned corroboration by some of the workers concerned who, at the request of the head of the human resources management department of the Crédit Agricole of Morocco, stated that they “had no problem” with the Crédit Agricole.
- 239.** *The Committee notes this information and the legal and administrative decisions sent by the Government relating to the situation of Mr. Chatri Abdelkader. These decisions are currently being translated and therefore the Committee is currently not able to come to any definitive conclusions. The Committee notes, however, that the decision of the Court of First Instance concerning the case filed by the 34 temporary workers against the CNCA has not been sent. The Committee urges the Government to send a copy of the decision handed down in this regard.*
- 240.** *With regard to the situation of the striking workers and the reasons stated with regard to the steps taken concerning the 10 trade union officials referred to by the complainant organization [see 333rd Report, para. 603], the Committee notes that the Government has not provided information on the opening of an independent inquiry to determine whether the striking workers, including the trade union officials named by the complainant organization were the target of sanctions following their participation in the strike of 13 and 14 June 2001. The Committee requests the Government to keep it informed on this issue.*

Case No. 2281 (Mauritius)

- 241.** The Committee last examined this case, which concerns the need to revise the Industrial Relations Act (IRA) in conformity with freedom of association principles, during its March 2005 meeting [336th Report, paras. 79-81]. On that occasion, the Committee took note with interest of the approval of the ratification of Convention No. 87 and the ongoing preparation of new legislation to revise the IRA and strongly encouraged the Government to maintain consultations with the social partners during the revision process, reiterating its hope that this process would be concluded soon so as to bring the law into full conformity with Conventions Nos. 87 and 98.
- 242.** In its communication dated 22 April 2005, the Government furnished a detailed chronology of the efforts made to adopt legislation revising the IRA. In particular, in June 2003 a technical committee was set up at the Ministry of Labour, Industrial Relations and Employment to work on the replacement of the IRA. The Committee started consultations with the social partners.
- 243.** At a first stage in the consultations, a meeting was held with the social partners, who were invited to submit their proposals in writing. The 13 federations of trade unions submitted a common memorandum on 30 January 2004 and the Mauritius Employers’ Federation submitted its proposals on 26 March 2004. At a second stage of consultations, the Ministry invited the ILO to provide technical assistance. A tripartite seminar was held from 8 to 11 July and broad consensus was reached with the help of the ILO experts on issues such as the right to strike, dispute settlement procedures and the autonomy of trade unions. The

13 federations of trade unions and the Mauritius Employers' Federation were invited to participate in the seminar. Several trade union leaders did not attend or participated only in a few sessions of the seminar.

- 244.** At a third stage of consultations, in November 2004, a White Paper on new industrial relations framework-making proposals for a new legislation to replace the IRA was circulated publicly for national debate. The federations of trade unions and the employers' organization, as well as any other interested party, were invited to submit their recommendations within a period of two months. They submitted their views. Only a few members of the public and one political party transmitted their comments and suggestions. At a fourth stage of consultations, a meeting was held with the trade unions to explain to them the various proposals contained in the White Paper and to listen to their observations. In December 2004, the Mauritius Employers' Federation submitted its views. The federations of trade unions submitted their views in a common memorandum but, at the same time, burnt the White Paper publicly. This brought an end to the consultations.
- 245.** A fifth stage of consultations started in January 2005, when the Government again solicited the assistance of the ILO to resume consultations and continue the discussions on the proposed new legal framework with a view to building consensus. An ILO delegation held meetings with the trade unions and the Mauritius Employers' Federation, as well as the Prime Minister, and made a number of recommendations to the technical committee and various ministries that were included in the draft bill.
- 246.** Following the ILO technical assistance mission, the Government decided to ratify Convention No. 87 in February 2005. The decision was implemented immediately and the instruments of ratification have already been deposited at the ILO. The decision to ratify the Convention reaffirmed the Government's good faith and strong commitment to replace the IRA. The immediate ratification of the Convention was one of the main requests of the trade unions. At a sixth stage of consultations, three meetings were held with the trade unions and the employers' organization separately to continue the consultations so that the final proposals could be drawn up for the preparation of a draft bill. Subsequently, a draft bill was prepared and a meeting was held in March 2005 with the trade unions and the employers separately to inform them of the final proposals which would be incorporated in the bill. The suggestions made by the trade unions were noted and some of them were included in the bill. The employers' organization was informed that its persistent request to dismantle the National Remuneration Board would not be considered, as it would create social problems given that there was no consensus on the proposal.
- 247.** The bill was circulated to all trade unions and employers' organizations on 9 April, as soon as the Government had approved it. The employers' organizations held a meeting on 11 April and submitted a memorandum to the Government on the same day. They opposed the bill radically and reiterated their requests to dismantle the National Remuneration Board outright and to allow collective bargaining with non-unionized workers (text attached). As regards the trade unions, two federations made verbal proposals for minor amendments to the bill. Their proposals were taken into consideration and amendments were brought immediately, though the draft bill had already been submitted to the National Assembly. On 12 April, the bill was moved for first reading in the National Assembly (copy attached). On 13 April, the federations of trade unions wrote a letter (attached) to the Prime Minister asking that the debates on the bill be postponed to the following week, as the trade union movement was organizing a workshop on Friday, 15 April. This request for postponement put the enactment of the bill in jeopardy, as it was public knowledge that the National Assembly would be dissolved by 22 April, in view of the forthcoming general elections. The Minister of Labour, Industrial Relations and Employment nevertheless informed the unions that he was at their disposal to reply to any of their queries (letter attached). However, one trade union federation chose to circulate a petition in the National

Assembly, asking that the bill should not be enacted without amendments (text attached), whereas others made diverse press statements decrying the bill as being pro-employer, repressive, denying the right to strike and being worse than the existing IRA, etc. Some stated that they were seeking the support of political parties of the opposition to stand against the enactment of the bill. Others raised objections on issues that had already been thrashed out during previous consultations and on which agreement had already been reached (text attached). Diverse and contradictory statements were made by the various trade unions.

- 248.** In view of the request of the trade unions, the Government had no choice but to postpone the enactment of the bill. In his statement in the National Assembly, the Prime Minister took the firm commitment that he would personally look at the requests for amendment and ensure that the bill was enacted after the elections (text attached).
- 249.** *While duly noting the detailed information provided by the Government on the efforts made to prepare and pass through the National Assembly a draft bill to replace the IRA which would take into account the Government's recent international commitments through the ratification of Convention No. 87, the Committee regrets that these efforts did not result in the adoption of legislation that would be based on broad consensus among the social partners. Noting with interest the Government's recent ratification of Convention No. 87, the Committee and trusts that it will vigorously pursue its efforts to bring the IRA into full conformity with Conventions Nos. 87 and 98. The Committee would like to emphasize, once again, the importance that should be attached to full and frank consultations taking place on any questions or proposed legislation affecting trade union rights [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 927] and trusts that the Government and the social partners will continue to engage fully in such consultations with the aim of building consensus and preparing the ground for future legislation amending the IRA.*
- 250.** *The Committee requests to be kept informed of further steps taken with a view to bringing national law into conformity with Conventions Nos. 87 and 98, ratified by Mauritius, and progress made in this respect. Noting that the technical assistance of the Office has been useful in the context of generating social dialogue on the possible future amendment of the IRA, the Committee would like to remind the Government that such technical assistance remains at its disposal if it so wishes.*

Case No. 2234 (Mexico)

- 251.** The Committee last examined this case at its November 2004 meeting [see 335th Report, paras. 156-158]. On that occasion, the Committee stated that it hoped that the judicial authority would announce a decision as soon as possible and that it would take into account the principles of freedom of association with regard to the charges against Mr. Fernando Espino Arévalo, General Secretary of the Metropolitan Rail Transport Workers' Union (SMTSTC), and other participants in the industrial action carried out on 8 August 2002 in the metropolitan passenger train.
- 252.** In a communication dated 18 May 2005, the Government provided the information given to it by the Federal District Public Prosecutor's Office that, on 18 March 2005, the head of the Fiftieth Investigative Office of this department stated that the application to begin legal proceedings under Case No. FACI/50T/1008/02-08 against Mr. Fernando Espino Arévalo for coalition of public servants and attacks on means of communication was submitted to the Secretary-General of the Chamber of Deputies of the LVIII Session of the Honourable Congress of the Union on 3 September 2002 and was ratified on 5 September 2002, and this is currently awaiting decision.

253. *The Committee notes this information and requests the Government to keep it informed of the final decision on the legal proceedings currently under way against trade union official Mr. Fernando Espino Arévalo and other participants in the industrial action of 8 August 2002 in the metropolitan passenger train.*

Case No. 2347 (Mexico)

254. At its March 2005 meeting, the Committee had declared that it expected the judicial authority fully to take into account the principles cited in its conclusions concerning the registration of the complainant organization (the Trade Union of Associated Football Players of Mexico), and had requested the Government to communicate any ruling or decision taken in relation to the registration of the complainant organization [see 336th Report, para. 630].

255. In a communication dated 6 September 2005, the Trade Union of Associated Football Players of Mexico informed the Committee that it had been registered following a decision of the Local Council of Arbitration and Conciliation dated 8 July 2005 (enclosed with its communication) and thanks the Freedom of Association Committee for its contribution to the registration.

256. In a communication dated 23 September 2005, the Government confirms this information.

257. *The Committee notes this information with satisfaction.*

Case No. 2274 (Nicaragua)

258. The Committee examined this case at its November 2004 meeting [see 335th Report, paras. 1097 to 1126] and made the following recommendations: “As regards the dismissal of a number of trade union officials, observing that the dismissals of Mr. Edwin García and Ms. Blanca Alejandrina Aráuz took place in 2001 and 2002, the Committee deplores the delay in the judicial proceedings and trusts that if the judicial authority confirms the anti-trade union character of those dismissals, both officials will be reinstated without delay and without loss of pay. If the judicial authority determines that reinstatement is not possible, both officials should be fully compensated. The Committee requests the Government to keep it informed thereof. The Committee further requests the Government to inform it if Ms. Suárez was in fact reinstated in her post.”

259. In a communication dated 17 May 2005, the Government rejects the Committee’s view about the judicial proceedings provided for by the law. There has been no delay; these proceedings are a matter for the Nicaraguan judicial authorities, which are competent to carry out this work. On the other hand, as regards the dismissals of Edwin García and Blanca Alejandrina Aráuz, which took place in 2001 and 2002 respectively, the Government notes that it has had no information from the complainant, which is actively promoting the case before the labour courts. *The Committee regrets that despite the time that has passed, the judicial authorities have not made a ruling on these dismissals. The Committee requests the Government to keep it informed of the final outcome of the judicial proceedings. The Committee also once again requests the Government to inform it if Ms. Suárez was in fact reinstated in her post.*

260. “As regards the alleged restrictions on collective bargaining, the Committee requests the Government to adopt the necessary measures to ensure in the future the implementation of the obligation to encourage and promote collective bargaining provided in Article 4 of Convention No. 98 and observance of the principle of good faith in collective bargaining. The Committee recalls to the Government that the technical assistance of the ILO is

available in this regard.” The Government states that there are no obstacles to the negotiation of a collective agreement between a trade union and an employer or employers’ organization. In Nicaragua, employers and workers have mechanisms of conciliation and mediation available to them to solve any socio-economic and legal disputes, whether individual or collective, which may arise regarding labour relations, with a view to solving socio-economic disputes through the conclusion or revision of collective agreements. The Ministry of Labour Directorate of Collective Bargaining and Individual Conciliation analyses, approves and registers collective agreements; the Government thanks the Committee for its offer of technical assistance. *The Committee takes note of this information.*

- 261.** “As regards the allegation concerning the conclusion of a collective agreement with a trade union financed by the employer, the Committee requests the Government to undertake an investigation in this respect and to keep it informed of the result, in particular as regards the representative character or otherwise of the Roo Sing Garment Co. Democratic Workers’ Union.” In this regard the Government reports that the Roo Sing Garment Co. Democratic Workers’ Union is representative, and legally enjoys trade union rights in accordance with the law. There is no trade union organization financed by the employer. *The Committee takes note of this information.*
- 262.** “As regards the proceedings for slander and libel initiated against trade union officials and members, the Committee requests the Government to send information on the criminal proceedings initiated against the members of the trade union’s executive board and other workers and hopes that, since the administrative authority has confirmed that there had indeed been acts of sexual harassment, the dismissals will be cancelled and the criminal proceedings against the trade unionists declared inadmissible.” In this regard the Government indicates that in matters regarding the criminal proceedings for slander and libel against Eddy Reyes and against César Pérez Rodríguez and others, the Ministry of Labour is not a party in that case, and so is not linked to it, and has no jurisdiction in strictly criminal matters. There is no information from the complainant trade union organization about the outcome of this case. *The Committee requests the Government to keep it informed of the progress of the criminal proceedings.*
- 263.** “As regards the alleged drawing up of blacklists, the Committee requests the Government to conduct a thorough and independent investigation into the matter and to keep it informed in this respect.” The Government reports that prior to the installation of an enterprise or enterprises covered by the export processing zones scheme, they are informed of the rights and obligations under national labour law. Ministerial resolutions are binding on both employers (Nicaraguan or foreign) and workers (Nicaraguan or foreign) who settle in Nicaragua. No evidence has been found of the existence of “blacklists” that are detrimental to the rights of workers as laid down in the law or that target members of trade unions in enterprises covered by the export processing zones scheme. The Nicaraguan administrative and judicial authorities do not, under any circumstances, allow this sort of practice, which seriously infringes the rights of workers. *The Committee takes note of this information.*

Case No. 2006 (Pakistan)

- 264.** The Committee last examined this case at its June 2005 meeting when it urged, once again, the Government to ensure that the ban on trade union activities at Karachi Electric Supply Corporation (KESC) is lifted immediately and the rights of the KESC Democratic Mazdoor Union, as collective bargaining agent, are restored as soon as possible. It further requested the Government to continue to keep it informed of the developments in the process of privatization, in particular as regards the preservation of workers’ rights [337th Report, paras. 102-104].

265. In its communication of 24 June 2005, the Government indicated that, during the process of privatization, the KESC management was taking all possible measures to improve the working environment, and that lifting a ban on the CBA would give a wrong signal and would be likely to have an adverse effect on the interests of local as well as foreign investors. Therefore, a close liaison was being ensured between the employees of the KESC, the Ministry of Finance, the Privatization Commission and the Ministry of Labour, Manpower and Overseas Pakistanis, to address labour issues. The Government further informed that, during a meeting of privatization of the KESC, the following package had been agreed with the new owner in respect of the KESC employees: 20 per cent salary increase, maintenance of all existing benefits and facilities enjoyed by the employees, employment security for a period of one year, training programmes for KESC employees, grant of 10 per cent shares to KESC employees. However, the same package included an understanding that trade union activities would commence on expiry of the six-month period after the take over of the company by a new investor.
266. *The Committee notes the information provided by the Government. It recalls that, already in its January communication, the Government had indicated that the trade union rights at the KESC would remain suspended for six months after privatization of the corporation. The Committee regrets that the Government, invoking economic interests, continues to violate the trade union rights of KESC workers. It recalls in this respect that the solution to the social and economic problems of any country cannot possibly lie in the suspension of trade union rights [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 31]. The Committee therefore reiterates its previous request to lift immediately the ban on trade union activities at KESC and to restore without delay the rights of the KESC Democratic Mazdoor Union and to keep it informed in this respect.*

Case No. 2096 (Pakistan)

267. The Committee examined this case at its March 2004 meeting [see 333rd Report, paras. 833-848] and on that occasion it formulated the following recommendations:
- (a) The Committee deplors that, despite the time that has elapsed since this case was first examined, the Government has not replied to all of the Committee's recommendations, although it has been invited on several occasions, including by means of an urgent appeal, to present its comments and observations on the case. The Committee urgently requests the Government to be more cooperative in the future.
 - (b) The Committee urges the Government to amend section 27-B of the Banking Companies (Amendment) Act, 1997, without delay and requests it to provide information on any progress made in this regard.
 - (c) The Committee once again strongly urges the Government to provide information without delay on 500 trade union leaders in the banking sector, including Mr. Maqsood Ahmed Farooqui, President of the UBL Employees' Federation of Pakistan, and Mr. Rahmat Ullah Kazmi, General Secretary, UBL Labour Union Karachi, who were dismissed or terminated from employment pursuant to the enactment of section 27-B of the Banking Companies Act.
 - (d) The Committee refers to its recommendations in Case No. 2229 concerning Pakistan approved by the Governing Body at its March 2003 meeting where it requested the Government to amend the Industrial Relations Ordinance of Pakistan (IRO) of 2002, as well as to the observations of the Committee of Experts. The Committee regrets that so far the Government has not been able to amend the IRO so as to bring it into conformity with Conventions Nos. 87 and 98.
268. In communications of 1 and 26 June 2004, the United Bank Limited Employees' Union (UBL employees' union), affiliated to the complainant organization, stated that no progress

was made in respect of implementation of the Committee's recommendations in this case. It furthermore submitted several letters (notices) sent by the management of the UBL in reply to the request of the UBL employees' unions in Sialkot (Gujranwala) and in Lohore Region to start collective bargaining in which the UBL indicated that the unions active at the UBL were illegal bodies and that therefore the bank could not enter into any bilateral negotiation with them. The following reasons were invoked by the bank:

- (i) The notice inviting the UBL management to start bilateral negotiation was signed by Mr. Raja Mohammed Sarfaraz, who was not a bank employee and therefore could not be a UBL trade union office bearer.
- (ii) Under the IRO 2002, the UBL constitutes one establishment. The law did not permit the establishment of unions in subdivisions of an establishment. Therefore, the union, its statutes and its collective bargaining agent (CBA) certification were without any legal effect. Moreover, the Registrar should cancel registration of unions registered under the IRO 1969, as their registration violated the IRO 2002.
- (iii) The rights conferred under the IRO 2002 were subject to the Constitution of Pakistan, as well as "any other law" (section 3), i.e. section 27-B of the Banking Companies Ordinance, 1962.
- (iv) The UBL employees' union, violated section 3(1)(d) of the IRO 2002 which provided for a compulsory affiliation of every CBA with a federation at national level within two months of determination of the CBA or promulgation of the IRO 2002 whichever is earlier.
- (v) The union used the address of the branch office of the bank. In other words, the union was carrying out its activities at the bank premises, which violated section 27-B of the Banking Companies Ordinance, 1962.

269. The complainant also submitted a letter from the Office of the Registrar of Trade Unions in Sargodha, addressed to the Senior Vice-President of the ULB in Karachi, answering the abovementioned objections raised by the UBL management in the following way:

- (i) Although Mr. Raja Mohammed Sarfaraz was not an employee of the UBL, he was retired from service. By virtue of section 6(1)(d) of the IRO 2002, he had the right to hold trade union office.
- (ii) The objection that the UBL constituted one establishment was legally incorrect. Moreover, the existing status of the union as a CBA was in conformity with section 80 of the IRO 2002.
- (iii) The statutes of the union were not inconsistent with the IRO 2002; therefore, the registration of the union could not be cancelled.
- (iv) The federal Government had not exempted banks from the scope of the IRO 2002.
- (v) The status of the union as CBA within the meaning of section 20(1) of the IRO 2002, was lawful and beyond any doubt, the UBL management was legally bound to negotiate with the union.

270. In its communication of 24 June 2005, the Government provided a detailed reply to the Committee's recommendations. With regard to the previous request to amend section 27-B of the Banking Companies (Amendment) Act, 1997, so as to admit as candidates for union office persons who have previously been employed in the occupation concerned and, by exempting from the occupational requirement a reasonable proportion of the officers of an

organization, the Government indicated that the procedure of establishment and registration of trade unions, as well as other matters related to industrial relations, were regulated by the IRO 2002. By virtue of section 6(1)(d), 25 per cent of the trade union officers could be elected from among the persons who were not employees of the banking company in question. The provisions of the IRO took precedence over the provisions of the Banking Companies Ordinance. The Government further indicated that a case on this issue was pending before the high court (Petition C.P. No. 331/2003).

- 271.** The Government contested the allegation of mass dismissals in the banking sector. It stated that, according to the ULB, none of the ex-employees have been dismissed on the grounds of their trade union activities. Mr. Maqsood Ahmed Farooqi, the President of the UBL Employees' Federation of Pakistan, was dismissed on the basis of a proven act of misconduct on 28 July 1999 and not pursuant to section 27-B of the Ordinance. His appeal to the Federal Services Tribunal was dismissed. His appeal before the Supreme Court was still pending. As concerns the case of Mr. Rahmat Ullah Kazmi, General Secretary, UBL Labour Union Karachi, the Government also contested the allegation that he was dismissed pursuant to section 27-B, as amended in 1997. According to the Government, he was dismissed on 5 September 1996 and therefore could not be dismissed pursuant to section 27-B. Following a rejection of his appeal by the Federal Services Tribunal, Mr. Rahmat Ullah Kazmi filed a second appeal before the same tribunal. The bank, being aggrieved by the second appeal, filed an appeal before the Supreme Court of Pakistan, which was still pending.
- 272.** With regard to the amendment of the IRO 2002, the Government stated that it had held full and frank consultations with the stakeholders. The amending law would soon be placed before Parliament for approval.
- 273.** *The Committee notes with interest the detailed reply provided by the Government. While noting the Government's statement that the IRO 2002 takes precedence over the Banking Companies (Amendment) Act, 1997, and that, therefore, 25 per cent of the trade union office bearers could be elected among persons who were not employees of the banking company in question, the Committee also notes that, on the one hand, this assertion is presently contested before the high court and, on the other hand, the management of the UBL in Sargodha refused to negotiate with the union and one of the reasons it had invoked was that the President of the union was not an employee of the bank. The Committee considers that where difficulties with regard to the interpretation of rules concerning the election of trade union officers create situations where the employers refuse to negotiate with the union concerned and, more in general, to recognize such a union, problems of compatibility with Convention No. 87 arise. The Committee therefore requests the Government to take all necessary measures so as to ensure, in practice, that trade unions can carry out their activities in the banking sector, including the right to elect their representatives in full freedom and the right to collective bargaining. More specifically, it requests the Government to take all necessary measures so as to ensure that the UBL employees' unions can negotiate the terms and conditions of employment of its members with the managers of the UBL branches concerned and keep it informed in this respect.*
- 274.** *As concerns the alleged cases of dismissal, the Committee notes that the Government submitted that Mr. Maqsood Ahmed Farooqi, the President of the UBL Employees' Federation of Pakistan, was dismissed on the basis of a proven act of misconduct on 28 July 1999 and not pursuant to section 27-B of the Ordinance. The same is submitted in respect of the dismissal in 1996 of Mr. Rahmat Ullah Kazmi. The Committee notes that the dismissal of Mr. Maqsood Ahmed Farooqi as well as of some other trade union members took place in the context of a strike in March 1998 where the strikers demanded, inter alia, an end of a ban on the UBL trade unions. The Committee further notes that, although the Government indicated that Mr. Rahmat Ullah Kazmi was not dismissed pursuant to section*

27-B, it did not provide for any further information on the circumstances of his dismissal, nor on the numerous other alleged anti-union dismissals. The Committee therefore requests the Government to conduct an independent inquiry to thoroughly and promptly consider the allegations of anti-union dismissals at the UBL and to ensure that appropriate measures are taken in response to any conclusions reached in relation to these allegations of anti-union discrimination. The Committee requests the Government to ensure that, if it appears that the dismissals occurred as a result of involvement by the workers concerned in the activities of a union, those workers are reinstated in their jobs without loss of pay. If the independent inquiry finds that reinstatement is not possible, the Committee requests the Government to ensure that adequate compensation, so as to constitute sufficiently dissuasive sanctions, is paid to the workers. The Committee requests the Government to keep it informed of any developments in this regard.

Case No. 2229 (Pakistan)

275. The Committee last examined this case at its March 2003 meeting [see 333rd Report, paras. 102-109]. On that occasion, it recalled that workers of the Employees' Old-Age Benefits Institution (EOBI) should enjoy the right to establish and join organizations of their own choosing and requested the Government to amend the Industrial Relations Ordinance of Pakistan (IRO) of 2002, accordingly. It further requested the Government to conduct an independent investigation into the alleged acts of anti-union discrimination against trade union officers of the EOBI Employees' Federation of Pakistan. The Committee regretted that the Government had not been able to amend the IRO and, in particular, its sections 1(4), 3(1)(d), 18, 19(1), 20(11), 49(4)(e) and 65(5) and requested the Government to engage in full consultations with the social partners in order to amend the IRO so as to bring it into conformity with Conventions Nos. 87 and 98 and to resolve the issue concerning the labour judiciary system. It further regretted that no information was provided by the Government in respect of the waiting period relative to the strike.
276. In its communication of 24 June 2005, the Government reiterated that the amendments to the IRO 2002 were prepared following full and frank consultations with the stakeholders and forwarded its observations on the previous recommendations of the Committee.
277. With regard to the Committee's recommendation to ensure that workers of Bata Shoes company; Pakistan Security Printing Corporation; Pakistan Security Papers Ltd.; Pakistan Mint; establishments or institutions maintained for the treatment and care of sick, infirm, destitute and mentally unfit persons; institutions established for payment of employees' old-age pensions or workers' welfare; members of Watch and Ward; security and fire services staff of an oil refinery; or establishments engaged in the production, transmission or distribution of natural gas or liquefied petroleum gas or petroleum products, or of a seaport and airport; railways; and administration of the State, enjoy the right to establish and join organizations of their own choosing, the Government submitted that the IRO 2002 was applicable to the Bata Shoes company and that it was planning to make certain amendments to section 1(4) of the IRO, keeping in view the international commitments and security concerns of the country in the present state of war against terrorism.
278. As concerns the Committee's request to amend the IRO so as to ensure that workers' organizations are allowed to determine themselves whether they wish to join a federation (section 3(1)(d)) and, if that is the case, to enjoy the right to establish and join the federation of their own choosing, the Government indicated that it was in the process of amending its legislation.
279. As concerns the Committee's request to repeal section 19(1) of the IRO, which imposed measures of administrative control over trade union assets, the Government stated that the audit was necessary for financial discipline. It indicated that section 19(1), which related to

the audit of accounts of trade unions, did not impose any administrative control over trade unions. The Government considered that it was rather a question of a simple verification that the receipt from the poor workers was properly and fairly utilized for the purpose of their welfare and in accordance with the charter of the union. This section did not discriminate any particular union. However, the Government had proposed to amend the law so as to give the right of choice of an auditor to trade unions. It further indicated that only the accounts of a collective bargaining agents having membership of 10,000 or more (as opposed to 5,000 previously) would be subject to an external audit.

- 280.** As to the request of the Committee to lower the minimum requirement of ten trade unions, with at least one from each province, for establishment of a national federation (section 18), the Government stated that this number was being lowered to four, one from each province.
- 281.** In respect of the Committee's request to repeal section 65(5) of the IRO, which stipulated the disqualification of a trade union officer from holding any trade union office for the following term for committing an unfair labour practice and covered a wide range of conduct not necessarily making it inappropriate to hold a position of trust, the Government explained that not all types of unfair labour practice enumerated in section 64 debarred the office bearer from re-election. Section 65(4) referred only to clause (d) of section 64, which defined unfair labour practice as an act of compelling or attempting to compel the employer to accept any demand by using intimidation, coercion, pressure, threat, confinement or ouster from a place, dispossession, assault, physical injury, disconnection of telephone, water or power facilities or by such other methods.
- 282.** With regard to the Committee's request to amend the IRO so as to enable the review of the factual bases on which the power to represent workers in collective bargaining was granted to unions if there is a change in the relative strength of unions competing for that right, the Government stated that it was considering to lower from one-fourth to one-fifth the number required for registration of a trade union at the enterprise where two or more registered unions already exist.
- 283.** As to the request to amend the IRO so as to allow workers to seek legal remedies against the acts of anti-union discrimination at any time, and not only during an industrial dispute (section 49(4)(e)), the Government indicated that it had been proposed to restore the competence of the National Industrial Relations Commission to grant interim relief to the aggrieved party.
- 284.** As concerns the Committee's request to provide information on whether there is an additional waiting period relative to strike notice before initiating a strike action and, if so, to indicate the duration, the Government indicated that there was a provision for seven days notice before initiating a strike.
- 285.** Finally, as to the Committee's request to engage in full consultations with the social partners on the possible amendment of the IRO in order to resolve the issue concerning the labour judiciary system, the Government indicated that, on the demand of the stakeholders of the last Pakistan Tripartite Labour Conferences, the Labour Appellate Tribunal was abolished by the IRO 2002. However, following recent demands of workers, the Government was considering to revive the said forum.
- 286.** *The Committee takes notes of this information and, in particular, of the intent of the Government to amend several provisions of the IRO and to resolve the issue concerning the labour judiciary system, as requested by the Committee. It further notes the Government's intention to amend section 1(4) of the IRO and trusts that the measures taken will enable the EOBI workers rapidly to enjoy the right to establish and join*

organizations of their own choosing. It requests the Government to keep it informed of the progress made in this regard. The Committee refers the legislative aspects of this case, in particular as regards the numerous proposed amendments to the IRO, to the Committee of Experts on the Application of Conventions and Recommendations.

- 287.** *The Committee regrets that no information was provided by the Government on the alleged acts of anti-union discrimination against trade union officers of the EOBI Employees' Federation of Pakistan or on the measures taken to conduct an independent investigation in this respect. The Committee therefore reiterates its previous recommendation and requests the Government to keep it informed of developments in this respect.*

Case No. 2242 (Pakistan)

- 288.** The Committee examined this case at its November 2003 meeting [see 332nd Report, paras. 808-828] and on that occasion it formulated the following recommendations:

- (a) The Committee considers that Chief Executive Order No. 6 suspending trade unions and existing collective agreements at the Pakistan International Airline Corporation violates Articles 2 and 3 of Convention No. 87 and Article 4 of Convention No. 98. It therefore urges the Government to repeal Chief Executive Order No. 6 of 2001 and to take the necessary measures in order to repeal Administrative Orders Nos. 14, 17, 18 and 25 so as to restore full trade union rights to the workers concerned.
- (b) The Committee requests the Government to take the necessary measures so as to ensure that trade union office bearers enjoy such facilities as may be necessary for the proper exercise of their functions.
- (c) The Committee requests the Government to keep it informed of the measures taken to restore full trade union rights to PIAC workers.

- 289.** In its communication of 18 March 2005, the complainant, the International Transport Workers' Federation (ITF), submitted that there had been no changes concerning freedom of association rights of workers of the Pakistan International Airlines Corporation (PIAC). It requested the Committee to seriously review the situation in Pakistan concerning this case.

- 290.** In its communication of 24 June 2005, the Government repeated its previous statement to the effect that that the Pakistan International Airline Pilot's Association (PALPA), the People's Unity of PIA Employees and Air League of PIA Employees challenged the executive order and subsequent administrative orders before the High Court of Sindh in Karachi. The High Court, through its judgement of 29 March 2002, dismissed the petitions of the two latter unions. The two unions have lodged appeals before the Supreme Court of Pakistan which are still pending. The suit filed by the PALPA is still pending before the High Court of Sindh in Karachi.

- 291.** *The Committee deeply regrets that no measures have been taken by the Government to give effect to the recommendations of the Committee to ensure trade union rights at the PIAC. It recalls that all governments are obliged to respect fully the commitments undertaken by ratification of ILO Conventions [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 11] and recalls once again that Articles 2 and 3 of Convention No. 87 provide that workers without distinction whatsoever, shall have the right to join organizations of their own choosing and that these organizations shall be able to exercise their activities in full freedom. It therefore reiterates its previous recommendation to repeal Chief Executive Order No. 6 of 2001 and Administrative Orders Nos. 14, 17, 18 and 25 and requests the Government to take all necessary measures without delay to restore full trade union rights to PIAC workers and to keep it informed in this respect.*

Case No. 2273 (Pakistan)

- 292.** The Committee examined this case, in which the complainant alleged that the management of the Army Welfare Sugar Mill ordered the dissolution of the Army Welfare Sugar Mills Workers' Union (AWSMWU), at its November 2004 meeting [see 335th Report, paras. 1150-1163]. On that occasion, the Committee noted with interest that the Labour Court concluded that the services of the Army Welfare Sugar Mill were not exclusively connected to the armed forces and that its employees should enjoy the fundamental right to form a trade union. The Court dismissed the case brought by the Registrar following the application of the Army Welfare Sugar Mill requesting to cancel registration of the AWSMWU. The Committee requested the Government to ensure the implementation of the judicial decision.
- 293.** In its communication of 24 June 2005, the Government indicated that the matter regarding registration of the AWSMWU was before the Registrar of Trade Unions at Hyderabad and that no order had yet been passed. Furthermore, the Government stated that the charter of demands submitted by the union was under conciliation with a conciliator. Both parties, i.e. the management and the union, were actively participating in the conciliation proceedings. Due to the intervention of the Provincial Labour Department, the relations between parties were healthy; both parties were pursuing the case before the legal forums.
- 294.** *The Committee notes the information provided by the Government. It regrets that, despite the court ruling dated 7 August 2004, the question of registration of the union is still pending before the Registrar. The Committee considers that a long registration procedure constitutes a serious obstacle to the establishment of organizations and amounts to a denial of the right of workers to establish organizations without previous authorization. In view of the length of time that has elapsed since the court ruling, and of the fact that there are no apparent obstacles justifying the delay, the Committee requests the Government to take the necessary measures to ensure the registration of the AWSMWU without delay and keep it informed in this respect.*

Case No. 2285 (Peru)

- 295.** The Committee last examined this case at its November 2004 meeting, when it made the following recommendation regarding the allegations that remained pending [see 335th Report, paras. 1173 to 1185]:
- Recalling that the authorities should not discriminate against a trade union organization as concerns the imposition of taxes, the Committee requests the Government to confirm whether or not trade union organizations generally benefit from tax exemption and, if so, to take measures to ensure that the complainant organization is not discriminated against and so that the back taxes being demanded by the Municipality of Metropolitan Lima from the Federation of Peruvian Light and Power Workers (FTLFP) are not levied. The Committee requests the Government to keep it informed in this respect.
- 296.** In a communication dated 27 June 2005, the FTLFP reiterated the allegations made in its initial complaint.
- 297.** In a communication dated 19 April 2005, the Government indicated that the complaint concerned, in essence, the property tax and municipal tax levied by the Municipality of Metropolitan Lima (MML). Regarding the property tax, it says that national law provides that land owned by trade union organizations, duly recognized by the Ministry of Labour and Employment Promotion, is exempt as long as it is used for the specific purposes of the union. It should be noted, however, that the exemption from this tax for land belonging to trade unions was introduced recently by Act No. 27616 (which came into force on

1 January 2002), as it was not included in the original text of the Municipal Tax Law (Legislative Decree No. 776, which came into force on 1 January 1994). Therefore the claim made by the FTLFP regarding the alleged unjust imposition of the aforementioned tax by the MML in 1997, 1998, 1999, 2000 and 2001, is without foundation, as in that period there was no provision for trade union exemption. On the other hand, there may be grounds for the claim corresponding to the period from 2002 to the present day. In this regard, the complainant could appeal to the MML for a declaration of exemption from the tax in question for that period, as long as it can show that it meets the relevant requirements; if its request is not granted, it could go through the appropriate channels of appeal according to the current provisions in force. Regarding the municipal tax, the Government states that there is a paragraph in Standard IV of the introductory title of the Consolidated Text of the Tax Code, approved by Presidential Decree No. 135 99-EF, according to which local governments can use by-laws to create, modify or abolish contributions, municipal taxes, laws and licences or give exemption from them, within their jurisdiction and subject to the requirements of the law. According to the MML, between 1997 and 2004 there has been no by-law under the aforementioned standard exonerating trade union organizations from these taxes. This being the case, there are no grounds for the complaint against the collection of municipal taxes, as there is no specific provision supporting it.

298. In a communication dated 24 August 2005, the Government confirmed that federations are exempt from property tax in accordance with the Municipal Tax Law. They must pay municipal tax as long as the by-laws regulating such a tax, for fiscal years 1997 to 2004, do not provide for any relief for the complainant and provided that the requirement to pay taxes cannot be identified as being an anti-union practice.

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

Case No. 2289 (Peru)

300. At its June 2005 meeting, the Committee requested the Government to keep it informed of the outcome of the judicial proceedings concerning the dismissal of the SUTREL general secretary, Mr. Luis Martín del Río Reátegui and, should the first-level ruling ordering the reinstatement of the union official in question be confirmed, to take the necessary steps to ensure that he is reinstated immediately [see 337th Report, para. 124].

301. In communications dated 14 January and 22 April 2005, the Peruvian Union of Folklore Artists (SITAFP) and the General Confederation of Workers of Peru (CGTP) stated that the Ministry of Labour had again refused to register the executive committee rightfully elected by the members of the SITAFP, in spite of the omissions that were questioned at the first attempt to register the executive committee having been corrected.

302. In communications dated 18 February and 21 June 2005, the Government stated that the Luz del Sur S.A.A. company appealed the decision of 25 October 2004 ordering the reinstatement of trade union official Mr. Luís Martín del Río Reátegui and that there was still no decision on the appeal proceedings. The Government also stated that the registration of the executive committee of SITAFP was accepted on 26 May 2005 under the corresponding executive decision, once certain aspects of that infringed legislation and trade union statutes were corrected.

303. *The Committee notes with interest the registration of the executive committee of SITAFP. The Committee looks forward to hearing the decision handed down by the legal authority on the appeal by the Luz del Sur S.A.A. company against the decision of 25 October 2004 ordering the reinstatement of trade union official Mr. Luís Martín del Río Reátegui to his duties.*

Case No. 2252 (Philippines)

- 304.** The Committee last examined this case at its November 2004 Session [see 335th Report, paras. 162-167]. On that occasion, it urgently requested the Government to take the necessary steps to: (1) amend the national legislation so as to allow a fair, independent and speedy certification process and to provide protection against acts of employer interference; (2) amend article 263(g) of the Labor Code concerning the exercise of the right to strike; (3) take measures so that the complainant Toyota Motor Philippines Corporation Workers' Association (TMPCWA) and the Toyota Motor Philippines Corporation negotiate in good faith; (4) initiate discussions to consider the reinstatement of the 227 workers dismissed by the corporation and union officers deemed to have lost their employment status, or, if reinstatement is not possible, the payment of adequate compensation; (5) keep it informed of any measures taken to withdraw criminal charges laid against union officers; and (6) finally, noting that, in its decisions of 24 September 2003 and 28 January 2004, the Supreme Court nullified the preliminary injunction that the corporation had obtained to prevent the union from demanding collective bargaining, the Committee requested the Government to provide clarification as to whether, in the absence of an injunction preventing the TMPCWA from relying upon its earlier certification as exclusive bargaining agent, the certification was valid despite the pending legal challenge, until any appropriate court order to the contrary.
- 305.** In a communication dated 30 August 2005, the complainant TMPCWA indicated that: (1) the Toyota Motor Philippines Corporation still refused to negotiate despite the complainant's recognition as the exclusive bargaining agent since 19 October 2000 and the abovementioned rulings by the Supreme Court favouring the commencement of negotiations, as well as the Committee's recommendations calling for negotiations in good faith to reach a collective agreement; (2) pursuant to a notice of strike filed before the National Conciliation and Mediation Board on 4 March 2005 by the TMPCWA on the ground of the corporation's refusal to bargain, several conciliation meetings took place between 10 March and 27 July 2005, to which the corporation failed to appear, continuing to ignore the decision of the Supreme Court which favoured the starting of negotiations with the complainant; (3) instead of taking steps to ensure that the recognition of the TMPCWA became effective and that negotiations took place, the Department of Labor, in complicity with the corporation, issued an order dated 30 June 2005, to conduct a new certification ballot at the request of another union, the Toyota Motor Philippines Corporation Labor Organization (TMPCLO), which had been recently created under the dominance of the corporation; (4) the complainant lodged an appeal against the decision of the Department of Labor on 19 July 2005, but it was dismissed by the National Labor Relations Commission (NLRC) on 9 August 2005 on the ground that the complainant was seeking to delay the certification ballot; this decision did not take into account the fact that the corporation had been vigorously opposing the certification of the complainant and had refused any negotiation with it since February 1999; the complainant filed a request for reconsideration on 19 August 2005; (5) 227 TMPCWA members and officers, including its President Ed Cubelo, remained dismissed and were not included in the list of voters submitted to the Department of Labor with a view to conducting the certification ballot; (6) after having fabricated criminal charges against 18 members and leaders of the TMPCWA the corporation insisted during the criminal proceedings that those workers who had not yet paid their bail should be arrested, thus imposing a heavy financial burden on the complainant which had to shoulder every year the renewal of the bail; (7) certain TMPCWA members and their families continued to suffer harassment, including by the police; (8) on 17 July 2005 the Philippine House of Congress invited the TMPCWA to appear in the deliberations as one of the Resource persons in the ongoing hearing concerning the amendment of article 263(g) of the Labor Code. The complainant attaches numerous documents to its communication.

306. *The Committee deeply regrets the fact that the Government has so far failed to communicate any follow-up information on the measures taken to give effect to the Committee's recommendations. 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 [Digest of decisions and principles of the Freedom of Association Committee, 4th edition, 1996, para. 10]. Moreover, noting that the Philippines have ratified Conventions Nos. 87 and 98, the Committee recalls that all governments are obliged to respect fully the commitments undertaken by ratification of ILO Conventions [see Digest, op. cit., para. 11]. The Committee requests the Government to provide information without further delay on the steps taken with regard to the Committee's recommendations.*

307. *With respect to the complainant's allegations concerning the issuing of an order by the Department of Labor authorizing a new certification ballot at the request of a trade union established under the dominance of the corporation, and the absence of any measures on behalf of the Department of Labor to remedy the employer's persistent refusal to recognize and negotiate with the complainant, the Committee observes from the text of the Order that:*

[While it] may be admitted that there is a pending issue before the Court of Appeals between intervenor [the TMPCWA] and management with regard to the decision of the Secretary of Labor dated 19 October 2000, certifying herein intervenor as the sole and exclusive bargaining agent of the employees" ... "[in] granting the petition, it does not necessarily mean that this Office is defiant of the order of the Secretary of Labor or the Court of Appeals. On the contrary, granting the instant petition and ordering the conduct of certification election would be more in harmony with the Secretary's recognition of the desire of the majority of the employees to conduct a certification election, and their need to be represented by a labor union in the negotiating table. It must be emphasized that the Secretary of Labor certified intervenor as the bargaining agent of the employees due to the fact that it was the sentiment of the majority of the employees at that time. ... In the instant case, more than majority of the employees have already expressed their desire to conduct another certification election. ... Under these present circumstances, it would appear that there was a shift in allegiance on the part of the employees. ... We opine that the most democratic method and the best forum to ascertain the true will of the employees is in a certification election where the employees would be given the chance to choose their collective bargaining agent through secret ballot. After all, ordering the conduct of the certification election would be more in consonance with the State's policy to promote and emphasize the primacy of free collective bargaining and free trade unionism considering that the employees have long been deprived of their bargaining representation, as well as the benefits of a collective bargaining agreement. Such order to conduct the certification election would also not be considered an open defiance of any order of the Court of Appeals. Unless and until restrained by the Court, this Office will not shirk from its obligation of accepting, hearing and resolving petitions for certification election."

308. *The Committee deplores the fact that in granting this order, the Department of Labor did not give consideration to the employer's consistent refusal to recognize the TMPCWA and the influence that such a stance might have had on the workers' choice of the organization representing them. The Committee recalls from the previous examination of this case that it took more than one year to organize the election for the certification of the TMPCWA and another year to have the complainant confirmed as the exclusive bargaining agent within Toyota Motor Philippines Corporation, due to the various petitions, appeals and motions filed by the corporation with the labour authorities and, in particular, with the Secretary of the Department of Labor who has the final say on the matter [see 332nd Report, para. 878]. Moreover, ever since its certification, the TMPCWA has been unable to engage in collective bargaining with the corporation due to further legal action taken by the corporation before the courts. The Government has indicated in a previous communication that as long as these cases are pending, the legitimacy of the certification*

of the TMPCWA by the Secretary of Labor and Employment remained unresolved and the Department of Labor could not be accused of inaction [see 335th Report, para. 164]. The Committee observes that while the legal challenges pending before the Courts are considered as preventing the TMPCWA from exercising its functions as representative union, they have not been considered as preventing the Department of Labor from authorizing a new certification ballot in the abovementioned order.

- 309.** *The Committee trusts that the proceedings which have been pending for quite some time before the courts with regard to the certification of the TMPCWA will be concluded soon and requests the Government to keep it informed of the final decision as soon as it is handed down. The Committee also requests the Government to institute an independent inquiry into the allegations of employer interference, in particular, the creation of a new union under the dominance of the corporation, and if such allegations are found to be true, to take the necessary remedial action. The Committee trusts that before moving forward with a new ballot for certification, the Government will await the outcome of the Court proceedings concerning TMPCWA's certification as well as the outcome of the independent judicial inquiry into the allegations of employer interference. The Committee further reiterates its previous request to the Government to amend the national legislation so as to allow a fair, independent and speedy certification process providing adequate protection against acts of employer interference.*
- 310.** *Observing that the employer's refusal to recognize and negotiate with the TMPCWA dates as far back as 1999, and that the Government has not communicated any information on efforts to ensure that negotiations in good faith take place despite the corporation's persistent refusal to recognize and negotiate with the TMPCWA, the Committee once again recalls that the principle that both employers and trade unions should negotiate in good faith and make efforts to reach an agreement means that any unjustified delay in the holding of negotiations should be avoided and once again urges the Government to provide information on efforts made to promote negotiations in good faith between the TMPCWA and the Toyota Motor Philippines Corporation.*
- 311.** *With regard to the 227 dismissed members and officers including the President of the TMPCWA Ed Cubelo, the Committee once again urges the Government to indicate the measures taken to initiate discussions to consider the reinstatement of the 227 workers dismissed or, if reinstatement is not possible, the payment of adequate compensation.*
- 312.** *With regard to the penal proceedings concerning 18 trade union members and officers, the Committee once again urges the Government to inform it of developments in the proceedings and of any measures taken to withdraw the criminal charges. The Committee also requests the Government to provide its observations on allegations of harassment, including by the police.*
- 313.** *With regard to the amendment of article 263(g) of the Labor Code, the Committee notes with interest that the complainant was invited to appear before the House of Congress as one of the Resource persons in the ongoing hearing concerning the amendment of this article. The Committee requests the Government to provide information on developments in this respect.*

Case No. 2383 (United Kingdom)

- 314.** The Committee examined this case at its March 2005 meeting [see 336th Report, approved by the Governing Body at its 292nd Session, paras. 722-777] and reached the following recommendations on which it requested to be informed of developments:

- (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.

315. In a communication dated 19 August 2005, the Government welcomed the Committee's recognition that the prison service is an essential service where the right to strike can be restricted or even prohibited. So far as compensatory guarantees for employees of private sector companies providing prison services were concerned, the Government was in consultation with private contractors on this issue and would keep the Committee informed of developments.

316. The Government added that it had instructed the Director-General of HM Prison Service together with officials at HM Treasury and the Office of Manpower Economics to consult with the Prison Officers' Association with a view to improving the current mechanism for the determination of prison officers' pay in England, Wales and Northern Ireland on the understanding that: (i) while the recommendations of the Pay Review Body could not be binding, they would only be departed from in exceptional circumstances, one of which would be on the grounds of affordability (this reflected current practice). Recommended awards were very rarely abated and the existing administration had never taken such action. (ii) The independence of the Pay Review Body was achieved by: (a) all appointments of members being subject to scrutiny by the Commissioner for Public Appointments, an official accountable directly to Parliament; (b) the Director of the Office of Manpower Economics being a member of the selection panel, whose approval of the selection criteria brought further independent scrutiny to the process; (c) all vacancies being publicly advertised and therefore open to a cross-section of applicants from all aspects of society; and (d) selection being by way of a panel whose recommendations for appointment must be approved by the Home Secretary, the Chief Secretary of the Treasury and the Prime Minister. The Government would seek to enhance this selection process by proposing that: (i) the criteria for appointment to the Pay Review Body include the range of experience, skills and competencies required of candidates; and (ii) prior to any vacancy being advertised, both the criteria and the advertisement for the vacancy be subject to consultation with the trade unions representing workers within the scope of the Pay Review Body.

317. *With regard to the establishment of 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, the Committee notes that the Government is in consultation with private contractors on this issue. The Committee requests to be kept informed of developments in this respect.*

318. *With regard to the issue of engaging in consultations with a view to improving the current mechanism for the determination of prison officers' pay in England, Wales and Northern Ireland, the Committee notes that the Government has instructed the Director-General of*

HM Prison Service together with officials at HM Treasury and the Office of Manpower Economics to consult with the Prison Officers' Association with a view to improving the current mechanism in particular, by proposing that: (i) the criteria for appointment to the Pay Review Body include the range of experience, skills and competencies required of candidates; and (ii) prior to any vacancy being advertised, both the criteria and the advertisement for the vacancy be subject to consultation with the trade unions representing workers within the scope of the Pay Review Body. The Committee requests to be kept informed of the progress of the consultations.

Case No. 2200 (Turkey)

319. The Committee last examined this case at its meeting in June 2004 and made the following recommendations which remain pending [see 334th Report, para. 762]:

- (a) Bearing in mind that a process to amend Act No. 4688 is under way and that it is part of a more general reform process, the Committee requests the Government to provide the relevant texts amending Act No. 4688 in compliance with its obligations to the ILO supervisory mechanisms.
- (b) With respect to the allegations of favouritism within Türk TELEKOM and the Office of Agricultural Products, the Committee urges the Government: (i) to examine without delay the allegations on the establishment of an institution administrative committee in Türk TELEKOM with the participation of Türk Haber-Sen and the distribution by the Office of Agricultural Products of membership forms in favour of Türk Tarım-Orman Sen union, including any concomitant acts of anti-union discrimination that might have occurred; (ii) to take the necessary steps in order to ensure that all unions are treated on an equal footing and that the workers concerned may freely choose the union they wish to join; and (iii) to keep it informed of any developments in this respect.
- (c) With respect to the 107 workers involved in SES' activities, the 30 members and officers of EGITIM-SEN and the 13 members and officers of unions affiliated to KESK, the Committee: (i) urges the Government to institute, without further delay, independent inquiries, in order to establish whether the workers concerned have been adversely affected in their employment by reason of their legitimate trade union activities; (ii) urges the Government, if it is established that these workers have been subject to anti-union discrimination, to take all the necessary measures to remedy without delay any effects of anti-union discrimination and, in particular, to declare null and void transfers decided for anti-union reasons and take immediate measures so that the workers concerned be returned to the positions they held before being transferred; and (iii) requests the Government to keep it informed of developments in this respect.

320. In a communication dated 25 July 2005, the Government indicated with regard to the allegations of favouritism during the establishment of the administrative committee in Türk TELEKOM under the Public Employees' Trade Unions Act No. 4688, that section 22 of the said Act required the establishment of an administrative committee within public organizations with the participation of the representatives of the public employer and an equal number of representatives of the most representative trade union in the relevant organization in order to give their opinions on the questions of working conditions of the public employees and the equal application of the law vis-à-vis public employees. In accordance with Act No. 4688 and the regulation issued in pursuance of section 41 of the said Act, this Committee has been meeting twice a year in April and October on the day, hour and place to be determined by representatives of the employer. At the end of the meetings, the views of the parties have been reported as meeting records and one copy has been given to both the representative of the trade union and the representative of the public employer. One copy has been displayed at the notice board of the public organization.

321. The Government added that within this framework the administrative committee meetings have been held every year in April and October following the first meeting in April 2002

with the participation of the representatives of Türk TELEKOM A.S. (Turkish Telecom Company) and the most representative trade union at Türk TELEKOM A.S. According to the Government, there has never been favouritism in this respect.

322. *With regard to its request under (a) above for the Government to provide the texts amending Act No. 4688 in compliance with its obligations to the ILO supervisory mechanisms, the Committee takes note of the observations made in 2004 on Act No. 4688 by the Committee of Experts on the Application of Conventions and Recommendations (see 2004 observations on the application by Turkey of Conventions Nos. 87 and 98). The Committee also takes note of the information of legislative amendments on Act No. 4688, provided by the Government representative of Turkey to the Conference Committee on the Application of Standards during the 93rd Session of the International Labour Conference (June 1005) (see **Provisional Record** No. 22, Part two, 93rd Session, Geneva, 2005).*
323. *The Committee notes with regret that the Government does not provide specific information in reply to its recommendations under (b) and (c) above, for the Government to examine allegations of favouritism and adopt measures to treat all trade unions on an equal footing, and to conduct independent inquiries into numerous allegations of anti-union discrimination against KESK affiliates and their members, with a view to the adoption of remedial measures in cases where the allegations are found to be true.*
324. *The Committee recalls the allegations made by the complainant Confederation of Public Employees' Trade Union (KESK) according to which: (1) Türk TELEKOM and Türk Haber Sen had established an administrative committee on 29 April 2002, that is, before the end of the legal deadline of 31 May set in section 30 of Act No. 4688, thus preventing KESK from participating in the Committee; (2) the Office of Agricultural Products had distributed to workers membership forms in favour of the Türk Tarım-Orman Sen union, asking both employees joining the union and those not joining, to return the forms in question; (3) members and officers of KESK's constituent unions as well as workers participating in their activities were victims of anti-union discrimination mainly consisting in transfers against their will from one duty station or workplace to another and court actions against some of them. The three groups of public employees which had allegedly suffered anti-union discrimination were: (i) 107 officers and members of the Health Workers' Union (SES) affiliated to KESK, as well as workers who participated in the union's activities; (ii) 30 members and officers of EGITIM-SEN, the education union affiliated to KESK, the majority of whom were also subject to court actions by the administration; and (iii) 13 officers and members of affiliated unions who were subject to a number of penalties such as imprisonment, administrative sanctions and refusal of promotion [see 330th Report, paras. 1081-1083, 1100, and 334th Report, paras. 726 and 749-750].*
325. *The Committee regrets that, for the third time, the Government failed to reply to serious allegations of favouritism and anti-union discrimination and has ignored the specific recommendations made by the Committee in this respect. The Committee must recall, once again, that by according favourable or unfavourable treatment to a given organization as compared with others, a government may be able to influence the choice of workers as to the organization they intend to join; in addition, a government which deliberately acts in this manner violates the principle laid down in Convention No. 87 that public authorities should refrain from any interference which would restrict the rights provided for in the Convention or impede their lawful exercise. On more than one occasion, the Committee has examined cases in which allegations were made that public authorities had, by their attitude, favoured or discriminated against one or more trade union organizations. Any discrimination of this kind jeopardizes the right of workers set out in Convention No. 87, Article 2, to establish and join organizations of their own choosing [see **Digest of***

decisions and principles of the Freedom of Association Committee, 4th edition, 1996, paras. 304 and 306].

326. *The Committee must also recall regarding acts of anti-union discrimination that:*

- *no person shall be prejudiced in his employment by reason of his trade union membership or legitimate trade union activities [see **Digest**, op. cit., para. 690];*
- *protection against acts of anti-union discrimination should cover not only hiring and dismissal, but also any discriminatory measures during employment, in particular, transfers, downgrading and other acts that are prejudicial to the workers [see **Digest**, op. cit., para. 695];*
- *protection against acts of anti-union discrimination is particularly desirable in the case of trade union officials to enable them to perform their trade union duties in full independence [see **Digest**, op. cit., para. 724];*
- *the Government is responsible for preventing all acts of anti-union discrimination and ensuring that workers subject to such treatment have access to means of redress which are expeditious, inexpensive and fully impartial [see **Digest**, op. cit., paras. 738 and 741];*
- *where cases of alleged anti-union discrimination are involved, the competent authorities dealing with labour issues should begin an inquiry immediately and take suitable measures to remedy any effects of anti-union discrimination brought to their attention [see **Digest**, op. cit., para. 754].*

327. *In view of the complete lack of new information the Committee can only reiterate its previous conclusions, which read as follows:*

- (a) *With respect to the allegations of favouritism within Türk TELEKOM and the Office of Agricultural Products, the Committee urges the Government: (i) to examine without delay the allegations on the establishment of an institution administrative committee in Türk TELEKOM with the participation of Türk Haber-Sen and the distribution by the Office of Agricultural Products of membership forms in favour of Türk Tarim-Orman Sen union, including any concomitant acts of anti-union discrimination that might have occurred; (ii) to take the necessary steps in order to ensure that all unions are treated on an equal footing and that the workers concerned may freely choose the union they wish to join; and (iii) to keep it informed of any developments in this respect.*
- (b) *With respect to the 107 workers involved in SES' activities, the 30 members and officers of EGITIM-SEN and the 13 members and officers of unions affiliated to KESK, the Committee: (i) urges the Government to institute, without further delay, independent inquiries, in order to establish whether the workers concerned have been adversely affected in their employment by reason of their legitimate trade union activities; (ii) urges the Government, if it is established that these workers have been subject to anti-union discrimination, to take all the necessary measures to remedy without delay any effects of anti-union discrimination and, in particular, to declare null and void transfers decided for anti-union reasons and take immediate measures so that the workers concerned be returned to the positions they held before being transferred; and (iii) requests the Government to keep it informed of developments in this respect.*

Case No. 2303 (Turkey)

328. *The Committee examined this case at its meeting in November 2004 and made the following recommendations [see 335th Report, para. 1378]:*

- (a) Recalling that it has already observed in a similar case concerning Turkey that the Government needed to amend its legislation in order to ensure a more effective protection of workers against all acts of anti-union discrimination, the Committee requests the Government to ensure that the competent labour authorities conduct an investigation promptly into the reasons for which 246 trade union members were dismissed on 27 September 2003 and, if it is found that there has been anti-union discrimination, to take all necessary measures with a view to their reinstatement in their posts without loss of pay or, if the competent court were to decide that reinstatement is not possible, to ensure that the dismissed workers receive full compensation for the prejudice suffered. The Committee requests to be kept informed in this respect.
- (b) Noting that 50 trade union members who were dismissed between 30 September and 10 October 2003 have filed a lawsuit for unjustified dismissal at the 8th Istanbul Industrial Court, the Committee requests the Government to keep it informed on the progress of the proceedings and to communicate a copy of the final decision once rendered.
- (c) The Committee requests the Government to amend section 12 of the Collective Agreements, Strike and Lockout Act, No. 2822, so as to bring it in line with the principle according to which, if there is no union covering more than 50 per cent of the workers in a unit, collective bargaining rights should nevertheless be granted to the unions in this unit, at least on behalf of their own members. The Committee requests to be kept informed in this respect.
- (d) The Committee deplores the fact that strikes have been suspended and compulsory arbitration imposed in numerous cases, and requests the Government to ensure in the future that such restrictions may only be imposed in cases of essential services in the strict sense of the term, public servants exercising authority in the name of the State or an acute national crisis.
- (e) The Committee requests the Government to amend section 33 of Act No. 2822 so that the authority to decide whether to suspend a strike rests with an independent body which has the confidence of all parties concerned. The Committee requests to be kept informed in this respect.

329. In a communication dated 25 July 2005, the Government recalled the facts of this case, pointing out that section 33(1) of the Collective Agreements, Strike and Lockout Act No. 2822 stipulated that if a lawful strike was considered to be prejudicial to public health or national security, the Council of Ministers could, by decree, suspend the strike for a period of 60 days. Section 34 of the Act stated that upon the entry into force of the decree, the Minister of Labour and Social Security with the assistance of a mediator, would choose from the list of official mediators and would make every effort to resolve the conflict. The provisions of the Act also recognized the trade unions' right to appeal against the decree of the Council of Ministers.

330. The Government further recalled that the complainant in this case, i.e. the Glass, Cement and Soil Industries Workers' Union (Kristal-Is) had announced on 31 October 2003 its decision to strike at the Turkish Glassware Factories and its affiliated workplaces as of 9 December 2003. Since the strike was considered to be prejudicial to national security, it was suspended for 60 days by a decree issued by the Council of Ministers on 4 December 2003 (published in the *Official Gazette* on 8 December 2003). The Minister of Labour and Social Security appointed Professor Dr. Mr. Fevzi Sahlanan as the official mediator to resolve the conflict under section 34 of Act No. 2822. The trade union lodged an appeal at the 10th Chamber of the Council of State against the decree of the Council of State which suspended the execution of the decree on 12 January 2004. After this decision by the Council of State, the trade union started the strike on 30 January 2004. However, the Council of Ministers issued again on 11 February 2004 a decree suspending the strike for a period of 60 days (published in the *Official Gazette* on 14 February 2004). As the strike action was suspended for a second time, the Minister of Labour and Social Security reappointed Professor Dr. Mr. Fevzi Sahlanan as the official mediator to resolve the conflict peacefully. With the personal help of the Minister, the abovementioned official

mediator mediated successfully between the parties and the relevant trade union and employer organization signed a protocol with a view to concluding a collective labour agreement. As a consequence, the strike decision taken by the complainant was dropped.

- 331.** The Government added on the issue of the unlawful dismissal of the workers from Pasabahce Glassware Factory in Eskisehir (see recommendation (a) above), that, as it had already previously reported, the employer was fined and the relevant trade union was informed of the action taken.
- 332.** With regard to the amendments to the Trade Unions Act No. 2821 and the Collective Agreements, Strike and Lockout Act No. 2822 (see recommendations (c) and (e) above), the Government stated that work on the amendments had been completed by a committee of academics and the draft texts had been submitted to the Ministry of Labour and Social Security in April 2003. The social partners had examined these draft texts and handed in their views and proposals. These draft amendments had also been discussed in academic quarters, panels and symposia. In the meantime, various new developments (new Act on Associations, new Civil Code, amendment to the last paragraph of article 90 of the Constitution, EU Progress Report and 2004 observations by the ILO Committee of Experts on the Application of Conventions and Recommendations) necessitated the re-evaluation of the draft bills amending the Trade Unions Act No. 2821 and the Collective Labour Agreements, Strike and Lockout Act No. 2822. The Tripartite Advisory Committee unanimously concluded that the abovementioned draft bills should be examined by a committee established with the participation of members of the committee of academics, experts appointed by the social partners and representatives of the Ministry of Labour and Social Security, taking into consideration the developments which took place concerning the abovementioned laws. It was also decided that this work should be completed by September 2005.
- 333.** With regard to the 50 per cent representativeness requirement found in section 12 of Act No. 2822 (see recommendation (c) above), the Government indicated that this section provided that a trade union representing at least 10 per cent of the workers engaged in a given branch of activity (excluding the branch of activity covering agriculture, forestry, hunting and fishing) and more than half of the workers employed in the establishment or each of the establishments to be covered by the collective labour agreement shall have power to conclude a collective labour agreement covering the establishment or establishments in question. In the new draft bill the 10 per cent requirement would be lowered to 5 per cent.
- 334.** *With regard to its request for a prompt investigation into the reasons for which 246 trade union members were dismissed on 27 September 2003 (see recommendation (a) above), the Committee notes that according to the Government, the dismissals were found to be unlawful and the employer had been fined. The Committee recalls that although it had already noted this information in its previous examination of the case, it had also observed that the employer had been fined for a violation of section 28 of Labour Act No. 4857 which concerned the obligation to notify the trade union and undertake consultations in case of mass dismissals. The Committee further notes that in its latest communication the Government once again refrained from making observations on the allegations that the dismissed trade unionists were replaced with other workers and that the purpose of the dismissals was to prevent the union from reaching the 51 per cent representativeness requirement. The Committee therefore reiterates its previous request that the Government ensure that the competent labour authorities conduct an independent investigation promptly into the reasons for which 246 trade union members were dismissed on 27 September 2003 and, if it is found that there has been anti-union discrimination, to take all necessary measures with a view to their reinstatement in their posts without loss of pay or, if the competent court were to decide that reinstatement is not possible, to ensure that*

the dismissed workers receive full compensation for the prejudice suffered. The Committee requests to be kept informed in this respect.

- 335.** *Noting that the Government does not provide any information on the 50 trade unionists who were dismissed between 30 September and 10 October 2003 and have filed a lawsuit for unjustified dismissal at the 8th Istanbul Industrial Court (see recommendation (b) above), the Committee once again requests the Government to keep it informed on the progress of the proceedings and to communicate a copy of the final decision once rendered.*
- 336.** *With regard to its previous request to amend section 12 of the Collective Agreements, Strike and Lockout Act No. 2822 (see recommendation (c) above), the Committee notes that the Government reiterates the previously furnished information according to which section 12 of Act No. 2822 currently indicates that a trade union shall have the power to conclude a collective labour agreement in an enterprise only if it represents at least 10 per cent of the workers engaged in a given branch of activity (excluding the branch of activity covering agriculture, forestry, hunting and fishing) and more than half of the workers employed in the establishment or each of the establishments to be covered by the collective labour agreement. The Government further adds that in the new draft bill the 10 per cent requirement would be lowered to 5 per cent.*
- 337.** *While taking due note of the steps taken to lower one of the two representativeness requirements set out in section 12 of the Collective Labour Agreements, Strike and Lockout Act No. 2822, the Committee once again recalls that it has requested the Government on more than one occasion to amend the absolute majority requirement which stipulates that a collective agreement may be negotiated only if a trade union represents an absolute majority of workers in an enterprise [see also Case No. 2126, 327th Report, paras. 846 and 847(d)]. The Committee recalls once again that if there is no union covering more than 50 per cent of the workers in a unit, collective bargaining rights should nevertheless be granted to the unions in this unit, at least on behalf of their own members [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 833] or they should be allowed to jointly negotiate a collective agreement applicable to the enterprise or bargaining unit. The Committee therefore once again requests the Government to amend section 12 of the Collective Agreements, Strike and Lockout Act No. 2822, so as to bring it in line with the principle according to which, if there is no union covering more than 50 per cent of the workers in a unit, collective bargaining rights should nevertheless be granted to the unions in this unit, at least on behalf of their own members, or they should be allowed to jointly negotiate a collective agreement applicable to the enterprise or bargaining unit. The Committee requests to be kept informed in this respect.*
- 338.** *With regard to its request to amend section 33 of the Collective Labour Agreements, Strike and Lockout Act No. 2822 so that the authority to decide whether to suspend a strike rests with an independent body which has the confidence of all parties concerned (see recommendation (e) above), the Committee observes that the Government does not provide any response. The Committee notes that according to the Government, work on the amendments to the Trade Unions Act No. 2821 and the Collective Labour Agreements, Strike and Lockout Act No. 2822 by a committee of academics had been completed in April 2003. The draft texts prepared by the committee had been submitted to the Ministry of Labour and Social Security and the social partners handed in their views and proposals on the draft amendments, which were also discussed in the academic quarters, panels and symposia. In the meantime, various new developments (new Act on Associations, new Civil Code, amendment to the last paragraph of article 90 of the Constitution, EU Progress Report and 2004 observations by the ILO Committee of Experts on the Application of Conventions and Recommendations) necessitated the re-evaluation of the two draft bills. The Tripartite Advisory Committee therefore unanimously concluded that the draft bills*

should be examined by a committee established with the participation of members of the committee of academics, experts appointed by the social partners and representatives of the Ministry of Labour and Social Security, taking into consideration the developments which took place concerning the abovementioned laws. It was also decided that this work should be completed by September 2005.

- 339.** *Noting that work on the amendments to the Trade Unions Act No. 2821 and the Collective Labour Agreements, Strike and Lockout Act No. 2822 should normally be completed in September 2005, the Committee once again requests the Government to inform it of the steps taken to ensure that section 33 of Act No. 2822 is appropriately amended so that the authority to decide whether to suspend a strike rests with an independent body which has the confidence of all parties concerned. The Committee notes furthermore that this issue is also the subject of Case No. 2329 examined by the Committee at its current session and refers the Government to the conclusions and recommendations formulated on that case.*

Case No. 2038 (Ukraine)

- 340.** The Committee last examined this case at its March 2005 meeting when it expressed the hope 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 Trade Unions, would soon be adopted [see 336th Report, paras. 121-126].
- 341.** In its communications of 15 April and 17 May 2005, the Government stated that in April 2005, the Ministry of Labour held meetings between representatives of the Government, leaders of employers' associations, All-Ukrainian trade unions and trade union confederations. This led to the signing of a document providing for a specific mechanism to regulate issues relating to the rights and activities of trade unions. On the basis of the outcome of that meeting, the Cabinet of Ministers instructed the relevant authorities to take steps to implement the decisions of the meeting. At the same time, it requested the Supreme Court of Ukraine to examine any relevant judicial decisions, legal actions and substantive violations of trade union rights and proposed to the Office of the Prosecutor General to improve monitoring of compliance with the trade union legislation. Furthermore, the Government informed that, on 28 April 2005, the Ministry of Labour held another meeting between representatives of the Government, the Supreme Council of Ukraine, the Federation of Trade Unions of Ukraine and the Confederation of Free Trade Unions of Ukraine. The meeting was devoted to the discussion of the bill, drafted by the Ministry of Justice, to amend certain legislative acts with a view to bringing current legislation into line with Convention No. 87 and the Law on Trade Unions. Also, the Ministry of Labour has sent a letter to the Cabinet of Ministers proposing that the Ministry of Justice draw up interim provisions on the organizational and legal aspects of the legalization (registration) of trade unions in order to have interim provisions allowing the rights of trade unions to be safeguarded until the adoption of the bill. Furthermore, the Cabinet of Ministers gave instructions to the central executive authorities to issue systematic recommendations to their local offices regarding the application of section 16 of the Law on Trade Unions in a manner consistent with Convention No. 87.
- 342.** *The Committee notes this information. It requests the Government to transmit the bill on the amendment of the Law of Ukraine on the State Registration of Legal Persons and Physical Persons/Entrepreneurs and the Civil Code to the Committee of Experts on the Application of Conventions and Recommendations once it has been adopted.*
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343. Finally, the Committee requests the governments concerned to keep it informed of any developments relating to the following cases.

Case	Last examination on the merits	Last follow-up examination
1955 (Colombia)	November 2002	June 2003
1965 (Panama)	March 2001	March 2005
1970 (Guatemala)	November 2000	March 2005
2048 (Morocco)	November 2000	June 2005
2087 (Uruguay)	March 2005	–
2111 (Peru)	November 2004	June 2005
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 2004
2134 (Panama)	June 2003	June 2005
2142 (Colombia)	March 2002	March 2003
2146 (Serbia and Montenegro)	March 2002	November 2004
2148 (Togo)	March 2002	March 2005
2160 (Bolivarian Republic of Venezuela)	June 2002	March 2005
2166 (Canada)	March 2003	March 2004
2173 (Canada)	March 2003	March 2004
2175 (Morocco)	November 2002	November 2004
2180 (Canada)	March 2003	March 2004
2189 (China)	June 2005	–
2192 (Togo)	March 2003	March 2005
2216 (Russian Federation)	November 2003	June 2005
2233 (France)	November 2003	March 2005
2244 (Russian Federation)	June 2005	–
2251 (Russian Federation)	March 2004	June 2005
2257 (Canada)	November 2004	–
2258 (Cuba)	June 2005	–
2267 (Nigeria)	June 2004	–
2271 (Uruguay)	June 2004	March 2005
2276 (Burundi)	November 2004	–
2277 (Canada)	June 2005	–
2286 (Peru)	June 2005	–
2288 (Niger)	March 2004	March 2005
2293 (Peru)	June 2005	–
2296 (Chile)	June 2004	June 2005
2324 (Canada)	March 2005	–
2346 (Mexico)	June 2005	–
2357 (Bolivarian Republic of Venezuela)	June 2005	–
2367 (Costa Rica)	June 2005	–

344. The Committee hopes that these governments will quickly provide the information requested.
345. In addition, the Committee has just received information concerning the follow-up of Cases Nos. 1937 (Zimbabwe), 1996 (Uganda), 2017 (Guatemala), 2027 (Zimbabwe), 2050 (Guatemala), 2084 (Costa Rica), 2086 (Paraguay), 2097 (Colombia), 2104 (Costa Rica), 2118 (Hungary), 2153 (Algeria), 2156 (Brazil), 2171 (Sweden), 2188 (Bangladesh), 2199 (Russian Federation), 2208 (El Salvador), 2211 (Peru), 2214 (El Salvador), 2215 (Chile), 2217 (Chile), 2227 (United States), 2236 (Indonesia), 2237 (Colombia), 2249 (Bolivarian Republic of Venezuela), 2255 (Sri Lanka), 2272 (Costa Rica), 2291 (Poland), 2297 (Colombia), 2299 (El Salvador), 2301 (Malaysia), 2327 (Bangladesh), 2328 (Zimbabwe), 2336 (Indonesia), 2338 (Mexico), 2340 (Nepal), 2371 (Bangladesh) and 2395 (Poland), which it will examine at its next meeting.

CASE NO. 2302

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

**Complaint against the Government of Argentina
presented by
the Trade Union of “Puntanos” Judicial Employees (SIJUPU)**

Allegations: The allegations still pending concern dismissals and suspensions of trade union officials and members following an application for official registration from SIJUPU

346. The Committee examined this case at its meeting in November 2004, when it presented an interim report to the Governing Body of the ILO [see 335th Report, paras. 228-247, approved by the Governing Body at its 291st Session in November 2004].
347. The Government sent new observations in communications dated 9 May and 14 October 2005.
348. 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. Previous examination of the case

349. When it examined the case at its meeting in November 2004, a number of allegations remained pending, concerning dismissals and suspensions of trade union leaders and members following an application for official registration from the complainant, the SIJUPU. On that occasion, the Committee made the following recommendations with regard to the pending allegations [see 335th Report, para. 247]:
- The Committee requests the Government to: (1) ensure that Juan Manuel González has been reinstated at his post and received payment of his wage arrears as ordered by the court, and keep it informed in this regard; and (2) report on the results of the appeal for review lodged by Vilma Fuentes de Ochoa and Susana Muñoz, members of SIJUPU regarding their dismissals.

- As regards the alleged preventive sanctions against Fredy López Camacho, General Secretary, Rubén Magallanes, Social Action Secretary, Gladis Abdón, Records Secretary, and the summons to give evidence sent to Mario Becerra, Secretary, and Silvia Zavala, a union member, the Committee requests the complainant to send additional information in this respect (nature of the sanctions and date on which they were imposed, supporting documentation, etc.).
- As regards the allegations concerning the violation of trade union rights and of the national legislation by the STJSL, which purported to discuss trade union issues with various groups and individuals, disregarding the fact that the SIJUPU, according to the complainant, is the most representative organization, the Committee requests the Government to provide it rapidly with its observations.
- Moreover, the Committee requested the Government, in the event that the SIJUPU seeks official trade union status and is shown to be the most representative organization, to grant trade union status (*personaria gremial*) without delay.

B. The Government's reply

- 350.** In its communication of 9 May 2005, the Government states that Juan M. González has been reinstated in his post and paid the arrears of wages owed to him. The Government states that the appeals lodged by Vilma Fuentes de Ochoa and Susana Muñoz de Alaniz were partially accepted, with the result that instead of being dismissed they were suspended for 30 days (the Government states that the workers in question are now working in the appropriate offices). Lastly, the Government states that the Higher Court of Justice of San Luis Province states that it has not in any way infringed the complainant's trade union rights, and emphasizes its willingness to establish dialogue with the complainant.
- 351.** In its communication of 14 October 2005, the Government states that on 5 August 2004 the complainant organization initiated the procedure for obtaining trade union status (*personaria gremial*) and that currently the relevant file is under examination for the elaboration of the final report on this request.

C. The Committee's conclusions

- 352.** *The Committee notes that, when it examined this case at its meeting in November 2004, it requested the Government to: (1) ensure that Juan Manuel González had been reinstated at his post and received payment of his wage arrears as ordered by the court; (2) report on the results of the appeals for review lodged by Vilma Fuentes de Ochoa and Susana Muñoz, members of SIJUPU, regarding their dismissals; and (3) send without delay its observations regarding the allegations concerning the violation of trade union rights and of national legislation by the Higher Court of Justice of San Luis Province (STJSL), which had purported to discuss trade union issues with various groups and individuals, disregarding the fact that the SIJUPU, according to the complainant, was the most representative organization. The Committee also requested the Government, in the event that the SIJUPU sought official trade union status and was shown to be the most representative organization, to grant it trade union status (personaria gremial) without delay.*
- 353.** *As regards the employment situation of Juan Manuel González, the Committee notes with satisfaction that, according to the Government, Mr. González has been reinstated in his post and has been paid his arrears of wages.*
- 354.** *As regards the applications for review regarding their dismissal, lodged by Vilma Fuentes de Ochoa and Susana Muñoz, both members of the SIJUPU, the Committee notes with interest that according to the Government, these applications were partially accepted since*

instead of being dismissed, these workers were suspended for 30 days; they are now working in the appropriate offices.

- 355.** *As regards the allegations concerning the violation of trade union rights and national legislation by the Higher Court of Justice of San Luis Province (STJSL), which attempted to discuss trade union issues with various groups and individuals, disregarding the fact that the SIJUPU, according to the complainant, was the most representative organization, the Committee notes that according to the Government, the Higher Court has stated that it did not in any way infringe the trade union rights of the SIJUPU by holding a meeting with a group of employees in order to discuss certain issues, and that it affirms its willingness to establish a dialogue with the complainant. The Committee requests the Government to keep it informed of any negotiations or dialogue undertaken by the parties in this regard.*
- 356.** *As regards the alleged preventive sanctions imposed on Fredy López Camacho, General Secretary, Rubén Magallanes, Social Action Secretary, and Gladis Abdón, Records Secretary, and the summons to give evidence sent to Mario Becerra, Secretary, and Silvia Zavala, a union member, in view of the Government's strong denial that any such sanctions were imposed, the Committee requested the complainant to send additional information on these matters (the nature of the alleged sanctions, dates on which the sanctions were applied, corroborating documents, etc.). Noting that the complainant has not provided the information requested, the Committee will not pursue its examination of these allegations.*
- 357.** *Finally, with regard to the request for trade union status (personaria gremial) by SIJUPU, the Committee notes that according to the Government, the trade union initiated the procedure in August 2004 and that the file is currently under examination for the preparation of the final report on this request. The Committee regrets the long time which elapsed for the adoption of a decision on this question and expresses the hope that the authorities will issue a decision soon. The Committee requests the Government to keep it informed in this respect.*

The Committee's recommendations

- 358.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government to keep it informed of any negotiations or dialogue undertaken between SIJUPU and the Higher Court of Justice of San Luis Province (STJSL).*
 - (b) With regard to the request for trade union status (personaria gremial) by SIJUPU, the Committee regrets the long time which elapsed for the adoption of a decision on this question and expresses the hope that the authorities will issue a decision soon. The Committee requests the Government to keep it informed in this respect.*

CASE NO. 2373

INTERIM REPORT

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

- the Confederation of Argentine Workers (CTA) and
- the Association of State Workers (ATE)

Allegations: The complainants object to the rulings of the Undersecretariat of Labour and Social Security of Mendoza Province according to which a direct action measure (workplace meeting) was illegal and the parties involved were required to maintain a minimum 50 per cent level of health and municipal services during a stoppage on the grounds that it constituted an essential public service. The complainants also allege that sanctions were applied against 45 workers who participated in the supposedly illegal meeting

- 359.** The complaint is set out in a communication dated July 2004 from the Association of State Workers (ATE) and the Confederation of Argentine Workers (CTA). The complainants sent additional information and new allegations in communications sent in September 2004 and May 2005.
- 360.** The Government sent its observations in a communication dated 12 May 2005.
- 361.** 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

- 362.** In their communication of July 2004, the Association of State Workers (ATE) and the Confederation of Argentine Workers (CTA) state that on 1 March 2004, the executive council of the ATE in Mendoza Province requested a hearing from the mayor of Godoy Cruz municipality in Mendoza Province with a view to formally introducing the local ATE delegates and discussing other matters of concern to the workers. Some 15 days later, on 16 March 2004, the mayor was informed by the union that: "In view of the absence of any reply to our request for a hearing to discuss various problems affecting the sector, we have declared a permanent assembly and mobilization in Godoy Cruz Province", in order to demand the opening of "joint" collective talks on wages and conditions. The complainants add that on the same date, the Undersecretariat of Labour and Social Security of Mendoza Province was notified of the measures. According to the complainants, this shows that the employer and the provincial authorities were informed of the direct action decided on by the unions.
- 363.** The complainants state that on 26 April 2004, the ATE Executive Council in Mendoza Province informed the mayor of Godoy Cruz municipality of the resolutions adopted by the ATE extraordinary provincial general assembly, including a decision to join in a

national day of protest called by the ATE extraordinary national congress for 28 April 2004. The measures consisted in holding a permanent assembly in the workplaces concerned, in order to press a number of claims relating to wage increases and the opening of collective (joint) talks. The same notification was also conveyed to the Undersecretariat of Labour and Social Security of Mendoza Province and the local representatives of the Ministry of Labour.

- 364.** The complainants state that the continuing failure to reply and absence of a climate conducive to discussion caused the dispute to deteriorate. Thus, on 14 May 2004, the mayor of Mendoza municipality was informed that direct action was planned for 19 May 2004, having been decided on in a timely manner by the Provincial Congress of the ATE, and would consist of “permanent assembly and mobilization”. The mayor persisted in his refusal to respond to the workers’ claims, and the workers continued with their permanent state of assembly and mobilization, notice of which was given through note No. 7220-E-04 of 1 June 2004. Lastly, on 25 June 2004, the Undersecretariat of Labour and Social Security of Mendoza Province and the local representatives of the Ministry of Labour were notified that a day of protest would take place on 29 June 2004.
- 365.** The complainants indicate that the principal claims of workers in Godoy Cruz municipality related to a wage increase and the opening of collective talks, and it was only the indifference and lack of interest in creating a climate for discussion that prompted the workers to initiate direct action. The workers are seeking collective talks and an opportunity to determine conditions through autonomous provisions; it is the employer – in this particular case, the municipal authority – that is making this impossible. It should be borne in mind that there is no question of an absence of a legislation or regulations. Argentina in general, and Mendoza Province in particular, have an abundance of laws and regulations in this area.
- 366.** The complainants allege that the employer not only rejected these fundamental demands, but also took action against individual workers and thereby sought to curtail collective decision-making. On 22 June 2004, the workers held a meeting – of which the employer and the provincial and national authorities had been duly notified – and the Undersecretariat of Labour of the Province, together with the municipal authority (the employer), carried out an inspection. This led to the creation of case file No. 4476-S-04. The inspection report (No. 270476 of 22 June 2004) was drawn up by the provincial authorities and representatives of the municipal authority, without any direct input from the inspector, let alone from the workers who had been present. On the basis of a document totally lacking in legitimacy – based solely on the wish to interfere of a mayor unable to resolve the dispute, and with the complicity of the provincial authorities – moves were then made to identify the workers who had taken part in the assembly. The harassment of individuals continued through memos addressed to each worker demanding explanations for their failure to carry out their normal duties on 22 June 2004.
- 367.** The complainants state that as a result of the case file established with the labour inspectorate on 22 June 2004, the Legal Affairs Department of the Undersecretariat of Labour of Mendoza Province issued a ruling No. 2735/04 of 24 June 2004, as follows: “IN VIEW OF: the provisions of sections 2, 5, 68, 87, 103, 104, and the National-Provincial Agreement No. 22/2000, Act No. 23551; CONSIDERING: that the Undersecretariat of Labour and Social Security of the Province is competent to intervene in the dispute in question in accordance with Act No. 4974; that, according to the information provided, the existing procedures for reaching a negotiated settlement were not exhausted, and given the failure to notify the administrative authorities of the proposed direct action before implementing the latter, the dispute was not resolved and the applicable provisions were thus violated; the legal advisory office has issued a ruling (see pages 5 and following) and the Undersecretariat of Labour and Social Security of the Province accordingly DECIDES:

(section 1) that the direct action measure adopted is illegal; (section 2) that this must be recorded, announced and filed.”

- 368.** The complainants deny that, in the words of the ruling, the direct action in question was decided on “without consultation, abruptly, and without any prior claim or petition being submitted”. According to the complainants, the dispute had developed over a number of months, and appropriate notifications and clear demands were made. They also deny the claim that “the available procedures established under the laws in force for achieving a negotiated settlement” had not been exhausted; neither the case file produced after the inspection nor any of the background information suggests that any consultation was initiated by the employer. On the contrary, it was the workers who consistently called for collective talks and gave notice of the intended action in the face of the employer’s silence, and the provincial and national authorities were duly informed of every initiative. Lastly, they maintain that it is clearly established that in every communication regarding the direct action, the matter of a wage increase and the need for collective talks were central issues.
- 369.** The complainants add that subsequently (on 25 June 2004), ruling No. 2738/04 was adopted. According to this, the Undersecretariat of Labour and Social Security of Mendoza Province includes “municipal public services” in the category of essential services, with a view to guaranteeing a minimum 50 per cent level of such services. According to the disputed ruling, “IN VIEW OF: the information given by the ATE regarding the day of protest on 29 June 2004 involving a stoppage, general meeting, and/or mobilization in all the departments directly subordinate to the central administration, central and decentralized authorities and municipalities of the Province; CONSIDERING: that in relation to the facts alleged and given the powers given to the authority to intervene in the dispute under the terms of Act No. 4974: the Legal Affairs Department has issued a ruling ... by virtue of which the Undersecretariat of Labour and Social Security of the Province HEREBY DECIDES: (section 1): to extend the provisions of resolution No. 2539/2004 to the stoppage of 29 June 2004, planned for all departments and offices directly subordinate to the central administration, decentralized authorities and municipalities of the Province, the measure in question being defined in terms of a stoppage; (section 2): the parties concerned are ordered to ensure that a minimum level of 50 per cent of normal services be maintained in the areas of health and municipal public services, given that the services in question constitute an essential public service; (section 3): Let this be duly registered, announced, and filed.”
- 370.** The complainants state that this is from every point of view a generalization which fails to specify which municipal services must be maintained, other than indicating that they include services other than health services.
- 371.** Lastly, the complainants maintain that the disputed rulings contravene the principles of freedom of association and, specifically, the provisions of Convention No. 87, which provide for the right of trade unions to formulate their own programmes of action and state that their purpose is to promote and defend workers’ interests. According to the complainants, the central fact in the case is that the majority of workers in Godoy Cruz municipality decided at a meeting on direct action in pursuit of claims relating to conditions of work, a wage increase and the opening of collective talks.
- 372.** In their communication of September 2004, the complainants state that Godoy Cruz municipality in Mendoza Province adopted ruling No. 1727 of 11 August 2004, under the terms of which official warnings were given to 45 of the workers who had taken part in the permanent assembly of 22 June 2004.
- 373.** In their communication of May 2005, in which the CTA and ATE present new allegations relating to Misiones Province, the complainants allege that after the Undersecretariat of

Labour and Employment of Misiones Province had been notified that the ATE had decided on a stoppage, state of alert, permanent assembly and mobilization over the course of a number of days during April 2005, the authorities of Misiones Province took steps against the workers who had taken part in the direct action.

B. The Government's reply

- 374.** In its communication of 12 May 2005, the Government states that because of the federal structure of the country's administration, provincial governments have autonomy to legislate and act as they consider appropriate. The national Government accordingly informed the Mendoza provincial authorities of the complaint in question to enable them to make any observations they considered appropriate.
- 375.** The Government states that according to the information provided by the provincial authorities, the dispute that led to the complaint was confined to the refuse collection services in Godoy Cruz municipality. The concept of "essential services" may include any activity the absence of which could affect the life, safety or health of individuals. In the light of this, and given that a total stoppage of refuse collection services could indeed affect public health, the labour authorities of Mendoza Province ordered that a minimum 50 per cent level of health and municipal services be maintained on the basis of clear public health and safety criteria.
- 376.** The Government states that according to the Mendoza provincial authorities, the ATE brought a case before the courts to challenge the ruling that their direct action was illegal and to challenge the sanctions imposed on the workers concerned. Proceedings were initiated before the First Labour Chamber of the first judicial district of Mendoza on the case "Association of State Workers (ATE) versus the municipality of Godoy Cruz regarding protection of constitutional trade union rights (*amparo sindical*)". The case is currently at the evidentiary stage and no ruling has been handed down on the substance of the case.

C. The Committee's conclusions

- 377.** *The Committee notes that according to the complainants, the Association of State Workers (Provincial Executive Board), having attempted repeatedly and unsuccessfully to meet with the authorities of Godoy Cruz municipality in Mendoza Province with a view to introducing their delegates and discussing matters of concern to the workers (including wage claims and the opening of collective talks), gave written notice to the effect that it had declared a state of permanent assembly and mobilization from 16 March 2004 onwards, and subsequently that it would be organizing a day of protest on 29 June 2004. The complainants allege that the Undersecretariat of Labour of Mendoza Province issued a formal ruling (No. 2735 of 24 June 2004) according to which the union's direct action (permanent assembly) on 22 June 2004 was illegal and 45 workers involved in the measure were given formal warnings. On 25 June 2004, it issued another ruling, No. 2738, which defined the measure planned for 29 June as a stoppage and formally ordered the parties concerned to maintain a minimum level of 50 per cent of health and municipal services on the grounds that they constitute an essential public service.*
- 378.** *As regards ruling No. 2735/04 of the Undersecretariat of Labour and Social Security of Mendoza Province according to which the direct action (assembly in the workplace) on 22 June 2004 by workers of Godoy Cruz municipality was illegal, the Committee notes the Government's information to the effect that the ATE has initiated proceedings to defend its constitutional rights (amparo) before the courts of Mendoza Province and that the proceedings are at the evidentiary stage. The Committee recalls that it has on many*

occasions expressed the view that the declaration of illegality of actions such as strikes or equivalent measures such as a declaration of permanent assembly should not be a matter for the Government but for an independent body that enjoys the confidence of both parties. Under these circumstances, the Committee requests the Government to take the necessary steps to ensure that this criterion is met. The Committee also requests the Government to keep it informed of the outcome of the constitutional protection (amparo) proceedings currently under way before the provincial court.

379. As regards the alleged penalty of a formal warning against 45 workers who participated in the supposedly illegal direct action and referred to in the preceding paragraph, the Committee notes that according to the Government, the application for constitutional protection (amparo) lodged with the courts with regard to the declaration of illegality of the direct action (permanent assembly) of 22 June 2004 also covers this issue. Under these circumstances, the Committee requests the Government to keep it informed of the outcome of the amparo proceedings.
380. Lastly, as regards the disputed ruling No. 2738 of 25 June 2004, by which the Mendoza Undersecretariat of Labour and Social Security ordered the parties to maintain a minimum level of 50 per cent of health and municipal services during the day of protest held on 29 June 2004 in all the subordinate departments and offices of the central administration and the central and decentralized authorities of Mendoza Province, on the grounds that they constitute an essential public service, the Committee notes the Government's statements to the effect that: (1) the dispute which led to the presentation of the complaint was confined to the refuse collection services of Godoy Cruz municipality; and (2) the concept of essential services can apply to any activity the absence of which could affect the life, security or health of individuals, and the labour authority of the Province accordingly considered that a total stoppage of refuse collection could indeed affect public health.
381. In this respect, the Committee notes that according to the information supplied by the complainants and the wording of ruling No. 2738, the day of protest was not confined to the refuse collection sector (the ruling refers to "health and municipal public services"). Nevertheless, the Committee recalls its statements on numerous occasions to the effect that the determination of minimum services and the number of workers required to assure these "should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a careful exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that a strike has come to nothing because of over-generous and unilaterally fixed minimum services" [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th (revised) edition, 1996, para. 560]. The Committee notes in this regard that according to section 24 of the Labour Organization Act (Ley de Ordenamiento Laboral) (No. 25877): "Essential services are deemed to include public health and hospital services, production and distribution of drinking water, electricity and gas, and air traffic control. An activity not covered by the previous paragraph may exceptionally be deemed by an independent commission formed in accordance with established regulations to be an essential service, subject to prior initiation of the conciliation proceedings provided for under law, under the following circumstances: (a) where by reason of the duration and geographical extent of the stoppage this might endanger the life, safety or health of all or part of the population; (b) where the public service affected is one of overriding importance according to the criteria established by the supervisory bodies of the International Labour Organization." In the view of the Committee, this provision could offer a satisfactory solution for all the

parties concerned as regards the determination of what are essential services in cases such as the one to which the complaint relates.

382. *In this respect, the Committee recalls that what is meant by essential services in the strict sense of the term depends to a large extent on the particular circumstances prevailing in a country. Moreover, this concept is not absolute, in the sense that a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population [see **Digest**, op. cit., para. 541]. The Committee requests the Government to take steps to ensure that in future, if a provincial authority considers it necessary to impose minimum levels of service in refuse collection which in the specific circumstances of this case cannot be considered essential in the strict sense of the term, consultations are held with the workers' and employers' organizations concerned.*

383. *Lastly, as regards the new allegations made in a communication sent in May 2005 regarding acts of anti-union discrimination against workers who participated in direct action at the end of April 2005 in Misiones Province, the Committee requests the Government to send its observations on the matter.*

The Committee's recommendations

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

- (a) As regards the disputed ruling No. 2735/04 of the Undersecretariat of Labour and Social Security of Mendoza Province according to which the direct action (assembly at the workplace) of 22 June 2004 by workers of Godoy Cruz municipality was illegal, the Committee recalls that responsibility for declaring illegal an action in support of claims, including strike action and equivalent measures such as permanent assemblies, should not lie with the government, but with an independent body which has the confidence of the parties, and requests the Government to keep it informed of the outcome of the trade union amparo proceedings initiated by the ATE and currently under examination by the judicial authorities of the Province.*
- (b) As regards the alleged sanction of warnings issued to 45 workers who had participated in the direct action carried out on 22 June 2004 and declared illegal by the administrative authority of Mendoza Province, the Committee, noting that the amparo proceedings initiated by the ATE regarding the declaration of illegality also cover this issue, requests the Government to keep it informed of the outcome of those proceedings.*
- (c) The Committee requests the Government to take steps to ensure that in future, if a provincial authority considers it necessary to impose a minimum level of service in refuse collection, which in the specific circumstances of this case cannot be considered essential in the strict sense of the term, it consults the workers' and employers' organizations concerned.*
- (d) As regards the new allegations presented in a communication of May 2005 concerning acts of anti-union discrimination against workers who took part in the direct action carried out in May 2005 in Misiones Province, the Committee requests the Government to send its observations on the matter.*

CASE NO. 2377

INTERIM REPORT

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

- **the Confederation of Education Workers
of the Republic of Argentina (CTERA)**
- **the Single Trade Union of Education Workers
of the Province of Buenos Aires (SUTEBA)**
- **the Confederation of Argentine Educators (CEA) and**
- **the Domingo Faustino Sarmiento Federation
of Educators of Buenos Aires (FEB)**

supported by

- **Education International (EI)**

Allegations: The complainants allege violations of the right to collective bargaining and to strike of education workers in the public sector of the Province of Buenos Aires

385. These complaints are contained in a communication from the Confederation of Education Workers of the Republic of Argentina (CTERA) and the Single Trade Union of Education Workers of the Province of Buenos Aires (SUTEBA) dated 1 July 2004, and a communication from the Confederation of Argentine Educators (CEA), the Domingo Faustino Sarmiento Federation of Educators of Buenos Aires (FEB) of 6 December 2004. The CTERA and the SUTEBA forwarded additional information in communications dated 15 October and 4 December 2004. Education International (EI) supported the complaint in a communication dated 18 January 2005. The CTERA, the SUTEBA, the CEA and the FEB submitted further allegations in the communication dated 7 July 2005.

386. The Government sent its observations in communications dated 14 January, 2 May and October 2005.

387. 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

388. In their communications of 1 July and 15 October 2004, the Confederation of Education Workers of the Republic of Argentina (CTERA) and the Single Trade Union of Education Workers of the Province of Buenos Aires (SUTEBA) state their objection to resolution No. 1509 of 16 June 2004 by the Labour Undersecretariat of the Province of Buenos Aires summoning the complainant organizations to mandatory conciliation, and resolution No. 166 by the Ministry of Labour of the Nation requiring compliance with the aforementioned provincial-level resolution. (It may be noted that these resolutions have already been challenged by other trade union organizations in Argentina in the context of another case examined by the Committee.)

389. In addition, the CTERA and the SUTEBA state their objection to decree No. 843/00 issued by the National Executive regarding strikes in essential services and, specifically, article 2

on the power of the Ministry of Labour to classify as an essential service an activity that is not included in the listing in the law and the possibility that it may, in the absence of agreement between the parties, impose a final decision regarding the establishment of a minimum service (the complainant organizations state that the decree remains in force following the promulgation of Act No. 25877).

- 390.** In communications of 4 and 6 December respectively, the CTERA, the SUTEBA, the Confederation of Argentinian Educators (CEA), and the Domingo Faustino Sarmiento Federation of Educators of Buenos Aires (FEB) state that, following successive demands for wage increases, the decision was taken to announce strikes for 2 and 3 December 2004. The complainants relate that, on 30 November 2004, the FEB and the SUTEBA – together constituting the *Frente Gremial Docente* – were summoned to the Seat of Government of the Province of Buenos Aires where officials of the Ministry of the Economy and of the Ministry of Education sought to explain that no financial proposal could be offered because the Province of Buenos Aires had not yet drawn up its budget for 2005, and that the necessary negotiations with the national Government had yet to be completed. No proposal was put forward to serve as the basis for discussions to find a means of settling the dispute or suspending direct action. The complainants allege that, in response to their confirmation of the announced direct action, the Ministry of Labour of the Province of Buenos Aires issued resolution No. 4273/04 summoning them to participate in mandatory conciliation. The complainants state that they contested the resolution and challenged the competence of the administrative authority to order mandatory conciliation; this new disagreement thus became an integral part of the dispute. Lastly, the complainants allege that the government of the Province of Buenos Aires has taken no steps to guarantee the right of collective bargaining of education workers in the public sector.
- 391.** In their communication of 7 July 2005, the CTERA, the SETEBA, the CEA and the FEB state that, in 2005, education workers in the Province of Buenos Aires continued, through direct action measures (which are lawful since they were never declared illegal), to demand the incorporation of sums of money over and above their remuneration but which would not be part of the basic wage and would not therefore be subject to payment of any additional contribution to the security system. The complainants further requested a wage review and improvements in hygiene and safety conditions. However, the State, as employer, has not responded to their demands and has shown no desire to negotiate. The complainants allege, furthermore, that the authorities of the Ministry of Labour of the Province of Buenos Aires have informed the education workers of the decision to dismiss them if they exercise their right to strike for more than three days. The complainants further state that, to date, no measures have been taken to guarantee the right of collective bargaining of education workers.

B. The Government's reply

- 392.** In its communication of 14 January 2005, the Government states, in reference to the complaints submitted by the CTERA and the SUTEBA objecting to resolutions Nos. 1509 and 166, that the dispute which gave rise to the complaints was settled when the trade union bodies accepted the wage proposal made by the executive of the Province of Buenos Aires, dated 6 July 2004. Nonetheless, the Government responds to the allegations regarding the existence and application of mandatory conciliation in this particular case to the effect that the involvement of a “conciliation body” allows the administrative authority to mediate between conflicting interests and positions, thereby contributing to finding a peaceful settlement to the dispute, with the key contribution being made by the parties concerned. Conciliation provides an opportunity for independent settlement and rapprochement whereby the parties themselves act autonomously by offering reciprocal concessions to arrive at an agreement which, in principle, resolves any fundamental differences.

- 393.** The Government adds that resolution No. 1509/04, which the complainants maintain to be a violation of freedom of association, in fact examined the nature of the activity relating to the dispute, which it classified as a “collective dispute” and, on this basis, ordered mandatory conciliation which applies the principles of promptness and due process, in keeping with the procedure embodied in Act 10149, Chapter III. The Under-Secretariat of the Ministry of Labour of the Province of Buenos Aires, adhering to the provisions of Act 10149, article 20, and given the absence of any settlement of the dispute that had arisen between the provincial executive and its employees, and acting within its sphere of competence, decided that the dispute should go to mandatory conciliation in order to reach consensus and arrive at a peaceful solution. The involvement of the Undersecretariat continued for the 15-day period provided for in article 28 of this Act. During that period, the parties were not permitted to engage in direct action which, under the law, are new measures that need to be taken in view of the situation that existed before the dispute (article 29 of Act No. 10149).
- 394.** The mandatory conciliation procedure is not a definitive measure, and is not binding, and the merits of the matter are not examined; as previously outlined, it simply constitutes a channel of negotiation during the course of which social peace may temporarily prevail. In other words, the trade union bodies were bound only in the sense that they were required to enter into the conciliation procedure (which, as stated, was of extremely short duration), but they were not obliged to agree to any solution. As stated, conciliation lasts for a pre-established maximum period of 15 days, after which the parties are free to proceed in the manner they deem appropriate.
- 395.** As regards the right of collective bargaining, the Government states that the Collective Bargaining Convention, 1981 (No. 154), provides that the parties in bargaining process should negotiate on a voluntary basis and that states should promote this procedure in a manner consistent with national practice, and providing for special modalities for “public service”. The Government is of the view that these principles have not been breached in any way by the provincial administration, since they are irrelevant to the case in question given that resolution No. 1509/04 relates to mandatory conciliation and not to any of the principles contained in ILO Conventions Nos. 151 and 154.
- 396.** Lastly, the Government reacts to the complainants’ demand that “the full exercise of freedom of association be restored, in order to guarantee to the education workers of the Province of Buenos Aires the right to take direct action and to exercise the right to strike and to apply to an impartial and independent body with a view to settling collective labour disputes, which is the right emanating from the exercise of freedom of association”, by saying that the question is hypothetical since the dispute had effectively ceased once the offer made by the provincial executive on 6 July 2004 had been accepted.
- 397.** Moreover, the Government adds that public education in the Province of Buenos Aires is effectively an essential service in a country beset by an acute economic and social crisis and in an area such as the Province of Buenos Aires where schooling frequently serves as a form of social containment for children belonging to disadvantaged families.
- 398.** In its communication of 2 May 2005, the Government responds to the allegations relating to the dispute in the Province of Buenos Aires, and which gave rise to resolution No. 4273/04 ordering mandatory conciliation, by repeating its earlier statements that mandatory conciliation is of limited duration. It adds that it should be remembered that, in the Province of Buenos Aires, given the acute economic and social crisis, education serves as a form of social containment for school-age children, particularly for low-income families, and serves as a means of preventing child labour and other situations of high risk to children, engendered by the precarious socio-economic situation of many parents. Thus,

in light of the above, the limited period of mandatory conciliation, as stated at the time, is an eminently reasonable manner of dealing with collective disputes in this sector.

- 399.** The Government notes that it is undeniable that, despite the mandatory conciliation order, the teaching union freely exercised the right to strike when it decided to do so, as is borne out irrefutably by the numerous strikes held in the Province of Buenos Aires during the course of 2004. Thus, there are no grounds for stating that the conciliation procedure in any way restricts the legitimate right to strike; indeed, on the contrary, it constitutes an alternative means of dealing with disputes, without detriment to this right which, in practice, is freely exercised. To wit, 21 strikes were held during the course of 2004: 28 May, 10 June, 16 June, 24 June, 2 July, 26 July, 4 August, 12 August, 20 August, 15 September, 29 September, 14 October, 19 October, 20 October, 4 November, 18 November, 24 November, 25 November, 26 November, 2 and 3 December. It is further noted that, subsequent to bargaining, substantial wage increases were granted to the education sector in the Province of Buenos Aires, which demonstrates that conciliation did indeed serve a useful purpose.
- 400.** The Government states that Decree No. 3087/2004 regulates the procedure to be followed in the event of collective disputes arising from collective bargaining. This decree permits the parties to opt to settle disputes between themselves. The Government considers it noteworthy that article 18 of the above decree refers specifically to this autonomous form of dispute settlement, whereby social dialogue is channelled through effective procedures that seek to achieve agreement between the parties in selecting the means to settle the dispute, as recommended by numerous ILO Recommendations. This decree is an illustration of the policy pursued by the provincial government for the public sector regime embodied in Act 10430 and similar regimes. In addition, a special joint regime is currently being negotiated with the SUTEBA for the teaching sector, which will moreover be extended to the judicial and legislative sectors likewise, contained within a legal framework agreed upon with the trade union sector.
- 401.** Lastly, the Government alludes to the federal nature of the country, whereby each province organizes its own institutions and retains all powers not delegated in the nation, including the police and dispute settlement. Thus, article 39 of the Constitution of the Province of Buenos Aires provides that the province must not only carry out an oversight function that cannot be delegated, but it is required also to settle disputes through conciliation and the establishment of special tribunals to settle labour disputes. Moreover, article 1 requires that the province must guarantee to its employees the right to negotiate and to settle disputes with the provincial administration through an impartial body provided for in law. This resulted in Act 13175 – the Ministries Act – which expressly and specifically lays down the powers of the Ministry of Labour of the Province of Buenos Aires to intervene in dealing with individual, public, provincial or municipal and private disputes, in the exercise of its powers of conciliation and arbitration, pursuant to the relevant regulations. It is a view of the Government that the legislation of the Province of Buenos Aires and, in particular, the conciliation procedure, does not infringe the principles of freedom of association, given that, far from undermining this principle, it provides it with an appropriate legal foundation whereby collective disputes may be dealt with in a manner provided for in law. In its communication of October 2005, the Government indicates that it is in the process of collecting the necessary information to elaborate its response to the allegations presented by SUTEBA, CEA and FEB in a communication of 7 July 2005.

C. The Committee's conclusions

- 402.** *The Committee notes that the complainants are challenging: (1) resolutions Nos. 1509 of 16 June 2004 and 4273 of 2 December 2004 (together with resolution No. 166 issued by the Ministry of Labour of the Nation ordering compliance with resolution No. 1509) issued*

by the Ministry of Labour of the Province of Buenos Aires imposing mandatory conciliation on the complainants in connection with the dispute to demand a wage increase, among other things; and (2) Decree No. 843/2000 issued by the national executive in regard to strikes in essential services and Act 25877 regulating collective labour disputes. The complainants further allege that: (1) in light of their continued wage demands through direct action in 2005, the Ministry of Labour of the Province of Buenos Aires informed education workers of the decision to dismiss them should they exercise their right to strike for over three days; and (2) to date, no steps have been taken to guarantee the right of collective bargaining of education workers in the Province of Buenos Aires.

- 403.** As regards the contested resolutions (Nos. 1509 of 16 June 2004 and 4273 of 2 December 2004, and resolution No. 166 issued by the Ministry of Labour of the Nation ordering compliance with resolution No. 1509) by the Ministry of Labour of the Province of Buenos Aires whereby the complainants were summoned, on several occasions during the course of 2004, to participate in mandatory conciliation in connection with collective disputes, the Committee notes the series of arguments put forward by the Government in support of mandatory conciliation and, in particular, the fact that it suspends strike action only temporarily. However, the Committee draws attention to the fact that, in the context of its consideration of another complaint against the Government of Argentina (Case No. 2369), presented by other trade union organizations, it has already given its opinion on the mandatory conciliation procedure and, specifically, on resolution No. 1509 of 16 June 2004) issued by the Ministry of Labour of the Province of Buenos Aires, (together with resolution No. 166 issued by the Ministry of Labour of the Nation ordering compliance with provincial resolution No. 1509. Consequently, the Committee restates its conclusions in that connection, as follows [see 336th Report, para. 213].

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.

- 404.** The Committee notes that the Government has not commented on the contested provisions of Decree No. 843/00 issued by the national executive on strikes in essential services (specifically in connection with the possibility that the administrative authority may classify as essential an activity that is not included in the listing contained in the decree and stipulate the minimum service that must be guaranteed in the event of non-agreement between the parties) which, according to the complainants, had not been derogated by the new Act No. 25877 of the 2004 labour scheme. The Committee meanwhile notes that Act 25877 has amended the contested provisions of Decree No. 843/00, article 24 of which provides that:

When, during the course of a labour dispute, any party decides to adopt legitimate direct action measures involving activities that may be considered to be essential services, uninterrupted minimum services must be guaranteed.

The following services are considered to be essential: sanitary and hospital services, production and distribution of drinking water, electricity and gas and air traffic control.

An activity that is not included in the previous paragraph may be classified, exceptionally, as an essential service by an independent commission constituted in a manner required by regulations, after the initiation of the conciliation procedure provided for in legislation, under the following circumstances:

- (a) *when the duration and territorial extension of the activity's interruption through execution of the direct action measures may jeopardize the life, security or health of all or part of the population;*

- (b) *when the public service is of transcendental importance, according to the criteria of the International Labour Organization's supervisory bodies.*

THE NATIONAL EXECUTIVE, in conjunction with THE MINISTRY OF LABOUR, EMPLOYMENT AND SOCIAL SECURITY and after consultation with the employers' and workers' organizations, will enact this article within a period of NINETY (90) days, consistent with the principles of the International Labour Organization.

- 405.** *The Committee considers that article 24 of Act 25877 is in compliance with the principles of freedom of association. However, the Committee notes that article 44 of this Act provides that: "Until such time as the NATIONAL EXECUTIVE enacts article 24 of the Act, Decree 843/00 will provisionally remain in force". This being so, the Committee requests the Government to provide information as to whether regulation have been issued for implementation of article 24 of Act 28577 within the 90-day period required by the law and, if not, to take the necessary measures to do so.*
- 406.** *As regards the allegation that the education workers in the public sector of the Province of Buenos Aires do not enjoy the right to collective bargaining, the Committee notes the Government's statements that: (1) Convention No. 154 provides that the bargaining parties must negotiate on a voluntary basis and that states must promote this procedure in compliance with national practice, developing specific application modalities for the public services; (2) article 1 of the Constitution of the Province of Buenos Aires provides that workers must be guaranteed the right to bargain and settle disputes between the provincial government and workers through an impartial body designated by law; and (3) consequently, Act 13175 was enacted which expressly gives the Ministry of Labour of the Province of Buenos Aires competence to intervene in handling individual public, provincial or municipal and private disputes, using powers to conduct conciliation and arbitration. In this regard, the Committee notes that Act 13175, article 25, paragraph 3, of February 2004, of the Province of Buenos Aires, provides that the provincial Ministry of Labour has competence to intervene in connection with collective bargaining and collective labour agreements throughout the province. Consequently, the Committee requests the Government to guarantee the exercise of the right of collective bargaining, in practice, to education workers of the public sector in the Province of Buenos Aires.*
- 407.** *Lastly, the Committee notes the Government's statement that it is in the process of collecting the information necessary to prepare a reply on the most recent communication received from the complainants (7 July 2005), alleging that, as a result of continued wage claims backed by direct action in 2005, the authorities of the Ministry of Labour of the Province of Buenos Aires have informed education workers of the decision to dismiss them if they exercise their right to strike for a period exceeding three days. The Committee requests the Government to communicate its observations in this respect.*

The Committee's recommendations

- 408.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *As regards the contested resolutions (Nos. 1509 of 16 June 2004 and 4273 of 2 December 2004 – together with resolution No. 166 by the Ministry of Labour of the Nation ordering compliance with resolution No. 1509) issued by the Ministry of Labour of the Province of Buenos Aires, pursuant to which – on several occasions during the course of 2004 – the complainants were summoned to mandatory conciliation in connection with a collective dispute, the Committee restates that it would be desirable to entrust the decision of opening the conciliation procedure in collective disputes to a*

body that is independent of the parties to the dispute and requests the Government to bring legislation and practice into conformity with Conventions Nos. 87 and 98.

- (b) The Committee requests the Government to provide information as to whether regulations have been issued for implementation of Act 25877, article 24, on collective labour disputes, within the 90-day period provided for in the Act and, if not to take necessary measures to do so.*
- (c) The Committee requests the Government to guarantee the exercise of the right to collective bargaining, in practice, to education workers of the public sector in the Province of Buenos Aires.*
- (d) The Committee requests the Government to communicate its observations on the most recent communication received from the complainants (7 July 2005) alleging that, as a result of continued wage claims backed by direct action in 2005, the authorities of the Ministry of Labour of the Province of Buenos Aires have informed education workers of the decision to dismiss them if they exercise their right to strike for a period exceeding three days.*

CASE NO. 2326

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

Complaint against the Government of Australia

presented by

- the Australian Council of Trade Unions (ACTU) and**
- supported by the Trade Unions International of Workers of the Building, Wood and Building Materials Industries (UITBB)**

Allegations: The complainant organization alleges that the Building and Construction Industry Improvement Bill 2003 would affect: the right to strike of workers in that industry by extending the scope of unprotected industrial action and introducing significant penalties; and their right to bargain collectively by restricting the scope of bargaining, preventing “pattern bargaining”, and making “project agreements” unenforceable

409. The complaint is contained in communications from the Australian Council of Trade Unions (ACTU) dated 10 March 2004 and 3 October 2005. The Trade Unions International of Workers of the Building, Wood and Building Materials Industries (UITBB) associated itself to the complaint in a communication dated 29 April 2004.

410. The Government replied in communications dated 14 February, 16 March and 28 September 2005.

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

A. The complainants' allegations

412. In its communication dated 10 March 2004, the ACTU stated that the Building and Construction Industry Improvement Bill 2003 is likely to have a detrimental effect on the right to strike and the right to bargain collectively. Although the Bill passed the House of Representatives on 4 December 2003, it should also be passed by the Senate in order to become law. At the time of the complaint, the Bill was the subject of an inquiry by a Senate Committee which was due to report by May 2004.
413. The complainant added in its main communication as well as the annexes attached thereto, that the content of the Bill was based on the recommendations of the Royal Commission into the Building and Construction Industry which issued its report to the Government on 24 February 2004. The Commission was established by the Government following a number of unsubstantiated allegations by the Office of the Employment Advocate of improper and unlawful conduct by building and construction industry unions. Although the Commission spent AU\$60 million in its inquiry, it was widely seen as having been biased and unfair in its processes and in its findings and recommendations. Efforts were made by the Commission's investigators to actively seek evidence against unions, while no interest was shown in bringing forward evidence which might exonerate unions. The latter were given very restricted opportunities to appear in the Commission's proceedings in order to present contrary evidence or to cross-examine witnesses. The process used by the Commission was such that wide media publicity was given to sensational allegations before the unions had an opportunity to produce contrary evidence or to cross-examine witnesses, so that damage to their reputation was maximized. Sometimes, evidence given by unions was allegedly downplayed in favour of evidence given by anti-union or employer witnesses. 90 per cent of hearing time involved allegations against unions, although employer misconduct in relation to tax avoidance, occupational health and safety and failure to meet legal obligations to employees has been a feature of the industry.
414. The complainant also stated that the Commission's recommendations were similarly unbalanced, focusing on relatively minor breaches of industrial relations legislation by unions and virtually ignoring evidence of tax avoidance and non-payment of employee entitlements by employers. Thus, 91.2 per cent of the findings were against unions and 8.8 per cent against employers. Moreover, the Commission adopted a broad view of the term "unlawful" as including non-criminal behaviour such as minor or technical breaches of the Workplace Relations Act 1996 (the WRA) or awards, as well as breaches of contract and so-called economic torts. Thus, 52.7 per cent of the so-called incidents of unlawful conduct related to breaches of dispute resolution clauses in awards or agreements, the tort of "interference with contractual relations", breaches of the strike pay provisions of the WRA and breach of federal right to entry provisions. Finally, the complainant states that the concept of the "rule of law" in industrial relations on which the Royal Commission relied heavily, was envisaged in the sense that every citizen and organization had an absolute duty to obey the law as it stood, irrespective of its content or the consequences that flew from obedience (generally answering to non-observance by harsher penalties). This concept was shifting away from the original concept of the rule of law as a protection of the citizen against the use of arbitrary force by the state.
415. With regard to the provisions in the Bill concerning the right to strike, the complainant claimed that the Bill sought to restrict even further than current Australian law (the WRA) the ability of building and construction workers to take protected industrial action free from the possibility of legal sanction. The law currently provided that only industrial

action taken in support of claims for a single enterprise collective agreement qualified as protected action, thus making subject to statutory penalties and/or common law damages any industrial action taken while a collective agreement was in force, or in support of a multi-employer agreement or over issues not subject to bargaining (such as retrenchments) or connected with sympathy or protest action. According to the complainant, the Bill introduced the following additional restrictions to protected industrial action:

- (a) protected action should be preceded by a secret ballot under a complex, costly and time-consuming procedure (sections 82, 85-115, 119, and 123-124 of the Bill). In particular, in order to take protected industrial action a union should make an application to the Australian Industrial Relations Commission (AIRC) and serve a copy on various parties which should have a reasonable opportunity to make submissions before the AIRC could determine the application. The AIRC should not grant an application for a ballot unless it was satisfied that the applicant had genuinely tried to reach agreement with the employer and was continuing to do so (sections 62 and 97 of the Bill). The order (if granted) should specify various matters concerning inter alia, the employees to be balloted, the voting method, the timetable of the ballot, the person authorized to conduct the ballot and the questions to be put to the employees. The industrial action would only be authorized if a prescribed percentage of persons on the roll voted in the ballot, more than 50 per cent of valid votes were in favour of the action and the action was taken within 30 days of the date of the declaration of the results of the ballot. The union would ordinarily be liable for the cost of holding the ballot. According to the complainant, this procedure would remove in practice any possibility to take lawful industrial action;
- (b) protected industrial action might be taken only during a “window” of 14 days after the date notified as its commencement date, after which it should be specifically authorized by the AIRC no earlier than 21 days after the expiry of the 14 days. Thus, a mandatory 21-day cooling-off period was introduced 14 days after industrial action was notified to commence or had actually commenced – and an additional cooling-off period was introduced after a further 14 days of strike (section 81 of the Bill). The AIRC might moreover decide not to certify the continuation of the strike after the end of the cooling-off period, taking into account inter alia the public interest, the effect of the industrial action on third parties, whether any party had failed to genuinely try to reach agreement, and the extent to which the conduct of the bargaining parties during the bargaining period had not been reasonable (section 81(3)(c), (d), (e) and (f) of the Bill);
- (c) protected action could not be taken during the term of a certified agreement, even though the issue in dispute was not addressed by the agreement and had been specifically laid aside to be dealt with at a later time (industrial action was currently possible under these conditions – section 80 of the Bill);
- (d) despite the extensive sanctions already in place for unprotected industrial action, the Bill introduced a new blanket prohibition on the taking of unprotected action which might be enforced by an injunction and which was punishable both by significant fines and financial compensation payable to the employer or to other persons who could show that they had suffered damage as a result of the action. Thus, the competent courts could impose a pecuniary penalty of up to AU\$110,000 for a body corporate, including an industrial association, and AU\$22,000 for an individual (sections 72(1), 73-75, 134, 136, 215 and 227 of the Bill).

416. With regard to the Bill’s provisions concerning collective bargaining, the complainant stated that the Bill sought to further restrict the scope of bargaining, although the WRA already practically prevented bargaining on a multi-employer or industry-wide basis. Thus:

- (a) the Bill prohibited “pattern bargaining” defined as “a course of conduct or bargaining, or the making of claims ... that involves seeking common wages or other common conditions of employment ... and extends beyond a single business”. This meant that unions were prohibited from making common claims (and taking industrial action) across part or all of an industry even though each enterprise received a specific claim and all other requirements of the WRA were met, including notification of any industrial action to the enterprise. The Bill also provided for injunctions to be issued by the Federal Court to prevent “proposed” pattern bargaining, whether or not the union had actually engaged in pattern bargaining or, if it had done so, was likely to engage in such bargaining again and irrespective of whether or not any damage to the employer or anyone else had been caused by the pattern bargaining (sections 56, 67 and 81 of the Bill);
- (b) the Bill provided that project agreements were unenforceable. Project agreements were an efficient means of ensuring that all employees on a building site, who might be employed by a large number of small subcontractors, were covered by one agreement setting standard wages and conditions. Project agreements were normally negotiated between unions and major employer contractors at the commencement of the building project (although agreements of this type were not currently capable of being certified under the WRA; this provision was aimed at agreements made outside the WRA which could be enforceable as ordinary contracts, and involved unions which were not registered under the WRA – section 68 of the Bill);
- (c) although the WRA currently excluded certain matters from collective bargaining, (including bargaining service fees, preference to unionists and other union-related matters), the Bill would extend the exclusions to provisions encouraging union membership (sections 7, 57, 69 and 70 of the Bill), right of entry to employer’s premises for union officials (sections 179, 180, 182, 184, 199 and 200(2) of the Bill) and the ability of unionists to address introduction sessions for new employees;
- (d) the Bill sought to place a number of procedural hurdles in the way of negotiating and certifying collective agreements by requiring that a bargaining period should be initiated as a precondition to certifying an agreement and that a ballot of employees should be conducted to approve the giving of notice of the initiation of the bargaining period (section 64 of the Bill). This cumbersome new procedural requirement had nothing to do with ensuring that employees were satisfied with the terms of their agreement as the WRA provided anyway that agreements might be certified only if there was evidence that a majority of employees had approved the making of the agreement.

417. The Bill also established, according to the complainant, the office of the Australian Building and Construction Commissioner (ABCC), with wide-ranging powers to monitor, investigate and enforce the legislation and the code. Employers would be required by law to notify the ABCC of events, including the taking and cessation of unprotected industrial action (sections 76 and 135 of the Bill). The new restrictive right to entry conditions for union officials required that the ABCC be supplied by the union with a copy of each notice of entry supplied to an employer (sections 189(8) and 190(3)(c) of the Bill). Moreover, the ABCC had extensive powers of interrogation, with the Bill seeking to override the common law privilege against self-incrimination (sections 230-234 of the Bill). Finally, in case of unprotected industrial action, the ABCC was empowered to assess the damages suffered by the employer or any other person and that assessment was treated as prima facie evidence of the damage, thus reversing in practice the onus of proof in relation to claimed loss (section 77 of the Bill).

418. In addition to this, according to the complainant, the Bill provided for the Minister for Workplace Relations to issue a building code or code of practice which was expected to

deal with the bargaining and other industrial relations practices in the building industry (section 26 of the Bill). The code was not subject to approval or amendment by Parliament and would extend the operation of the Government's current code, which was not provided for in legislation, but which had been used to deny Commonwealth funding to building projects where the collective agreement binding the proposed contractor, although lawful, did not meet the requirements of the code.

- 419.** In its initial communication, the complainant concluded that the Bill, if passed, would further exacerbate Australia's non-compliance with fundamental ILO principles, and pose a serious threat to the ability of building and construction industry workers and their unions to exercise their rights, in particular the right to strike and the right to bargain collectively.
- 420.** In a communication dated 3 October 2005, the complainant indicated that the 2003 Bill lapsed due to the prorogation of Parliament and a new version was reintroduced at the commencement of the new Parliament. The BCII Bill 2005 (the 2005 Bill) contained some specific elements of the 2003 Bill but not all. When the 2005 Bill was reconsidered by Parliament, the Government moved amendments to the Bill to incorporate a number of aspects of the 2003 Bill into the legislation. In general terms, the 2005 Bill was a reflection of the 2003 Bill, save for those matters that went to bargaining. The 2005 Bill was proclaimed and came into law on 12 September 2005 (the Building and Construction Industry Improvement Act 2005 – hereinafter the 2005 Act); some aspects – those in particular that touch upon the right to strike – were retrospective in their operation to March 2005.
- 421.** The complainant raised the following objections with regard to the 2005 Act. First, it provided for the introduction of the Industry Code (section 27), the content of which would not be subject to parliamentary scrutiny and would be subject to change at the wish of the Government. According to the code of practice for the building and construction industry as well as the Guidelines for Implementation adopted by the Government, any company wishing to contract for a construction project in receipt of federal government funding should be "code compliant". The code placed several restrictions on collective bargaining and, in any case, could not be seen as promoting collective bargaining as required by Convention No. 98, ratified by Australia.
- 422.** Second, the Act established the Australian Building and Construction Commissioner (ABC Commissioner) (section 9); the powers of the ABC Commissioner remained the same as in the 2003 Bill and the comments in the initial complaint remained relevant. More generally, with regard to the issue of inspection, the complainant noted that in considering a number of matters arising from the exercise of the powers of inspectors under the WRA, the Courts had found that inspectors were undertaking roving inquiries foreign to industrial relations in Australia, pursuing cases that were hopeless and prosecuting matters that were much ado about nothing (*PG&LJ Smith Plant Hire Pty Ltd. v. Lanksey Constructions Pty Ltd. [2004] FCA 1618*; *Pine v. Seelite Windows & Doors Pty Ltd. [2005] FCA 500*; *Thorsen v. Pine [2004] FCA 1316*). The complainant attached several notices issued to individual workers with the purpose of intimidating them and discouraging them from participating in trade union activities. Third, the Act introduced a blanket prohibition on the taking of industrial action and the comments in the initial complaint remained relevant. Fourth, the legislation did not allow protected action to be taken by employees where any aspect of their employment was already subject to an agreement – even if the issue in dispute was not subject to agreement (section 41).

B. The Government's reply

423. In its communication dated 14 February 2005, the Government emphasized the critical importance of the building and construction industry to Australia's economic welfare and prosperity (in 2002-03 it was an AU\$46 billion industry, accounting for nearly 6 per cent of GDP and for more than 775,000 employed persons representing 8.2 per cent of total employment). The Government also emphasized the unique nature of the industry where employment was often temporary and cyclical, dominated by small businesses (94 per cent of businesses in the industry employed fewer than five persons), covering a diverse range of building and construction-related activities and being reliant on continuous cash flow like most small businesses. The diversity of the industry and the vulnerability of its small businesses to industrial action made it difficult for existing government bodies to regulate it effectively. The Government added that the building and construction industry in Australia had a high rate of industrial disputation. In 2003, the industry recorded 249 working days lost per 1,000 employees due to industrial action. This figure compared to 53 working days for all industries and accounted for around 28 per cent of all industrial disputes. According to the Government, independent research found that improving workplace practices in the building and construction industry could bring a gain of AU\$2.3 billion per year to the economy, see the cost of living decline by 1 per cent and GDP increase by 1 per cent.

424. The Government added that the Royal Commission into the Building and Construction Industry (Royal Commission) was established by the Government in August 2001 to "conduct inquiries into the unlawful and otherwise inappropriate practice and conduct in the building and construction industry." The Government had found it necessary to establish an independent Royal Commission following claims by the National Secretary of the Construction Division of the Construction, Forestry, Mining and Energy Union (CFMEU) that organized crime elements were infiltrating his union; a series of violent invasions on Perth building sites, allegations of corruption by a former New South Wales CFMEU official, and an Employment Advocate report that the problems of the industry were beyond his office's power and capacity to handle. According to the Government, the Royal Commission was the most comprehensive independent investigation of the building and construction industry ever undertaken in Australia. The Commission conducted 171 days of public hearings. Some 750 witnesses gave evidence. Over 20 general submissions were received from interested parties throughout the industry and 1,489 summonses to attend public or private hearings were issued, as well as 1,677 notices to produce relevant documents. The final report of the Royal Commission, tabled in March 2003, found an unassailable case for reforming the building industry, concluding that the latter was characterized by lawlessness and widespread disregard for the rule of law, including the Workplace Relations Act (WRA), by both unions and employers. The findings demonstrated an industry which departed from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. The report catalogued numerous examples of unlawful and highly inappropriate conduct. The Royal Commission saw lasting change in the industry being achieved through structural and cultural change. The report proposed a number of initiatives to reform the industry, including industry-specific legislation. In addition to this, a permanent and dedicated enforcement body was seen as necessary for real and lasting reform of the industry.

425. The Government added that following the release of the final report of the Royal Commission, it announced that it would accept the Royal Commission's key recommendations, including introducing industry-specific legislation to regulate workplace relations in the industry, setting up a new regulatory body, the Australian Building and Construction Commission (ABCC), and implementing changes to occupational health and safety. The industry-specific legislation, the Building and Construction Industry Improvement Bill 2003, was a key plank in the most significant reform of the building and

construction industry ever attempted in response to the compelling and unassailable case for reform presented by the Royal Commission.

- 426.** An exposure draft of the Bill was released for public comment on 18 September 2003. During the four-week consultation period, the Department of Employment and Workplace Relations received a total of 61 submissions from employer organizations, unions, subcontractors, and other interested parties. It also met with key industry participants and state and territory governments. The measures proposed in the Bill were both appropriate to the national conditions in Australia's building and construction industry and necessary to address effectively the findings of the Royal Commission. On 6 November 2003, the Minister of Employment and Workplace Relations introduced the Bill into the House of Representatives. It was passed on 4 December 2003. In the Senate, the Bill was referred to the Senate Employment, Workplace Relations and Education References Committee on 3 December 2003. The Committee received over 120 submissions and heard 141 witnesses in 14 public hearings over a six-month period. Its report was tabled on 21 June 2004. The Government was yet to respond to this Report. Subsequently, the Bill lapsed with the prorogation of the 40th Parliament, prior to its final consideration by the Senate. On 4 November 2004, the Minister announced that the Government would reintroduce the Bill into the Parliament in 2005. The precise form of the Bill and timing of its reintroduction were still under consideration by the Government.
- 427.** As for the Bill's compliance with ILO Conventions, the Government indicated that in developing the legislative response to the Royal Commission's findings, it had regard to its international obligations and considered that the Bill complied with these obligations. The Bill sought to establish a framework for fair and effective agreement-making between employers and employees, including appropriate access to industrial action. The Bill also sought to build on the focus of Australia's federal workplace relations framework on bargaining at the enterprise level. In particular, the Bill supported the goal of an inclusive and cooperative workplace relations system that sustained and enhanced living standards, jobs, productivity and international competitiveness. The Bill also recognized that many building and construction employees were covered by collective instruments and contained provisions for collective agreements to be made through collective bargaining. The Bill did not seek to prescribe bargaining outcomes, whether collective or individual, reflecting the Government's view that these were matters for employers and their employees to determine.
- 428.** According to the Government, the Bill afforded additional protection for freedom of association thereby enhancing Australia's compliance with Convention No. 87. It provided greater protection from discrimination or victimization on the basis of a person's decision to join or not to join an industrial association. For example, the Bill would have enhanced the protection of persons who chose to be members or officers of industrial associations. It also ensured that independent contractors and employers were afforded the same level of protection and freedom of choice as employees. Further, the Bill would have enhanced Australia's compliance with the Labour Inspection Convention, 1947 (No. 81), and the Occupational Safety and Health Convention, 1981 (No. 155).
- 429.** Finally, the Government indicated that following the Minister's announcement that the Bill would be reintroduced into Parliament, interested parties were invited to provide suggestions on the Bill. Although this request was only made in early November 2004, the Department of Employment and Workplace Relations had, at the time of the communication, received feedback from employer organizations, key industry participants and interested parties. The Minister would consider the suggestions received prior to reintroduction. The reintroduced Bill would be subject to the formal legislative processes of Parliament, as provided by the Australian Constitution. This would enable non-Government parties, senators and members of parliament to comment on the proposed

legislation, to question Government ministers about the content of the legislation and to propose amendments. The Government stated its steadfast commitment to reintroduce the Bill into Parliament in 2005, so as to reintroduce the rule of law in the industry. At this stage, it would be inappropriate to pre-empt the final content or form of the legislation.

- 430.** The Government concluded by indicating that it undertook to keep the ILO informed on the progress of the proposed legislation and would continue to have regard to Australia's international obligations and its particular national conditions when developing workplace relations legislation.
- 431.** In a communication dated 16 May 2005, the Government indicated that, in March 2005, it introduced the Building and Construction Industry Improvement Bill 2005 into Federal Parliament (the 2005 Bill). This Bill incorporated only the unlawful industrial action and ancillary provisions of the initial (2003) Bill. The remaining elements of the initial Bill were expected to be introduced separately into Parliament after July 2005. The 2005 Bill was referred to the Australian Senate's Employment, Workplace Relations and Education Committee on 16 March 2005 for an assessment of its provisions. The Senate Committee tabled its report on 10 May 2005 and the Government was currently considering its response to the Committee's report. The Government attached a copy of the 2005 Bill.
- 432.** In its communication dated 28 September 2005, the Government indicated that it had significantly amended the 2005 Bill after its introduction in Parliament to include only those provisions relating to the establishment of the Australian Building and Construction Commissioner's office. The Government attached a supplementary explanatory memorandum provided to Parliament. The Parliament passed into law the Building and Construction Industry Improvement Act 2005 (the 2005 Act), a copy of which was attached to the communication. According to the Government, the key elements of the complaint relative to alleged restrictions on the ability of building and construction workers to strike and negotiate collectively across the industry were not included in the 2005 Act. The Government therefore considered that, as the substantive elements of the complaint were no longer included in the 2005 Act, the Committee should give due consideration to closing this case.

C. The Committee's conclusions

- 433.** *The Committee notes that this case concerns allegations that the Building and Construction Industry Improvement Bill 2003 (the 2003 Bill) would affect: the right to strike of workers in that industry by extending the scope of unprotected industrial action and introducing significant penalties; and their right to bargain collectively by restricting the scope of bargaining, preventing "pattern bargaining", and making "project agreements" unenforceable. The Committee observes that the 2003 Bill lapsed with the prorogation of the 40th Parliament, prior to its consideration by the Senate. The Building and Construction Industry Improvement Bill 2005 (the 2005 Bill) was introduced into Federal Parliament and the Senate in March 2005. This Bill incorporated only part of the provisions of the 2003 Bill on unlawful industrial action and ancillary provisions. After its introduction in Parliament, the 2005 Bill was significantly amended by including in it further elements from the 2003 Bill, specifically as regards the Australian Building and Construction Commissioner's office (ABCC), the issuing of a building code, the possibility of applying for an injunction against unlawful industrial action, the prohibition of industrial action involving "extraneous participants", the non-enforceability of project agreements, the prohibition of discrimination, coercion and unfair contracts, and finally, occupational safety and health. The 2005 Bill was passed into law as the Building and Construction Industry Improvement Act, 2005 (the 2005 Act) on 12 September 2005.*

434. *By way of background, the Committee notes that the 2003 Bill was prepared on the basis of the recommendations of the Royal Commission into the Building and Construction Industry. According to the complainant, the Royal Commission was established following a number of unsubstantiated allegations of improper and unlawful conduct by building and construction industry unions and was widely seen as biased and unfair in its processes and in its findings, focusing on relatively minor breaches of industrial relations legislation by unions and virtually ignoring evidence of tax avoidance and non-payment of employee entitlements by employers. According to the complainant, unions were given very restricted opportunities to appear in the Royal Commission's proceedings in order to present contrary evidence or to cross-examine witnesses while efforts were made by the Commission to actively seek evidence against unions and to maximize damage to the unions' reputation.*
435. *The Government for its part states that the Royal Commission was established pursuant to claims by the National Secretary of the Construction Division of the Construction, Forestry, Mining and Energy Union (CFMEU) that organized crime elements were infiltrating his union, a series of violent invasions on Perth building sites, allegations of corruption by a former New South Wales CFMEU official, and an Employment Advocate report that the problems of the industry were beyond his office's power and capacity to handle. It was the most comprehensive independent investigation of the building and construction industry ever undertaken in Australia and found an unassailable case for reforming the building industry, concluding that the latter was characterized by lawlessness and widespread disregard for the rule of law, including the Workplace Relations Act (WRA), which is the general industrial relations law, by both unions and employers. The Committee also notes from the Government's initial communication that interested parties had been invited to provide suggestions on the Bill prior to its reintroduction to Parliament and the Senate, and that feedback had been received from employer organizations, key industry participants and interested parties, while further comments could be made by non-Government parties after the Bill's reintroduction to Parliament.*
436. *The Committee takes due note of the Government's indication that various interested parties had the possibility to provide feedback and submit comments on the 2003 and 2005 Bills. It also observes, however, that the Government does not provide any indication of any direct consultation on the Bill's form and content with the social partners which are directly concerned by the legislation in question. The Committee emphasizes the importance that should be attached to full and frank consultations taking place on any questions or proposed legislation affecting trade union rights. It is essential that the introduction of draft legislation affecting collective bargaining or conditions of employment should be preceded by full and detailed consultations with the appropriate organizations of workers and employers. [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 927 and 931]. The Committee requests the Government to provide specific information as to the forums for consultations and proposals tabled by the social partners with regard to the 2003 and 2005 Bills.*
437. *The Committee notes that, according to the initial complaint concerning the 2003 Bill, the instances in which protected industrial action could be taken was restricted by:*
- (a) *requiring a secret ballot under a complex, costly and time-consuming procedure which would remove in practice any possibility to take lawful industrial action;*
 - (b) *limiting the duration of industrial action to a window of 14 days from notification, after which a mandatory 21-day cooling-off period would be imposed;*

- (c) *preventing industrial action while an agreement was in force even though the issue in question was not addressed in the agreement;*
- (d) *introducing a blanket prohibition on unprotected action which might be enforced by an injunction and was accompanied by significant fines (up to AU\$110,000 for an industrial organization and AU\$22,000 for an individual) and financial compensation payable to the employer.*

438. *Moreover, according to the complainant, the 2003 Bill would further restrict collective bargaining by:*

- (a) *prohibiting “pattern bargaining” (and related industrial action) so that trade unions would be unable to make common claims across part or all of the industry;*
- (b) *rendering unenforceable project agreements, which ensure that all employees on a building site, who may be employed by a large number of small subcontractors, are covered by one agreement setting standard wages and conditions of employment;*
- (c) *excluding certain issues from the scope of collective bargaining, in particular, the encouragement of union membership, the right of entry to employer’s premises for union officials and the ability of unionists to address introduction sessions for new employees;*
- (d) *placing procedural hurdles in the way of negotiating and certifying collective agreements (requirement of notification of the initiation of a bargaining period preceded by a ballot of employees);*
- (e) *granting the ABCC wide ranging powers to monitor, investigate and enforce all of the above;*
- (f) *enabling the Government to deny Commonwealth funding to contractors bound by a collective agreement which, although lawful, does not meet the requirements of a building code issued by the Government in the absence of any parliamentary involvement.*

439. *The Committee notes that in its communication dated 14 February 2005, the Government does not provide a point-by-point answer to the allegations but rather indicates in general that it considers that the 2003 Bill complied with Conventions Nos. 87 and 98 and sought to establish a framework of fair and effective agreement-making between employers and employees, including appropriate access to industrial action. According to the Government, the 2003 Bill built on the focus of Australia’s federal workplace relations framework on bargaining at the enterprise level. It supported the goal of an inclusive and cooperative workplace relations system that sustained and enhanced living standards, jobs, productivity and international competitiveness. It also sought to ensure that collective agreements were made through collective bargaining and did not prescribe bargaining outcomes. It provided moreover greater protection from discrimination or victimization on the basis of a person’s decision to join or not to join an industrial association. Finally, it addressed the economic significance and the difficulties of regulating this diverse industry which encompassed small businesses that were vulnerable to industrial action. The Committee finally notes the Government’s statement in its communication dated 28 September 2005 that the substantive elements of the complaint were no longer included in the 2005 Act and therefore the case should be closed.*

440. *The Committee takes note of the text of the 2005 Act, which has been transmitted by the Government. The Committee notes that the following provisions of the 2003 Bill, which were the subject of the complaint, do not appear in the 2005 Act:*

- (a) provisions requiring a secret ballot for the initiation of protected industrial action;
- (b) provisions limiting the duration of industrial action to a window of 14 days from notification after which a mandatory 21-day cooling-off period would be imposed;
- (c) provisions concerning “pattern bargaining”;
- (d) the exclusion of certain issues from the scope of collective bargaining;
- (e) procedural hurdles in the way of negotiating and certifying collective agreements.

The Committee therefore considers that these aspects of the case do not call for further examination.

- 441.** *With regard to the provisions of the 2005 Act, which would introduce a blanket prohibition on unprotected industrial action which might be enforced by an injunction and significant fines, the Committee notes from the text of the 2005 Act, which was communicated by the Government, that sections 36(1), 37 and 38 introduce the statutory concept of “unlawful industrial action” and prohibit a person from engaging in such action, unless industrial action is conducted in conformity with the requirements established in the Workplace Relations Act, 1996 (WRA). More specifically, section 37 of the 2005 Act defines unlawful industrial action as all “constitutionally connected”, “industrially motivated”, “building industrial action” that is not “excluded action”. “Excluded action” is defined in section 36(1) of the 2005 Act as building industrial action that is “protected action” for the purposes of the WRA. Whereas the concept of “protected action” under the WRA implies that trade unions might be divested from immunity and incur liability in tort in case of industrial action taken in contravention of the conditions specified in the WRA, the concept of “unlawful action” in the 2005 Act implies not simply liability vis-à-vis the employer, but a wider responsibility towards third parties and an outright prohibition (section 38).*
- 442.** *With regard to the references in the 2005 Act to the WRA, the Committee recalls that it has already reached conclusions and recommendations on certain of the provisions of the WRA relating to protected action in a previous case concerning Australia [Case No. 1963, 320th Report, paras. 143-241]. The Committee recalls in this respect that it had considered that, by linking restrictions on strike action to interference with trade (sections 170MW and 294), a broad range of legitimate strike action could be impeded, and had requested the Government to amend the WRA accordingly [Case No. 1963, 320th Report, paras. 229-230 and 241(c)].*
- 443.** *As regards the definition of unlawful industrial action under section 37 of the 2005 Act as all “constitutionally connected”, “industrially motivated”, “building industrial action” that is not “excluded action” (i.e. action protected under the WRA), the Committee notes that these concepts are defined in broad terms in sections 4, 5 and 36(1) of the 2005 Act, so as to render the prohibition of unlawful industrial action applicable in respect of a wide range of workers, activities and types of industrial action. The Committee notes in particular that section 36(4) of the 2005 Act includes within the definition of “industrial dispute” (and thereby, within the scope of industrial action) situations that are “likely” to give rise to an industrial dispute in addition to situations where an industrial dispute is threatened, impending or probable. Although this provision largely replicates the corresponding provision of section 4 of the WRA, its effects go further than the WRA due to the fact that the 2005 Act introduces an outright prohibition of unlawful industrial action accompanied by severe penalties and sanctions (see below). Moreover, section 39 of the 2005 Act enables any person, and not just the employer or the authorities, to request the appropriate court to grant an injunction against unlawful industrial action, not only where such action is occurring or impending but also where it is “probable”. Consequently, the scope for the application of injunctions, fines and penalties due to unlawful industrial*

action is enlarged, to encompass situations where an industrial action is not just impending but “likely” or “probable”.

- 444.** *The Committee further notes that the prohibition of unlawful industrial action in the 2005 Act is accompanied by significant civil penalties and criminal sanctions which may be claimed by a wide circle of “affected” persons against persons who may have a remote connection to the industrial action in question. Thus, the Committee notes that section 49(2) of the 2005 Act imposes pecuniary penalties for a contravention of its section 38 of up to 1,000 penalty units for bodies corporate (AU\$110,000) and 200 penalty units for individuals (AU\$22,000). The Committee further notes that these penalties would appear to be much higher than the corresponding ones established in the WRA, which are up to AU\$10,000 for bodies corporate and AU\$2,000 for individuals (sections 170CR, 170HI, 170NF, 170VV, 178, 285F, 298U and 533 of the WRA). Section 49(6) of the 2005 Act moreover has the effect of extending the range of persons who may seek compensation and penalties for damages caused by unlawful industrial action, so as to include parties not directly involved in the dispute who may be affected by the contravention. Section 48(2) of the 2005 Act finally includes among those potentially liable for a contravention those who aided, abetted, counselled or procured the contravention, induced the contravention by threats or promises or otherwise, were directly or indirectly knowingly concerned in or party to the contravention, or conspired with others to effect the contravention.*
- 445.** *Furthermore, the Committee notes that section 40 of the 2005 Act has the effect of rendering unlawful any industrial action, which involves “extraneous participants”, that is to say, one or more persons who are not employees of the employer in question or officers or employees of the organization, which is a negotiating party to the proposed agreement. This provision introduces higher penalties, as noted above, for a contravention of the provisions found in both the WRA and the Trade Practices Act, 1974, with regard to the prohibition of industrial action associated with the negotiation of multi-employer agreements, sympathy action and secondary boycotts (sections 170LI, 170MM and 170MW(4) and (6) of the WRA and section 45DB of the Trade Practices Act). The Committee recalls that in a previous case concerning Australia, it had already reached conclusions in respect of the Trade Practices Act noting that a general prohibition on sympathy strikes could lead to abuse and workers should be able to take such action provided the initial strike they are supporting is itself lawful [Case No. 1963, 320th Report, para. 235]. The Committee further recalls that provisions which prohibit strikes, if they are concerned with the issue of whether a collective employment contract will bind more than one employer, are contrary to the principles of freedom of association on the right to strike; workers and their organizations should be able to call for industrial action in support of multi-employer contracts [see **Digest**, op. cit., para. 490].*
- 446.** *In sum, the Committee notes that the 2005 Act carries over to the building industry the restrictions to strike action already criticized by the Committee in respect of the WRA and the Trade Practices Act and would appear to even broaden their effect within that industry. It further notes that the 2005 Act stiffens these restrictions by imposing penalties and sanctions which may be as high as 11 times the generally applicable penalties and sanctions. These may become applicable to workers having a remote connection to the building and construction industry and may be enforced by third parties. The Committee considers that the broad prohibition of unlawful industrial action and the heavy and widely applicable penalties and sanctions provided for in the 2005 Bill are likely to discourage any involvement in industrial activity due to fear of the consequences. The Committee emphasizes 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. To determine situations in which a strike could be prohibited, the criteria which has to be established is the existence of a clear and imminent threat to the life, personal safety or*

health of the whole or part of the population [*Digest*, op. cit., paras. 474 and 540]. Construction is not an essential service in the strict sense of the term [*Digest*, op. cit., para. 545] and therefore workers in this industry should enjoy the right to strike without undue impediments.

447. The Committee therefore requests the Government to take the necessary steps with a view to modifying sections 36, 37 and 38 of the 2005 Act so as to ensure that any reference to “unlawful industrial action” in the building and construction industry is in conformity with freedom of association principles. It further requests the Government to take measures to adjust sections 39, 40 and 48-50 of the 2005 Act so as to eliminate any excessive impediments, penalties or sanctions against industrial action in the building and construction industry. The Committee requests to be kept informed of measures taken or contemplated in this respect on all the abovementioned points.
448. With regard to the provisions of the 2005 Act which would render project agreements unenforceable, thus preventing negotiations at a multi-employer level, the Committee notes that section 64 of the 2005 Act provides that project agreements are not enforceable if they are: (a) entered into with the intention of securing standard employment conditions for building employees in respect of building work that they carry out at a particular building site or sites; (b) not all employees are employed by the same employer; (c) either (i) a party to the agreement is an organization and at least some of the employees are members of that organization; or (ii) a party to the agreement is a constitutional corporation and at least some of the employees are employees of that corporation; and (d) the agreement is not certified. The Committee emphasizes that according to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case law of the administrative labour authority [see *Digest*, op. cit., para. 851]. The Committee further considers that the type of demands that may be made by one of the parties to negotiations, such as the establishment of a common wage, should be a matter for the parties concerned and their authority to make such agreements. The Committee therefore requests the Government to take the necessary steps with a view to revising section 64 of the 2005 Act so as to ensure that the determination of the bargaining level is left to the discretion of the parties and is not imposed by law, by decision of the administrative authority or the case law of the administrative labour authority. The Committee requests to be kept informed in this respect.
449. With regard to the provisions of the 2005 Act which, according to the complainant, might enable the Government to deny Commonwealth funding to contractors bound by a collective agreement that, although lawful, does not meet the requirements of a building code issued in the absence of parliamentary involvement, the Committee notes that section 27(1) of the 2005 Act, authorizes the Minister for Employment and Workplace Relations to issue a code of practice (the Building Code) “to be complied with by persons in respect of building work”. This document is, according to section 27(5), a “legislative instrument” for the purposes of the Legislative Instruments Act 2003. Section 28 provides that any person is required to comply with the Building Code in respect of particular building work and may be requested by the ABCC to report in writing on such compliance within 14 days. Failure to comply incurs a penalty of AU\$11,000 for a body corporate and AU\$2,200 for others. As explained in a Government Information Sheet on the Code and Guidelines, although the only sanction for non-compliance provided in the text of the Code and Guidelines is an inability to tender for Australian government-funded construction work (so that from 1 October 2005, all new construction projects will need to be compliant with the Code and Guidelines in order to tender for an Australian government-funded construction project), the 2005 Act will impose tough sanctions for non-compliance to all

industry participants. The Committee further notes that the 2005 Act gives wide-ranging powers to the ABCC to investigate violations of the Code (see below). The Committee observes that, under the revised Guidelines, an industrial instrument:

- (i) must not contain a provision that restricts the type of agreement that can be offered to, or requested by, an employee. In particular, provisions must not inhibit, explicitly or in practice, an employer's capacity to offer an AWA to an employee during the term of a certified, registered or unregistered agreement;
- (ii) must not include a provision for access to be granted to a site to a representative of an industrial association other than in strict compliance with the procedures governing entry and inspection under the WRA. In particular, the instrument must not include provisions allowing access in addition to that permitted under the WRA;
- (iii) must not put any restriction or limitation on the choice of industrial instrument and, in particular, must not contain a requirement that an employer will renegotiate a future industrial instrument with a union;
- (iv) must not contain provisions for particular terms and conditions, including the making of an over-award payment, with regard to a group apprenticeship scheme or similar provider;
- (v) if it provides for a site allowance, the amount must be specified in an industrial instrument certified under the WRA or otherwise approved under relevant state legislation;
- (vi) must not make provision for project agreement other than for major contracts;
- (vii) must not include a provision requiring the employment of a non-working shop steward or job delegate, or other person;
- (viii) must not include a provision requiring an employer to apply union logos, mottos or other indicia to company-supplied property or equipment, including clothing;
- (ix) in case they contain dispute settlement provisions, they must allow an employee to have freedom of choice in deciding whether to be represented and, if so, by whom;
- (x) must not contain selection criteria for redundancy that ignore the employers' operational requirement, such as "last on, first off" clauses;
- (xi) must not contain a provision that restricts an employer's short- or long-term labour requirements; nor provisions that stipulate the terms and conditions for the labour of any person not a party to the industrial instrument. Accordingly, an industrial instrument must not include provisions that require an employer to consult or seek the approval of a union over the number, source, type (e.g. casual, contract) or payment of labour required by the employer;
- (xii) must not preclude the employer from making "all-in payments", i.e. payments (on an hourly, daily or weekly basis) in lieu of payment for all or some entitlement specifically provided for by legislation or awards, such as annual leave or overtime.

450. The Committee recalls that the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference, which would restrict this right

or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes. [see *Digest*, op. cit., para. 782]. The Committee considers that the matters which might be subject to collective bargaining include the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation etc.; these matters should not be excluded from the scope of collective bargaining by law, or as in this case, by financial disincentives and considerable penalties applicable in case of non-implementation of the Code and Guidelines.

- 451.** *As for the relationship between collective agreements and AWAs in particular, the Committee recalls that, in a previous case concerning Australia, it had already taken note of the concerns expressed by the Committee of Experts with regard to the primacy given to individual over collective relations through the AWA procedures. The Committee had therefore requested the Government to take the necessary measures, including amending the legislation, to ensure that AWAs do not undermine the legitimate right to bargain collectively or give primacy to individual over collective relations [see Case No. 1963, 320th Report, paras. 238-239]. The Committee notes that, by requiring collective agreements to contain a clause enabling employers to offer AWAs, even when a collective agreement is in force, the Code, Guidelines and the 2005 Act, which attaches significant penalties in case of non-implementation, tend to promote individual agreements over collective bargaining. The Committee recalls in this respect that, while significant incentives exist to ensure that AWAs can override collective agreements, the opposite is not possible under the WRA (section 170VQ6(c)), which provides that, once an AWA is in place, it excludes the application of a collective agreement.*
- 452.** *In light of the above, the Committee requests the Government to take the necessary steps with a view to promoting collective bargaining as provided in Convention No. 98, ratified by Australia. In particular, the Committee requests the Government to review, with the intention to amend, where necessary, the provisions of the Building Code and the Guidelines so as to ensure that they are in conformity with freedom of association principles and do not result in promoting, in practice, violations of these principles. It further requests the Government to ensure that there are no financial penalties, or incentives linked to provisions that contain undue restrictions on freedom of association and collective bargaining. The Committee requests to be kept informed in this respect.*
- 453.** *With regard to the provisions of the 2005 Act concerning the wide-ranging powers of the ABCC to monitor, investigate and enforce the provisions in the 2005 Act on freedom of association and collective bargaining, the Committee notes that section 9 of the 2005 Act provides that "there is to be an Australian Building and Construction Commissioner" appointed by the Minister (section 15 of the 2005 Act). Sections 11 and 12 provide that the Minister may give written directions to the ABCC and may require specific reports from the ABCC in addition to the annual report issued under section 14. The functions of the ABCC include, according to section 10, the investigation of suspected contraventions of the 2005 Act, the WRA, an award, certified agreement, AWA, order of the Australian Industrial Relations Commission (AIRC) and the Building Code. In particular, section 52 of the 2005 Act, gives the ABCC the power to serve written notices requiring persons to give information, produce documents and answer questions, and section 52(6) requires the persons concerned to comply with the ABCC's notice under penalty of six months' imprisonment. Section 53 provides that a person is not excused from complying with the ABCC's notice on the ground that to do so would contravene any other law, or might tend to incriminate the person, or would be otherwise contrary to the public interest. Section 55*

authorizes the ABCC to take possession of any document produced under section 52 “and keep it for as long as is necessary for the purposes of conducting the investigation to which the document is relevant”. Section 56 enables the ABCC to make and keep copies of all or part of any documents produced under section 52. Section 59(3) and (5) enables the ABCC to enter any premises on which he/she has reasonable cause to believe that there are documents relevant to compliance purposes and to inspect, make copies of any document that is on the premises, or is accessible from a computer kept on the premises, being a document that the inspector believes, on reasonable grounds, to be relevant to compliance purposes. Section 59(7) authorizes the inspector to keep the documents for as long as necessary. Section 59(9) and (10) authorizes the ABCC to enter business premises and interview any person who might have information relevant to compliance purposes.

- 454.** *The Committee observes with concern that, in addition to the restrictions on collective bargaining and industrial action imposed as a result of the 2005 Act, this Act also gives considerable investigatory powers to the ABCC without sufficient safeguards against interference in trade union activities. The Committee notes that the ABCC has the power to enter premises, take possession of documents “for as long as necessary”, keep copies, and interview any person for “compliance purposes”, that is to say, in the absence of any suspected breach of the law. Moreover, there is no reference in the 2005 Act to the possibility of lodging an appeal before the courts against the ABCC’s notices. The Committee further notes that there is no consideration in the 2005 Act for the need to ensure that penalties are proportional to the offence committed, given that serious sanctions can be incurred in case of failure to comply with a notice by the ABCC to give information or produce documents. The Committee further notes from the complainant’s allegations that these broad powers come within a context where the courts have found that inspectors have been undertaking roving inquiries foreign to industrial relations in Australia, pursuing cases that were “hopeless” and prosecuting matters that were “much ado about nothing”.*
- 455.** *The Committee considers that the expansive powers of the ABCC, without clearly defined limits or judicial control, could give rise to serious interference in the internal affairs of trade unions. The Committee therefore requests the Government to introduce sufficient safeguards into the 2005 Act so as to ensure that the functioning of the ABC Commissioner and inspectors does not lead to such interference and, in particular, requests the Government to introduce provisions on the possibility of lodging an appeal before the courts against the ABCC’s notices prior to the handing over of documents. As for the penalty of six months’ imprisonment for failure to comply with a notice by the ABCC to produce documents or give information, the Committee recalls that penalties should be proportional to the gravity of the offence and requests the Government to consider amending this provision. The Committee requests to be kept informed on all of the above.*
- 456.** *In light of the above, the Committee, recalling once again the importance that should be attached to full and frank consultations taking place on any questions or proposed legislation affecting trade union rights, requests the Government to initiate further consultations with the representative employers’ and workers’ organizations in the building and construction industry with a view to exploring the views of the social partners in considering proposed amendments to the legislation having due regard to Conventions Nos. 87 and 98, ratified by Australia, and with the abovementioned principles of freedom of association. The Committee requests to be kept informed of developments in this respect.*

The Committee’s recommendations

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

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- (a) *The Committee requests the Government to provide specific information as to the forums for consultations and proposals tabled by the social partners with regard to the 2003 and 2005 Bills.*
- (b) *The Committee requests the Government to take the necessary steps with a view to modifying sections 36, 37 and 38 of the Building and Construction Industry Improvement Act, 2005 (the 2005 Act), so as to ensure that any reference to “unlawful industrial action” in the building and construction industry is in conformity with freedom of association principles. It further requests the Government to take measures to adjust sections 39, 40 and 48-50 of the 2005 Act, so as to eliminate any excessive impediments, penalties and sanctions against industrial action in the building and construction industry. The Committee requests to be kept informed of measures taken or contemplated in this respect.*
- (c) *The Committee requests the Government to take the necessary steps with a view to revising section 64 of the 2005 Act so as to ensure that the determination of the bargaining level is left to the discretion of the parties and is not imposed by law, by decision of the administrative authority or the case law of the administrative labour authority. The Committee requests to be kept informed in this respect.*
- (d) *The Committee requests the Government to take the necessary steps with a view to promoting collective bargaining as provided in Convention No. 98, ratified by Australia. In particular, the Committee requests the Government to review, with the intention to amend, where necessary, the provisions of the Building Code and the Guidelines so as to ensure that they are in conformity with freedom of association principles. It further requests the Government to ensure that there are no financial penalties, or incentives linked to provisions that contain undue restrictions of freedom of association and collective bargaining. The Committee requests to be kept informed in this respect.*
- (e) *The Committee requests the Government to introduce sufficient safeguards into the 2005 Act so as to ensure that the functioning of the ABC Commissioner and inspectors does not lead to interference in the internal affairs of trade unions and, in particular, requests the Government to introduce provisions on the possibility of lodging an appeal before the courts against the ABCC’s notices prior to the handing over of documents. As for the penalty of six months’ imprisonment for failure to comply with a notice by the ABCC to produce documents or give information, the Committee recalls that penalties should be proportional to the gravity of the offence and requests the Government to consider amending this provision. The Committee requests to be kept informed on all of the above.*
- (f) *In light of the above, the Committee, recalling once again the importance that should be attached to full and frank consultations taking place on any questions or proposed legislation affecting trade union rights, requests the Government to initiate further consultations with the representative employers’ and workers’ organizations in the building and construction industry so as to explore the views of the social partners in considering*

proposed amendments to the legislation having due regard to Conventions Nos. 87 and 98, ratified by Australia, and with the principles of freedom of association set out in the conclusions above. The Committee requests to be kept informed of developments in this respect.

CASE NO. 2402

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

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

Allegations: The complainant organization alleges anti-union discrimination and intimidation through the discriminatory transfer of ten senior leaders of the Bangladesh Diploma Nurses Association (BDNA) and the proposed transfers of 200 other union members

- 458.** The complaint is set out in a communication from Public Services International (PSI) dated 20 December 2004 on behalf of one of its affiliate organizations, the Bangladesh Diploma Nurses Association (BDNA).
- 459.** The Government sent its observations in a communication dated 20 March 2005.
- 460.** Bangladesh 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

- 461.** In its communication dated 20 December 2004, the complaint raises allegations of anti-union discrimination against the officials and members of the Bangladesh Diploma Nurses Association (BDNA), 98 per cent of whose members are women. The complainant alleges that on 26 November 2004, the Director of Nursing in Bangladesh issued a series of transfer orders to senior trade union leaders of the BDNA with a view to disrupt the legitimate activities of the union. Transfer orders are stated to have been issued to ten central executive members of the union including: (1) Ms. Krishna Beny Day, Senior Vice-President of the BDNA who has been transferred from Dhaka Medical College Hospital to Narayangang Hospital; (2) Ms. Israt Jahan, General Secretary who has been transferred from IDC Hospital to Sarisabari Health Complex; (3) Mr. Golam Hossain, Joint General Secretary who has been transferred from Mitford Hospital to Sylett; and (4) Mr. Kamaluddin Ahmed, Organizing Secretary who has been transferred from Shahid Sorwadi Hospital to Mymensing Medical College Hospital, Dhaka. The complainant alleges that the transfer orders were issued a few days before a major BDNA conference on 28 November 2004 which was called to review a set of proposals designed to improve health services, employment conditions and address pay equity in Bangladesh. The complainant also alleges that the transfers are in contravention of the rules and regulations of the Ministry of Establishment.

462. The complainant states that it had written to the Nursing Director and the Prime Minister requesting that these transfers be revoked. However, the concerned trade union officials were directed to comply with the transfer orders within three days failing which they would be subject to dismissal procedures. Furthermore, up to 200 other members of the BDNA were also told that they would receive similar orders.
463. The complainant requests that: (a) all the aforementioned transfer notices be revoked and the persons affected be able to return to the posts they held previously; (b) the Nursing Directorate put an end to all discriminatory and intimidatory actions against the leaders and members of the BDNA; and (c) the Nursing Directorate and the Ministry of Health enter into negotiations with the BDNA concerning their legitimate demands for improvements in overall funding of health services in Bangladesh and terms and conditions of employment.

B. The Government's reply

464. The Government states that the concerned nurses had been transferred for administrative reasons and in the public interest and that their transfer does not amount to an infringement of trade union rights in Bangladesh. The Government also states that the aggrieved nurses filed writ petitions in the High Court Division of the Supreme Court against the transfer orders. The High Court issued injunctions on the transfer orders against which the Government filed petitions for leave to appeal to the Appellate Division. The Appellate Division stayed the ad interim orders of the High Court Division and parties were directed to take positive steps for expeditious disposal of the said writ petitions pending before the High Court Division.

C. The Committee's conclusions

465. *The Committee notes that this case concerns allegations of anti-union discrimination against the officials and members of the Bangladesh Diploma Nurses Association (BDNA). The complainant states that ten officials of the central executive of the BDNA including its Senior Vice-President, General Secretary, Joint General Secretary and Organizing Secretary were issued transfer orders by the Director of Nursing on 26 November 2004 just two days prior to a major BDNA conference to be held on 28 November 2004. According to the complainant, the transfer orders were issued with a view to disrupt the legitimate activities of the union. The complainant also states that the transfer orders are in contravention of the relevant rules and regulations of the Ministry of Establishment. The Government on the other hand states that the transfer orders had been issued for administrative reasons and in the public interest. The Government also states that the concerned nurses have filed writ petitions against their transfer orders that are pending before the High Court Division of the Supreme Court.*
466. *While taking note of the explanation of the Government that the transfer orders were issued for administrative reasons and in the public interest, in the view of the Committee, the en masse nature of the transfer, the fact that ten central executive members of the BDNA including its Senior Vice-President, General Secretary, Joint General Secretary and Organizing Secretary were transferred and the fact that the transfer orders were issued just two days prior to a major BDNA conference, suggests the possibility of a link between the transfers and the union activities of the transferred officials. In addition, the unanswered allegation that about 200 other members of the union were told that they would also be issued similar transfer orders seems to suggest that members of the union were generally being threatened for their union activities. The possibility of a link between the transfers and the trade union activities of the concerned BDNA officials is further reinforced by the fact that in a previous complaint presented in the recent past by the PSI on behalf of the BDNA (Case No. 2188) concerning the dismissal of Ms. Taposhi*

Bhattacharjee, President of the BDNA, the complainant had drawn attention to the fact that some of the officials presently transferred, in particular Ms. Krishna Beny Day, Senior Vice-President, Ms. Israt Jahan, General Secretary and Mr. Golam Hossain, Joint General Secretary, were at that time being harassed and victimized for their trade union activities and their public support to the President of the BDNA [see 329th Report, paras. 194-216]. The Committee notes with regret in this respect that the Government has never indicated, within the framework of Case No. 2188, the measures taken to implement its recommendation to issue instructions to the management of the Shahid Sorwardi Hospital to withdraw the warnings issued to ten members of the BDNA executive committee.

- 467.** *The Committee recalls in this context that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom. 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 of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 724 and 738].*
- 468.** *The Committee regrets that the transfers were allowed to take effect even before the cases against the orders of transfer were determined finally on their merits, particularly when there appears to be evidence linking the transfers to the trade union activities of the concerned BDNA officials. Noting that the writ petitions filed by the concerned officials of the BDNA against the orders of transfer issued to them on 26 November 2004 are pending before the High Court Division of the Supreme Court, the Committee expects that the court will take due account in its deliberations of the provisions of Conventions Nos. 87 and 98, which have to be fully incorporated in law and in practice and requests the Government to keep it informed of the outcome of the court proceedings and to provide it with the texts of the final orders of the High Court Division in these matters. The Committee also requests the Government to take the necessary measures to ensure that the concerned trade union officials are permitted to return to their original workplaces in the event of the court deciding that the transfer orders were issued on account of their trade union activities. The Committee requests the Government to keep it informed of developments in this respect.*
- 469.** *Taking into account the various allegations of anti-union discrimination against the officials and members of the BDNA, the Committee requests the Government to institute immediately an independent investigation into the allegations of anti-union discrimination against the officials and members of the BDNA, having due regard to the court proceedings currently under way, and, if it is found that the workers were harassed and victimized for their union activities, to take suitable measures to redress the situation and ensure that these union leaders may freely discharge their trade union duties and exercise their trade union rights. The Committee requests the Government to keep it informed of the measures taken in this regard.*

The Committee's recommendations

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

- (a) *Noting that the writ petitions filed by the concerned officials of the Bangladesh Diploma Nurses Association against the orders of transfer issued to them on 26 November 2004 are pending in the High Court Division of the Supreme Court, the Committee expects that the court will take due account in its deliberations of the provisions of Conventions Nos. 87 and 98, which have to be fully incorporated in law and practice, and requests the Government to keep it informed of the outcome of the court proceedings and to provide it with the texts of the final orders of the High Court Division in these matters. The Committee also requests the Government to take the necessary measures to ensure that the concerned trade union officials are permitted to return to their original workplaces in the event of the court deciding that the transfer orders were issued on account of their trade union activities. The Committee requests the Government to keep it informed of developments in this respect.*
- (b) *The Committee requests the Government to institute immediately an independent investigation into the allegations of anti-union discrimination against the officials and members of the BDNA, having due regard to the court proceedings currently under way, and, if it is found that they were harassed and victimized for their union activities, to take suitable measures to redress the situation and ensure that these union leaders may freely discharge their trade union duties and exercise their trade union rights. The Committee requests the Government to keep it informed of the measures taken in this regard.*

CASE NO. 2407

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

Complaint against the Government of Benin presented by the Confederation of Autonomous Trade Unions of Benin (CSA-BENIN)

Allegations: The complainant alleges that the employer, Financial Bank Benin, dismissed, in a selective and discriminatory manner, some 40 workers (most of them trade union officials and staff delegates) who were members of the Union of Workers of the Financial Bank Benin (SYN.TRA.F.I.B), because of their participation in a strike

471. The complaint is contained in communications from the Confederation of Autonomous Trade Unions of Benin (CSA-BENIN) dated 31 January and 18 March 2005.

472. The Government sent its reply in a communication dated 31 May 2005.
473. Benin 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

474. In its communication of 31 January 2005, the Confederation of Autonomous Trade Unions of Benin (CSA-BENIN) explains that, in accordance with the recommendations of the West African Economic and Monetary Union (UEMOA), the Financial Bank Benin was placed under temporary guardianship from April 2003 to July 2004 because of its poor results. At the end of that period, it was necessary to restore the bank's decision-making bodies (the general assembly of shareholders and the board of directors) and appoint a managing director. On 29 July 2004, the board of directors appointed Mr. Labonté, former director of operations of the bank, to that post. This gave rise to serious concerns among the staff because of Mr. Labonté's methods in the past, which have been described as "dubious". On 30 July 2004, the Union of Workers of the Financial Bank Benin (SYN.TRA.F.I.B) sent a petition on behalf of the staff to the chairperson of the board of directors, setting out their concerns regarding Mr. Labonté, in particular: his responsibilities, when director of operations of the bank, in creating a situation in which the bank was placed under temporary guardianship; extortion from clients; issuing cheques without the necessary funds; failure to adhere to commitments; and attempts to sabotage the temporary guardianship.
475. Mr. Labonté took up his new post on 3 August 2004, despite the protests of the staff. On the same day, the SYN.TRA.F.I.B passed a motion to go on strike for 72 hours to demand his resignation. At a meeting with the union and staff delegates, Mr. Labonté made some statements which somewhat reduced the tension. Just after the meeting, however, on 5 August 2004, he issued an official memo (No. 0408/DG/008) expressing disapproval of the strike motion and threatening sanctions against all the workers who had participated in the stoppage organized by the SYN.TRA.F.I.B. An initial attempt at conciliation failed. The staff held a general meeting on 6 August to decide on the implementation of the strike motion, and the strike took place over three days (from 9 to 11 August). The strike was renewed for a further three days (12 to 14 August) following a second unsuccessful conciliation initiative.
476. Another meeting was held on 12 August between the CSA-BENIN, its affiliate the Federation of Bank Employees' Unions (FE.S.TRA.BANK), of which the SYN.TRA.F.I.B is a member, and the bank's senior managers. This led to a written agreement according to which the board of directors would hold an extraordinary meeting on 13 August in order to consider the workers' grievances. The directors also gave an undertaking not to discipline workers who resumed work on 13 August. The CSA-BENIN has supplied a copy of the relevant minutes of the meeting of 12 August.
477. In accordance with the agreement, the board of directors set up a commission of inquiry to verify the allegations made by staff. The commission presented its report on 27 August (a copy of which is attached to the complaint). Despite the report's conclusions confirming some of the allegations, in particular the allegation that Mr Labonté had issued cheques without adequate funds, the board of directors confirmed Mr. Labonté in his post on 30 August.
478. The bank directors then began to apply sanctions against workers, in contravention of the agreement of 12 August. The deputy managing director was removed from his post, and the posts of inspector (auditor) general were abolished because the incumbents had stated

that Mr. Labonté did not have the qualifications required to extricate the bank from its difficulties. The bank's directors decided to dismiss 40 employees, including ten trade union officials (among whom was the general secretary) and four staff delegates, as of 17 September 2004. The reason given was that they had taken part in the stoppage organized by their union.

- 479.** A number of actions were carried out at the local and national levels by the different trade unions concerned, including actions aimed at the Ministry, the Government and the President, but without success. The complainant alleges that the bank's directors infringed national laws and Conventions Nos. 87 and 98. It also argues that, if the real motive for the dismissals was the fact that workers had responded to a strike call by the SYN.TRA.F.I.B, they should have affected all the workers, who heeded the strike call unanimously. Since more than 100 bank employees were not dismissed, the dismissals must have been selective and discriminatory, and had the characteristics of reprisal action. They were arbitrary in that they affected union officials and staff delegates, and were carried out without the due process normally required by national legislation.
- 480.** In its communication of 18 March 2005, the complainant provides copies of the correspondence of August 2004 between the chairperson of the board of directors and Mr. Dossou-Ahoue, deputy managing director of the bank and Mr. Labonté's superior at the time of these events, concerning certain irregularities and uncovered cheques, which cast doubt on Mr. Labonté's suitability for the post of managing director.

B. The Government's reply

- 481.** In its communication of 31 May 2004, the Government states that on 4 July 2004, the Ministry of Labour was presented with a motion to strike for 72 hours as planned by the workers of the Financial Bank Benin, in protest against the appointment of Mr. Labonté as managing director. The reason given for this was that the appointment posed a threat to customers, shareholders and employees. During discussions with the union aimed at finding a way out of the crisis, the union referred to the period of temporary guardianship during which Mr. Labonté had allegedly carried out a number of dubious acts, but gave no details. Mr. Labonté took the view that there was no justification for his resigning, as the union had demanded, and that this demand was unconnected with his professional suitability.
- 482.** The union's representatives were invited to supply details of the alleged acts and asked to suspend the planned strike, as they were engaged in talks with the board of directors which alone can appoint or dismiss a managing director. Contrary to all expectations, the strike went ahead, while consultations were supposed to continue, involving both the Minister and the board of directors.
- 483.** The Government recalls that Benin has acceded to the universal and regional instruments concerning the right of association, right of assembly, and right to form and join unions. It has also ratified ILO Conventions Nos. 87 and 98. Articles 25 and 31 of the country's Constitution recognize the rights of association, assembly, demonstration and strike. This also applies to the laws and regulations applicable specifically to civil servants and private sector workers.

484. Nevertheless, the right to strike is not an absolute and unlimited right. Article 8 of Convention No. 87 states that “In exercising the rights provided for in this Convention workers and employers and their respective organizations, like other persons or organized collectivities, shall respect the law of the land.” Article 31, *in fine*, of the Constitution stipulates that the right to strike may be exercised within the context defined by law. Section 264 of the Labour Code provides that strike action may be taken only if talks with the labour inspector or director have failed. In this case, talks were to be continued with the board of directors and with the relevant department of the Ministry when the strike began and was subsequently renewed.
485. As regards the reasons given for the dismissals, the employer cites the illegal work stoppage, and refutes the social motives of the strike. The Government is aware that the right to strike implies the continuation of the employment relationship, and that the legitimate exercise of the right to strike should not result in the dismissal of strikers, but considers nevertheless that any dispute arising from the exercise of the right to strike must be dealt with in the same way as any other individual or collective labour dispute. The relevant procedure is set out in sections 254-256 of the Labour Code and is based in essence on conciliation between the parties concerned. Efforts were made to bring this about but without success. The Government also points out that its efforts of persuasion have prevented other planned dismissals from taking place.
486. The fundamental issue on which the parties cannot agree is that of the legitimacy of the strike movement of the bank’s workers. Since it has not been possible to achieve settlement of the dispute through reconciliation, a response will be given by the court of first instance to which the case will be referred.
487. Responding to the main accusation made by the union, i.e. that it failed to exercise its political authority to demand the reinstatement of the dismissed workers, the Government states that neither judicial precedents nor positive law in Benin recognizes a right to reinstatement for dismissed workers.

C. The Committee’s conclusions

488. *This complaint concerns the dismissal of some 40 union members, officials and staff delegates following a strike called by the Union of Workers of the Financial Bank Benin (SYN.TRA.F.I.B) in protest against the appointment of a new managing director following a period of temporary guardianship imposed by the West African Economic and Monetary Union (UEMOA) owing to the bank’s poor performance.*
489. *The Committee notes that, according to the workers and their union, the new managing director Mr. Labonté bears personal responsibility for the situation which led the bank into temporary guardianship, that he was guilty of actions that were contrary to the bank’s directives (issuing uncovered cheques, unauthorized overdrafts) during the period of temporary guardianship, and that he does not have the qualifications required to improve the bank’s situation. Mr. Labonté considers that there is nothing to justify the call for his resignation made by the SYN.TRA.F.I.B.*
490. *The Committee wishes to emphasize from the outset that it is not for it to decide as to whether or not the grievances of the staff against Mr. Labonté are well founded.*

491. *As regards the central issue of the legality of the strike on which the justification of the dismissals depends, the Committee recalls that, while the Committee has always regarded the right to strike as constituting a fundamental right of workers and of their organizations, it has considered it as such only in so far as it is utilized as a means of defending their economic and social interests [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 473 and 474]. Noting that the litigation regarding the legality or otherwise of the strike has been referred to the court of first instance, the Committee requests the Government to communicate to it the text of any ruling handed down in the matter.*
492. *The Committee also notes that the complainant alleges that the dismissals were discriminatory in that they applied selectively to ten union officials and four staff delegates, of the 40 persons dismissed. The Confederation of Autonomous Trade Unions of Benin (CSA-BENIN) maintains that the provisions of national legislation providing greater protection for union officials were not respected. The Committee is not in a position to give an opinion on these points, since it has not received any relevant details from the complainant organization and no reply from the Government. Recalling that, where cases of alleged anti-union discrimination are involved, the competent authorities dealing with labour issues should begin an inquiry immediately and take suitable measures to remedy any effects of anti-union discrimination brought to their attention [see **Digest**, op. cit., para. 754], the Committee requests the Government to carry out swiftly an independent and impartial inquiry, having due regard to the judicial proceedings under way, in order to determine whether there has been anti-union discrimination on the part of the bank. In addition, since Benin has ratified the Workers' Representatives Convention, 1971 (No. 135), that inquiry should also reveal whether national legislation giving effect to that Convention has been properly applied in this case. The Committee requests the Government to communicate the results of the inquiry on these two points as soon as they are available.*

The Committee's recommendations

493. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee requests the Government to communicate to it the text of the ruling of the court of first instance concerning the legality of the strike carried out in August 2004 by the Union of Workers of the Financial Bank Benin (SYN.TRA.F.I.B).*
 - (b) *The Committee requests the Government to carry out swiftly an independent and impartial inquiry, having due regard to the judicial proceedings under way, in order to determine whether there was anti-union discrimination in the dismissals carried out in August 2004 by the Financial Bank Benin and whether national legislation giving effect to the Workers' Representatives Convention, 1971 (No. 135), has been properly applied in this case, and to communicate to it the results of that inquiry as soon as they are available.*

CASE NO. 2374

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

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

Allegations: The complainant alleges anti-union discrimination through the dismissal of striking workers and interference by employers in the establishment of a union at the Raffles hotels in Phnom Penh; and the existence of a non-binding arbitration procedure in relation to such complaints

- 494.** The complaint is contained in a communication dated 2 August 2004 from the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF), on behalf of its affiliated organization in Cambodia, the Cambodian Tourism and Service Workers' Federation (CTSWF).
- 495.** As a consequence of the lack of a response on the part of the Government, at its June 2005 meeting [see 337th Report, para. 10], the Committee launched an urgent appeal and drew 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 may present a report on the substance of this case even if the observations or information from the Government in question have not been received in due time. To date, the Government has not sent its observations.
- 496.** Cambodia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 497.** In its communication dated 2 August 2004, the complainant stated that following a legal and peaceful strike on 5-10 April 2004, the management of the Raffles hotels in Phnom Penh and Siem Reap had refused to allow striking workers to return to work at the two hotels, and instead had dismissed some 293 workers (97 in Phnom Penh, 196 in Siem Reap) for "serious misconduct".
- 498.** The complainant explained that although the Tripartite Arbitration Council had found unanimously that the dismissals were illegal, the hotel management had refused to accept the decision, considering that it was "non-binding". The complainant reported that the Arbitration Council had also found that "within two weeks of improperly dismissing 97 union members, including all of the union leadership, the Raffles Hotel Le Royal had organized an unlawful election of worker delegates and entered into a collective agreement with the group. These actions revealed a clear intent on behalf of the ownership and management of the Hotel Le Royal to bypass the union, which had the sole right to represent workers in the collective bargaining process. In pursuing this strategy, the

employer party had shown a flagrant disregard for the right to freedom of association and the right to bargain collectively”.

- 499.** The complainant added that the Raffles general manager had refused to submit documents to the Arbitration Council relating to the alleged election of a new union at the Hotel Raffles Le Royal and collective agreement he had signed with it. During a management raid on the union office at the Raffles Hotel Le Royal, the hotel personnel manager had deliberately torn up and destroyed the government certificate establishing the union as the representative trade union for its employees.
- 500.** According to the complainant, the Cambodian Government did not provide for any effective protection of the fundamental rights of freedom of association and collective bargaining that are guaranteed both in national legislation and by the ILO Conventions if the employer chose not to accept the findings of the Arbitration Council. Management’s mass dismissals and promotion of its controlled “union” and “collective bargaining agreement” violated basic trade union rights and the enforcement of these rights should not be left to non-binding arbitration. The notoriously slow and corrupt municipal courts provided no effective legal recourse, leaving the legitimate union no option but a prolonged strike.
- 501.** The complainant considered that the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation (MOSALVY), which is charged with the enforcement of Cambodian Labour Law, disregarded its responsibilities under Prakas (ministerial order) No. 305 (“regarding the representativeness of professional organizations of workers at the enterprise or establishment level and the right to collective bargaining for the conclusion of collective agreements at that level”), as this law calls for the protection of union representatives against dismissal (articles 3 and 4) and for the determination of most representative union status and a prohibition on employer interference in union affairs (articles 5 and 6). Moreover, article 280 of the basic Cambodian Labour Law specifically prohibits management interference in union affairs.
- 502.** The complainant further reported that despite the findings of the tripartite Arbitration Council, MOSALVY had not only failed to enforce the law, but the Deputy Director of its Labour Inspection had been quoted in the press that the Ministry supported the “illegal” collective agreements reached with the “management-controlled” unions at both hotels. MOSALVY refused to respond to the request from the CTSWF regarding its position on union recognition status at the hotel and the registration of collective bargaining agreements.

B. The Committee’s conclusions

- 503.** *The Committee deeply regrets that, despite the time which has elapsed since the presentation of the complaint, to date the Government has not responded to the allegations made by the complainant, although the Committee has urged it to send its observations or information on the case on several occasions, including through an urgent appeal made at the Committee’s June 2005 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.*

504. *The Committee recalls that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for this freedom in law and in fact. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments on their side will recognize the importance of formulating, for objective examination, detailed replies concerning allegations made against them.*
505. *The Committee notes that the allegations in this case concern: acts of anti-union discrimination due to the dismissal of striking workers; interference by the management in the establishment of a union at the Raffles Hotel in Phnom Penh; and the existence of a non-binding arbitration procedure in relation to such complaints.*
506. *With respect to the dismissal of workers on strike (97 in Phnom Pen, including all of the union leadership, and 196 in Siem Reap), the Committee notes from the allegations that these dismissals occurred following a legal and peaceful strike that took place in April 2004. It must recall 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 dismissal of workers because of a legitimate strike constitutes discrimination in employment [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 475 and 704]. The Committee also notes that Articles 3 and 4 of Prakas (ministerial order) No. 305 (“regarding the representativeness of professional organizations of workers at the enterprise or establishment level and the right to collective bargaining for the conclusion of collective agreements at that level”) require the protection of union representatives against dismissal. The Committee emphasizes that this protection is particularly important since, in order for trade union officials 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]. Recalling that the basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed, [see **Digest**, op. cit., para. 739], and in the light of the position taken by the tripartite Arbitration Council established by law which determined that the dismissals were illegal, the Committee urgently requests the Government to ensure in cooperation with the employer that the workers dismissed as a result of their legitimate trade union activities are reinstated without loss of wages and without delay or, if it is found by an independent judicial body that reinstatement in one form or another is not possible, that they are paid adequate compensation along with penalties against the employer in conformity with applicable national legislation, which would represent sufficiently dissuasive sanctions for such anti-trade union actions. The Committee requests the Government to keep it informed of any developments in this regard.*
507. *Concerning the question of alleged interference by management in the establishment of a union at the Raffles Hotel in Phnom Penh, the Committee notes from the information provided by the complainant that the Arbitration Council found that within two weeks of dismissing 97 union members, including all of the union leadership, the Raffles Hotel Le Royal organized an unlawful election of worker delegates and entered into a collective agreement with them. According to the Arbitration Council, these actions revealed a clear intent on behalf of the ownership and management of the Hotel Le Royal to bypass the union; in pursuing this strategy the employer party had shown a flagrant disregard for the right to freedom of association and the right to bargain collectively.*

508. *The Committee notes from the complainant's allegations that the Raffles general manager allegedly refused to submit documents to the Arbitration Council relating to the election of a new union at the Hotel Raffles Le Royal and the collective agreement he had signed with it and that during a management raid on the union office at the Raffles Hotel Le Royal, the hotel's personnel manager deliberately tore up and destroyed the government certificate establishing the CTSWF as the representative trade union for its employees. The Committee also notes the allegations that the MOSALVY supported the new trade union to the detriment of the CTSWF.*
509. *The Committee recalls that Article 2 of Convention No. 98 establishes the total independence of workers' organizations from employers in exercising their activities and that these organizations should enjoy adequate protection against any acts of interference by employers in their establishment, functioning or administration [see **Digest**, op. cit., para. 759]. In this connection it observes that articles 5 and 6 of Prakas No. 305 ("regarding the representativeness of professional organizations of workers at the enterprise or establishment level and the right to collective bargaining for the conclusion of collective agreements at that level") provide for the determination of most representative union status and a prohibition on interference by employers in union affairs, and that article 280 of the Labour Code specifically prohibits management interference in union affairs. The Committee recalls once again that the basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed [see **Digest**, op. cit., para. 739]. With respect to the alleged support of MOSALVY for the new trade union, the Committee has considered on many occasions that the attitude of public authorities that consists in favouring or discriminating against one or more trade union organizations, for instance by means of public statements or by refusing to recognize the leaders of certain organizations in the performance of their legitimate activities, jeopardizes the right of workers set out in Convention No. 87, Article 2, to establish and join organizations of their own choosing [see **Digest**, op. cit., para. 306]. In view of the foregoing, and emphasizing that, in accordance with the principles of freedom of association, both the government authorities and employers should refrain from any discrimination between trade union organizations [see **Digest**, op. cit., para. 307], the Committee urges the Government to take all necessary measures, in conformity with the conclusions drawn by the tripartite Arbitration Council, to put an end to the acts of anti-union discrimination and interference in this case. The Committee requests to be kept informed in this respect.*
510. *Finally, with respect to the allegations that the enforcement of trade union rights was left to non-binding arbitration, the Committee notes that, according to the allegations, the employer is reported to have refused to accept the Arbitration Council's decision. The Committee recalls the need to ensure by specific provisions accompanied by civil remedies and penal sanctions the protection of workers against acts of anti-union discrimination at the hands of employers. The Committee also emphasizes 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 that it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see **Digest**, op. cit., paras. 746-748]. The Committee considers that the protection of workers' trade union rights needs to be accompanied by efficient and enforceable procedures and requests the Government to ensure that all workers who suffer acts of anti-union discrimination have access to procedures which lead to final and binding decisions. In the present case, the Committee requests the Government to take the necessary steps urgently to ensure that the rights of the workers and union leaders concerned are effectively protected.*

The Committee's recommendations

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

- (a) *The Committee deeply regrets that the Government has not replied to the allegations despite the fact that it was invited to do so on several occasions, including by means of an urgent appeal, and urges it to reply promptly.***
- (b) *The Committee urgently requests the Government to ensure in cooperation with the employer that the workers dismissed as a result of their legitimate trade union activities are reinstated without loss of wages and without delay or, if it is found by an independent judicial body that reinstatement in one form or another is not possible, that they are paid adequate compensation along with penalties against the employer in conformity with applicable national legislation, which would represent sufficiently dissuasive sanctions for such anti-trade union actions. The Committee requests the Government to keep it informed of any development in this regard.***
- (c) *Concerning the question of alleged interference by management in the establishment of a union at the Raffles Hotel in Phnom Penh, the Committee urges the Government to take all necessary measures so as to 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.***
- (d) *With respect to the allegations that the enforcement of trade union rights were left to non-binding arbitration, the Committee considers that the protection of workers' trade union rights needs to be accompanied by efficient and enforceable procedures and requests the Government to ensure that all workers who suffer acts of anti-union discrimination have access to procedures which lead to final and binding decisions. In the present case, the Committee requests the Government to take the necessary steps urgently to ensure that the rights of the workers and union leaders concerned are effectively protected.***

CASE NO. 2382

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

**Complaint against the Government of Cameroon
presented by
the Single National Union of Teachers and Professors
in the Teachers' Training Faculty (SNUIPEN)**

Allegations: The complainant organization alleges that its general secretary was arrested by police without a warrant, repeatedly interrogated with use of threats and violence, then detained for three days, during which he was interrogated until he agreed, under pressure, to hand over union funds to a dissident faction of the SNUIPEN executive. The complainant organization also alleges that the police illegally removed the general secretary from his union position, repeatedly intimidated and harassed him, tried to arrest him again, searched his home, examined and seized union files and accounts, all of which without a warrant

512. The complaint is contained in communications from the Single National Union of Teachers and Professors in the Teachers' Training Faculty (SNUIPEN) dated 10 August 2004, 18 January and 13 June 2005.

513. The Government replied in a communication dated 1 March 2005.

514. Cameroon 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

515. In his communication dated 10 August 2004, Mr. Joseph Ze, general secretary of the Single National Union of Teachers and Professors in the Teachers' Training Faculty (SNUIPEN) explained that this organization is the largest and the best structured in this sector with more than 27,000 members (infants school and primary school teachers, and teacher trainers) out of 50,500 teachers, across all levels of education. The SNUIPEN was set up in May 1999, obtained approved status in July 2000 and held its first congress in August 2001; in November 2001, it took part in setting up the Confederation of Independent Unions of Cameroon and, in May 2004, the National Coordinating Committee of Teaching Unions.

516. While it was preparing for its second congress, the SNUIPEN underwent an internal crisis, which was used as a pretext by some members of the police force to violate trade union rights, aided and abetted by some members of the union. Mr. Roger Messi Bikoe, in

violation of union rules, secretly convened “national councils”, held in May 2004, during which the participants decided to remove Mr. Ze from office, without informing him of the decision, and tried to take possession of the SNUIPEN’s assets. Its funds were transferred to a new bank account as a precautionary measure. After Mr. Bikoe and the dissidents had failed to achieve their objectives, they called in the police and accused Mr. Ze, without any evidence, of having embezzled 6 million CFA francs.

- 517.** Mr. Ze was arrested on the morning of Friday, 16 April 2004, and taken to the police station where he was summarily and brutally interrogated by Captain Mengnfo Fai and Sergeant Ndjekida. The initial basis for the complaint against him was dropped, due to lack of evidence, and replaced by a new demand to release 3,800,000 CFA francs, which was the amount of the subsidy accorded to the SNUIPEN by the Ministry of Education. Mr. Ze was put into a prison cell for the whole weekend because he had refused to comply with this demand. He was interrogated again on Monday, 19 April, at intervals between 8 a.m. and 2 p.m. Finally, he agreed to go to the bank around 3 p.m. accompanied by Sergeant Ndjekida, and withdrew 2,300,000 CFA francs, which he handed over to the officer. When the officer returned to the police station, however, he declared there were 2,250,000 CFA francs, after having taken 50,000 CFA francs for himself on the way back. The dissidents considered this amount to be insufficient and demanded that Mr. Ze sign a statement acknowledging that he owed the union the amount in question, which, finally, exhausted and under pressure, he did. He was then released on 19 April.
- 518.** Mr. Ze reported these facts to the Ministry of Education and lodged a complaint with the Secretary of State and Defence (SED), which is in charge of the police. The SED is currently conducting an inquiry. Captain Mengnfo Fai has been suspended from his duties until the inquiry is concluded. Sergeant Ndjekida keeps threatening Mr. Ze for having defied the police. The dissidents keep spending the union funds, which they obtained fraudulently. The complainant considers that, even if the conclusions of the inquiry were brought before a court, there is no guarantee that the complaint would be investigated with all due respect for the law, given previous negative experiences.
- 519.** The complainant organization submits that the national councils held in April and May 2004 were convened in violation of union rules; that the complaint made by Mr. Bikoe should have been declared inadmissible as he did not have the right to bring charges on behalf of the SNUIPEN; that the police blatantly violated Convention No. 87 in arresting Mr. Ze, the elected general secretary of the union; and extorted union funds by forcing him to release these funds to a dissident faction.
- 520.** In its complaint dated 18 January 2005, the SNUIPEN reported that Mr. Ze was arrested once again on 12 January 2005, placed in a prison cell for 48 hours and then transferred to remand at the Yaoundé prison. According to the SNUIPEN, this arrest and detention were based on events related to the current complaint.
- 521.** In its communication dated 13 June 2005, the SNUIPEN reported that Mr. Ze was still in preventive detention (for three months at that point) and that the examining magistrate was making no efforts to begin a judicial inquiry, even though there was no reason why Mr. Ze could not appear as a free man.

B. The Government's reply

522. In its reply dated 1 March 2005, the Government stated that Mr. Ze was replaced as general secretary of the union at the end of the second SNUIPEN congress, which was held on 4 August 2004. The new leadership then demanded the restitution of union funds of which the complainant was in charge. Mr. Ze, however, disputed the legitimacy of the new leadership, which called on the police to partly recover the funds. The procedure to recover these funds entailed the complainant being taken into custody illegally. The funds thus recovered were handed over to the beneficiary trade union.
523. As regards the alleged violation of trade union rights, the Government stated that the second SNUIPEN congress was held in accordance with its by-laws; Mr. Ze did not challenge the legitimacy of the new union leadership in accordance with legal procedure: instead of appealing to the courts, he resisted the requests for restitution of union funds. By his own actions, Mr. Ze was the one who started what he referred to as the "internal crisis" of his trade union. The Government cannot be held responsible for the consequences of the choices made by the parties to call in the police rather than applying to the competent courts to settle their differences.
524. The Government endeavours to promote trade union pluralism and the proper exercise of freedom of association, in particular through the Committee for Synergy within the Ministry of Labour. In addition, the Government endeavours to promote respect for human rights and is constantly working with the police to increase awareness of due regard for the law when they take people into custody. The complainant is no longer in prison and the Government guarantees the Committee on Freedom of Association that the SNUIPEN will return to normal functioning once the complainant has returned the funds.

C. The Committee's conclusions

525. *The Committee notes that this complaint concerns the arrest, detention and interrogation of the general secretary of Single National Union of Teachers and Professors in the Teachers' Training Faculty (SNUIPEN), Mr. Joseph Ze, and the interference of certain police officers in an internal trade union dispute.*
526. *As regards the internal dispute within the SNUIPEN, the Committee notes that Mr. Ze disputes the legitimacy of the new leadership, which he claims was chosen during a so-called national congress which had been convened secretly and in violation of the union's by-laws. The Government, however, considers that the congress in question was held in accordance with the union's by-laws, and that Mr. Ze was removed from office according to the union's rules and replaced as head of the union. The Committee also notes that no court ruling has been handed down regarding the legality of the congress held on 4 August 2004, Mr. Ze's removal from office and the possible validity of the accusations against him of embezzlement of union funds brought by the dissident faction, which the Government now considers, for practical purposes, to be the legitimate leadership of the SNUIPEN.*
527. *The Committee recalls that it is not for it to comment on internal union disputes, as long as the Government has not intervened in a manner which might affect the exercise of trade union rights and the normal functions of a trade union, and that the involvement of the courts may allow the situation to be clarified from a legal point of view and may allow the leadership and representation of the trade union in question to return to normal [see *Digest of decisions and principles of the Freedom of Association Committee*, 4th edition, 1996, para. 965].*

- 528.** *In this particular case, the Committee observes that Mr. Ze was questioned by the police, kept in custody and was brutally and summarily interrogated, without a court having had the opportunity to give a ruling as to the legality of the congress held on 4 August 2004 which had removed Mr. Ze from office, or on the accusations brought against him by the new leadership of the SNUIPEN. Furthermore, the Government acknowledges that what it refers to as a “procedure to recover” these funds entailed the complainant being taken into custody illegally. The Committee considers that, by acting in this way, summarily to say the least, the members of the police implicated here effectively took the side of the dissident faction, and this is an attitude that the Government appears to have subsequently adopted, as can be seen in its reply to the complaint.*
- 529.** *The Committee emphasizes the obligation of total neutrality for all governments with respect to internal union disputes. The Committee reminds the parties that they may request the competent court to examine the question of the legality of the convening of the second SNUIPEN congress and the alleged removal from office of Mr. Ze, so that the court may make a ruling based on proven facts and the relevant provisions of the SNUIPEN’s by-laws. The Committee requests the Government to provide it with a copy of any court ruling in this regard.*
- 530.** *Noting further that one of the police officers concerned has been suspended from his duties until the inquiry by the Secretary of State and Defence into the circumstances surrounding Mr. Ze’s detention on 16 April 2004 is concluded, the Committee requests the Government keep it informed of the inquiry’s conclusions.*
- 531.** *As regards the accusations of embezzlement of funds brought against Mr. Ze, the Committee notes that, here also, certain police officers took up the cause of the dissident faction of the SNUIPEN and, subsequent to the pressure put on him during his interrogation and detention, forced the complainant to release the union’s funds in order to hand them over to the dissidents. This is tantamount to seizure and confiscation of union funds, without any court ruling and without any legal right to do so, to profit a third party. In this regard, the Committee recalls that, while persons holding trade union office cannot claim immunity with respect to ordinary criminal law, they should benefit from normal judicial proceedings and have the right to due process, just like other people, in particular: be informed of charges brought against them; have the time needed for preparation of their defence; be able to communicate freely with counsel of their own choosing; and be judged without delay by an impartial and independent court [see **Digest**, *op. cit.*, paras. 83, 102 and 117]. As these principles were not respected in this particular case, the Committee urges the Government to take the necessary measures to avoid such summary proceedings reoccurring in the future, by giving the police specific instructions with regard to due respect for the law when they make arrests or lay charges.*
- 532.** *As regards the re-arrest of Mr. Ze on 12 January 2005 for reasons which the complainant alleges relate to the complaint, an arrest which led to a long period of preventive detention, the Committee considers that union leaders should not be subject to retaliatory measures, and in particular arrest and detention without trial, for having exercised their rights which derive from the ratification of ILO instruments on freedom of association, in this case for having lodged a complaint with the Committee on Freedom of Association. In addition, the Committee recalls that, although the fact of holding union office does not confer immunity with respect to ordinary criminal law, the prolonged detention of unionists without bringing them to trial constitutes a serious obstacle to the exercise of trade union rights, keeping people on remand should thus be limited to very brief periods of time and only be used to facilitate the course of a judicial inquiry, and should observe all the guarantees of legal procedures [see **Digest**, *op. cit.*, paras. 87, 89 and 91]. The Committee urges the Government to take the necessary measures to avoid such incidents*

reoccurring, by giving the police specific instructions with regard to due respect for the law when they make arrests or detain people on remand.

- 533.** *Given the de facto situation which resulted from the unwarranted interference of the police in this internal union dispute, and to avoid misappropriation of the funds intended for the protection and promotion of workers' rights, the Committee requests the Government take the necessary measures to find out how the assets of the SNUIPEN are managed, for example under judicial control, should the competent court consider it necessary once it has given a ruling on all the matters under consideration.*
- 534.** *The Committee requests the Government keep it informed of action taken on all the recommendations below.*

The Committee's recommendations

- 535.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee reminds the parties that they may request the competent court to examine the question of the legality of the convening of the second SNUIPEN congress and the alleged removal from office of Mr. Ze, so that the court may make a ruling based on proven facts and the relevant provisions of the SNUIPEN's by-laws. It requests the Government to provide it with a copy of any court ruling in this regard.*
 - (b) The Committee requests the Government to keep it informed of the conclusions of the inquiry by the Secretary of State and Defence into the circumstances surrounding Mr. Ze's detention on 16 April 2004.*
 - (c) The Committee urges the Government to give specific instructions to members of the police force with regard to due respect for the law when they make arrests, detain people on remand and lay charges.*
 - (d) The Committee requests the Government to take the necessary measures to find out how the assets of the SNUIPEN are managed, for example, under judicial control, if the competent court considers it necessary once it has given a ruling on all the matters under consideration.*
 - (e) The Committee requests the Government keep it informed of action taken on all the recommendations above.*

CASES NOS. 2343, 2401 AND 2403

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

**Complaints against the Government of Canada
concerning the Province of Quebec
presented by**

CASE NO. 2343

— **the Confederation of National Trade Unions (CSN)**

CASE NO. 2401

— **the *Syndicat de professionnelles et professionnels du gouvernement du Québec* (SPGQ)**

CASE NO. 2403

— **the Federation of Employees of Quebec (FTQ)**
— **the *Centrale des syndicats démocratiques* (CSD) and**
— **the *Centrale des syndicats du Québec* (CSQ)**

Allegations: The complainants allege that, without prior consultation with representative workers' organizations, the Government of Quebec has introduced legislation amending the system of trade union representation and collective bargaining in the health and social affairs sectors, thereby infringing the freedom of association of the employees in question. The new compulsory certification structure involves cancelling certification of existing workers' organizations, thereby forcing them to re-apply for certification; it either imposes or bans particular employees' groups, on the basis of criteria that are unfavourable to workers and could lead to a decline in union membership. A ministerial decree suffices to bring any of these measures into effect. The new legislation amends the collective bargaining system by imposing bargaining at the local or regional level for particular matters, and fails to establish an arbitration mechanism offering the requisite conditions of independence and impartiality

536. The complaint in regard to Case No. 2343 is contained in a communication from the Confederation of National Trade Unions (CNS) dated 10 May 2004.

537. The complaint in regard to Case No. 2401 is contained in communications from the *Syndicat des professionnelles et professionnels du gouvernement de Québec* (SPGQ) dated 20 November and 14 December 2004.
538. The complaint in regard to Case No. 2403 is contained in joint communications by the *Centrale des syndicats démocratiques* (CSD), *Centrale des syndicats de Québec* (CSQ) and Federation of Employees of Quebec (FTQ), dated 27 October 2004 and 21 January 2005.
539. The Government of Canada forwarded the observations of the Government of Quebec regarding the three complaints in a communication dated 21 June 2005.
540. 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).

A. The complainants' allegations

The complainants

541. The Health and Social Services Federation of the Confederation of National Trade Unions (CNS), which is the complainant in Case No. 2343, represents more than 98,000 members belonging to over 550 trade unions. The Federation of Employees within the Confederation of National Trade Unions has 4,800 members belonging to the sector, grouped in nine trade unions accredited in 150 workplaces.
542. The *Syndicat de professionnelles et professionnels du gouvernement de Québec* (SPGQ), which is the complainant in Case No. 2401, is restricted to employees in the civil service or bodies belonging to the Government of Quebec. Currently, the SPGQ represents 18,800 employees of the Quebec civil service and some 130 employees of three establishments in the health sector.
543. Among the complainants involved in Case No. 2403, the Federation of Employees of Quebec (FTQ) is the largest central trade union organization of Quebec, with over half a million members; one-third of its members are engaged in the public and parapublic sectors. The *Centrale des syndicats de Québec* (CSQ) and the *Centrale des syndicats démocratiques* (CSD) represent some 170,000 and 65,000 members, respectively, including employees in the health and social services sectors.
544. The complainants impugn the Act respecting bargaining units in the social affairs sector which amends the Act respecting the process of negotiation of the collective agreements in the public and parapublic sectors, L.Q. 2003, C-25 (hereafter termed "the Act"; relevant excerpts are reproduced in Annex 1).

The legislative background

545. In Quebec, collective labour relations are governed by the Labour Code. In addition, a series of specific laws govern the parapublic sector. The Code provides that an association which wishes to be accredited to represent a group of workers must submit an application to the Labour Relations Committee (CRT), an independent body responsible for the implementation of the Labour Code, and demonstrate that: (1) the group it intends to represent constitutes an appropriate bargaining unit; (2) the majority of employees in the group belong to the association. If these criteria are met, the association is certified for the bargaining unit in question and acquires the exclusive right and responsibility to represent

the interests of its members. Hence, the workers of Quebec enjoy considerable freedom in developing their trade union structures.

- 546.** The employees of the public and parapublic sectors have exercised their freedom of association in the health and social services sector within this legislative framework since the 1960s. They opted to regroup, both within general units bringing together all or a large part of employees engaged by a single employer, or in smaller groups, for example of units by sector activity or by occupation. These choices were endorsed by the CRT. Today, the social affairs network accounts for 468 establishments and over 1,800 service outlets: hospitals, local clinics, local community services centres, long-term accommodation and care centres for persons who are losing their autonomy, centres for young people experiencing problems, etc. A wide range of employees from all categories are engaged in this network: the annexes to the Act list some 360 job types. The trade union members in this sector belong to some 3,300 accreditation units, some of which represent only a few employees, as a result of the fragmentation of certification units.
- 547.** The complainants allege that in 2003, the Government of Quebec adopted several anti-union, or even anti-social, laws. These laws were adopted very hastily, without the usual consultations with interlocutors from the world of work in Quebec and without endeavouring, as is customary, to achieve consensus among them. In addition, they were adopted by means of a “guillotine” procedure whereby the parliamentary debate that should normally occur prior to the adoption of a law is cut short. Normally, this procedure is used only in urgent circumstances that did not pertain in this case. This is the first law in the entire legislative history of Quebec where the State has intervened directly in dictating the composition and number of bargaining units and associations. Indeed, in all previous reforms of labour relations, the State had invariably demonstrated circumspection in such matters, in keeping with core international instruments.
- 548.** The Act introduces the new system of trade union representation that applies solely to associations of employees and establishments in the health sector. It provides that no more than four negotiating bodies can be represented by an association of employees within an establishment in the health sector, namely: personnel in nursing and cardiorespiratory care (27 types of occupation); paratechnical staff, auxiliary services and occupations (155 types of occupation); office staff, technicians and administration personnel (67 types of occupation); technical and professional staff (112 types of occupation).
- 549.** Thus, limiting the number of bargaining units per establishment effectively removes the previous possibility for workers to group themselves in small bargaining units revolving around a single occupation. At the other extreme, this measure also effectively prevents the establishment of a general association representing all employees of a given establishment. The existing units of this type, which are popular in small establishments, will be maintained, but no new ones can be established. The employees of an establishment who have chosen to group themselves in a single bargaining unit for the entire establishment are not affected for the time being by the Act. Meanwhile, associations that are accredited in establishments where employees belong to one of more than three bargaining units will immediately be affected by the Act as a result of the “transitional” regime written into the Act.
- 550.** The CRT, which used to decide whether or not bargaining units were appropriate, no longer has any such power and no debate is possible in this regard.
- 551.** According to the complainants, the Act is intended to dismantle the bargaining units that exist in the sector and replace them with units that are predetermined by the Act. In practical terms, this will lead to the disappearance of a large number of employee associations which will therefore no longer have the right to represent their members and

will simply cease to exist; their members will then be incorporated into other associations. Hence, the right of employees in this sector to join the association of their choice becomes illusory.

- 552.** If an existing association fails to submit an application to the CRT, or if it is too slow to do so, the establishment may apply for withdrawal of accreditation. If the health establishment does not apply for such withdrawal, the minister may do so him/herself. The minister may also decide, as he/she sees fit, that a health establishment should have no more than four employee associations. Any establishment that is subject to such a decision must submit a report on the situation to the minister describing each of the bargaining units that exist and their respective associations. These associations will receive from the establishment only a listing of the employees they represent and who will belong to one of the four bargaining units imposed by the Act. Hence, an association cannot apply to represent employees belonging to one of these four units unless it already represents some of them. As a result, the employees of health establishments can only join with the employees specified by the Government.
- 553.** The Act lays down not only the number of bargaining units that may operate within an establishment, but also who belongs to them. No new accreditation can be granted unless it conforms with the groups laid down in the Act. The transitional regime therefore provides for the disappearance of the existing bargaining units and imposes a model defined by the Act, whereby all employees will be forcibly assigned to one of the four bargaining units laid down by the Act. Accreditation for a given unit will only be given to an association if it seeks to represent all the employees of one of the four categories. Pursuant to the principle of trade union monopoly that is enforced in Quebec, only one association of employees will be granted accreditation for each of these units. Given that the choice of the association is based on level of representation, accreditation will inevitably be granted to the one that can obtain most votes. The process will therefore leave scores, or even hundreds, of associations without accreditation and thus doomed to extinction. Indeed, once their accreditation is withdrawn, these associations will disappear and with them, their experience, their membership and their expertise.
- 554.** Furthermore, the employees belonging to the small associations that have developed around a given occupation will be “diluted” among all the occupations gathered into each of the four categories imposed by the Act. They will not be able to maintain the associations which, in the absence of accreditation, will no longer have any purpose. These employees will find it very difficult to have a voice in the new association and to have their specific concerns reflected in the enlarged bargaining units.
- 555.** Ultimately, the Act will prevent associations from being established in response to the aspirations of employees in the health sector, considerably curtailing their freedom of association, with the remaining associations being subject to excessively rigid rules and thereby undermining the free representation of workers’ interests. The Act will also have a paralysing effect on employees and will discourage unionization. Indeed, the employees in the sector may question the usefulness of an association of employees which can be extinguished at the bureaucratic whim of the legislator.
- 556.** Moreover, the process is likely to cause previously represented employees to renounce union membership. Indeed, it is possible that a new unit may include 40 per cent or more of the employees who were not represented prior to the decree. In such cases, the Act requires that a vote be held to ascertain whether employees wish to become unionized, following which those who were previously represented by an association of employees may find themselves with no association. Moreover, any association which fails to submit an application will automatically lose its certification. Furthermore, the same process is

triggered in the event of a merger or integration of establishments or partial cessation of activities, each of which situations calls accreditation into question.

- 557.** The Act infringes the freedom of association of employees in the sector by reason of the fact that it terminates their associations' accreditation rights. Obtaining accreditation is one of the association activities that lies at the very heart of the freedom protected by the international instruments. In this case, the efforts by a group of employees to establish a recognized organization are nullified overnight by this Act, which is not consistent with the rules originally laid down. Certified associations are suddenly and arbitrarily deprived of their status as recognized associations; employees find themselves suddenly and arbitrarily deprived of their associative strength and obliged to start again from the beginning. For employees, this may culminate in the removal of any trade union recognition in the establishment. They may indeed find themselves deprived not only of their certified association, but also of the benefit of belonging to any certified association at all.
- 558.** The Act furthermore violates the freedom of association of employees in social affairs in that it excludes them from the protection of the Labour Code and railroads them into an accreditation regime that totally ignores the will of employees, their trade union aspirations and, more particularly, their community of interests. In establishing rigid accreditation units, employees who have no community of interests and even, in certain cases, employees with contrary interests, may be forced into the same association. Meanwhile, it is recognized in labour law that community of interest is an essential element in ensuring the viability of a unit. The establishment of rigid categories deprives social affairs employees of any possibility of choice in establishing the group, regardless of the fact that this consideration features in the general regime laid down by the Labour Code.
- 559.** Moreover, the Act totally ignores the geographical element that is provided for in the Labour Code. An establishment may combine several service points over a vast area or even an entire region. Section 9 of the Act provides that only those employees whose home base lies within the territory of a single regional board can belong to a bargaining unit, while a bargaining unit, as defined by the Act, could cover a whole territory, or even an entire administrative region; this may have an impact on an association's activities in that a single unit is required to cover an entire territory, regardless of the distances involved.
- 560.** A centralized structure for collective bargaining has been in place for several years in this sector, with bargaining taking place between, on the one hand, the major trade union confederations and, on the other, the Government and the employers' associations. The resulting agreements are applicable to all workers' associations and all employers. Agreement at the "national" level may provide for and allow so-called "local" bargaining between individual associations and employers in connection with specific employment conditions identified by the parties at the central level. This system is provided for in the Act concerning the system of negotiation of collective agreements in the public and parapublic sectors, which is substantially amended by the Act that has given rise to this complaint.
- 561.** The Act introduces substantial modifications to the modalities for the negotiation of collective agreements in that it dictates which matters are to be negotiated at the local level. The most unacceptable change relates to the fact that a number of important aspects of employment conditions must be negotiated at the so-called local level in circumstances under which workers cannot go on strike and cannot even refer their claims to arbitration. Indeed, the system laid down by the Act provides for local collective bargaining in connection with which strikes are not permitted. In the event of a stalemate, workers have no means to back their demands.

- 562.** While the Act allows for recourse to arbitration for disputes in local matters, this may take place only once, during the first round of bargaining following the changes imposed by the Act with, in addition, very substantial restrictions being placed on the arbitration tribunal. The method specified is known as the “selection of last offers” transmitted to the arbiter by each of the parties. However, section 42 of the Act provides that the option selected by the mediator-arbitrator cannot involve any costs additional to those already existing for implementing the matters in question and must ensure provision of services to clients. This effectively denies workers in this sector the right to bargain freely.
- 563.** Removing a range of employment conditions from the sphere of national level bargaining violates the principles of freedom of association, in that the mechanisms established by the Act for the negotiation of such matters hamper the establishment of any genuine process of collective bargaining. These matters are not of the type that can be removed from free and voluntary negotiation on the pretext that they fall within the competence of the administration of government affairs. In addition, these provisions infringe the principles of freedom of association in the sense that the level at which collective bargaining takes place should be decided by the parties concerned, not imposed by legislation.
- 564.** In short, the Act ultimately destabilizes and weakens the trade union movement in the social affairs network, by uprooting the workers’ associations which will, for the most part, cease to exist as a result of implementation of the system introduced by this law and by depriving workers of the right to bargain freely in several important aspects of employment conditions. This law sets a dangerous precedent in the annals of labour relations in Quebec, in that the legislator has departed from the historical principle whereby the Labour Code protects freedom of association and allows employees to join associations of their choice, in full freedom and without interference by the employer. The Act undermines the principles of freedom of association because it denies the choice expressed by employees, both in regard to the identity of the association chosen to represent them and in the composition, structure and modus operandi of their association.
- 565.** The complainant organizations ask the Committee to note that the Act is contrary to the Conventions and to the principles of freedom of association, and to recommend that it be repealed or amended to bring it into conformity with these Conventions and principles.

B. The Government’s reply

- 566.** In its communication dated 21 June 2005, the Government maintains that the Act does respect the principles of freedom of association and the right of workers to establish trade union organizations of their own choosing.
- 567.** Regarding the grounds for adopting the Act, the Government explains that, as in the other Canadian provinces and several developed countries, Quebec’s public health and social services scheme is under tremendous pressure because of the combination of a number of factors, including: a change in the demand for health care and social services; the high cost of recent scientific and technological progress; the aging of the population; the serious shortage of manpower; and budget constraints. In 2005 the health and social services sector accounts for nearly 40 per cent of Government expenditure, i.e. \$20.9 billion. Successive Quebec governments have tried to find solutions that can guarantee the continued existence and constant adaptation of the scheme in the best interests of the population. In 2000, the Government set up a commission on health and social services (Clair Commission) to undertake a broad-ranging debate on the issues involved and to suggest appropriate solutions. The Commission proposed that the scheme be made more user-oriented, that users be better covered by the scheme, and that they be given greater access to health and social services. For these proposals to be implemented, the network’s

very structure needs to be adjusted and the organization of work and management of human resources need to be made more flexible.

- 568.** Regarding the shortage of manpower, the Ministry of Labour and Social Services has undertaken various planning exercises to resolve this major problem. This is recognized by all trade unions in the health and social services sector, which have been directly involved in the Ministry's efforts to devise a set of strategies for the future: review of conditions for access to training programmes; organization of trainee programmes; promotion of training professions and programmes; and recruitment abroad. A new approach to the organization of work which has become essential and unavoidable, is one of the main thrusts of these strategies.
- 569.** The Act is intended to provide health and social service institutions with the means of streamlining their work so as to improve access to health care and its effectiveness. The Act is one of a series of Acts adopted in pursuit of these objectives: an Act to modify the Occupations Code and other health-care legislation was adopted in 2002 to introduce a new division of occupational responsibilities in the health-care field; in 2003 the Agencies Act established a system of integrated health and social services in order to bring those services closer to the population and to make it easier for people to find their way about in the network of services.
- 570.** The organization of integrated services entails the creation of one or more local health and social service networks, each of which has a local branch that is responsible for the population within its territory, provides first-line services and guarantees access to the services of specialists. Generally speaking, a local branch comprises the various institutions providing the services of a local community service centre, an accommodation and long-term health care centre, and a hospital. The public institutions that operate within the local health and social service network are thus amalgamated into a single public institution that serves as the network's local branch.
- 571.** Prior to the adoption of the Act the network comprised 3,914 bargaining units in 423 institutions, several of which had a very large number of bargaining units and often several units for the same class of personnel. A single institution, for example, might have more than one collective bargaining unit for nurses. Since each bargaining unit is governed by its own collective agreement, the large number of bargaining units within the same institution – especially when they cover a single class of personnel – is very difficult to operate and limits the institution's ability to organize work efficiently and meet users' needs. This situation derives from the Labour Code, according to which industrial peace is one of the criteria observed by the CRT in its assessment of the appropriate nature of the bargaining unit. Preference normally goes to "industrial" or general units, though the creation of specific units is accepted in so far as it does not pose a threat to industrial peace. In other words, the bargaining unit may be of a general nature or may be composed of employees belonging to one or more classes of personnel. In practice, there are almost as many bargaining units in the health sector as there are groups of health professionals and technicians. This multiplicity of general bargaining units did not pose any threat to industrial peace because collective bargaining at the national level was centralized.
- 572.** However, from the 1990s onwards, the need to reorganize the network led to the amalgamation of institutions and a consequent increase in the number of bargaining units in a single institution and the overlapping of bargaining units serving a single class of personnel, and this did affect industrial peace. Despite this, the situation remained unchanged because, once certification had been granted, the Labour Code did not provide for any kind of juridical mechanism to remedy it. This has generated serious problems in the organization of work in the institutions, notably for the posting of jobs and the corresponding budgetary provisions, overtime, holiday arrangements, working hours and

recall lists. The compartmentalization of bargaining units is also a genuine obstacle to staff mobility. For example, in an institution with more than one bargaining unit for nursing personnel, it may be impossible for a nurse to apply for a vacancy in another bargaining unit in which his or her seniority may not be recognized. Without the Bargaining Units Act, the restructuring provided for under the Agencies Act would obviously have added to the problems arising from the multiplication and overlapping of the bargaining units for a single class of personnel.

- 573.** It was therefore essential to make the organization of work and the management of human resources more flexible, and the Act is specifically designed with that in mind. In addition to determining that certain aspects of the organization of work shall be negotiated and agreed at the local or regional level, the Act provides for the bargaining units to be grouped together under four classes of personnel so that those responsible for managing the institutions are in a position to organize work along more efficient lines. Once the reform has come into effect, there will no longer be 423 institutions but 274 and the number of bargaining units will drop from 3,914 to around 1,000, i.e. generally speaking, four or fewer bargaining units per institution. This form of regrouping is similar to the practice followed in the parapublic, educational and municipal sectors in Quebec and in other provinces. The combined effect of these Acts is to focus the health and social services scheme more on the users, to improve their coverage and to give them better access to available services.
- 574.** The Act introduces a system of union representation for associations of employees and for institutions in the social affairs sector. Sections 4-11 lay down the general rules that are applicable to both the permanent and the transitional scheme. Bargaining units must be set up according to the four classes of personnel provided for under the Act: nursing and cardiorespiratory care personnel; paratechnical personnel and auxiliary services and trades personnel; office personnel and administrative technicians and professionals; health and social services technicians and professionals. These classes were determined on the basis of the organizational requirements of the health and social service institutions.
- 575.** The Act also provides that only one association of employees can be certified to represent the employees of a bargaining unit within each institution. Moreover, only one collective agreement can be applicable to the employees included in that bargaining unit. In this respect, the Act does not entail any change in previous arrangements, apart from the number of bargaining units.
- 576.** The Act further provides for the mechanisms for accrediting associations of employees to represent the personnel included in the new bargaining units. This can be done under the provisions either of the permanent scheme or of the transitional scheme. The latter is established by the Act in order to allow for the reorganization of the sector, mainly as a result of the adoption of the Agencies Act. Under the transitional scheme, the minister determines by decree, i.e. in stages, which institutions come under the Act as regards the grouping of bargaining units and the certification of the associations of employees for each of these units. This step-by-step implementation of the Act is designed to allow trade union and employers' organizations, as well as the CRT, to use the available time to complete successfully each of the stages in the regrouping of the bargaining units. The Act also provides for a permanent scheme to be introduced following an integration of activities, an amalgamation of institutions or a partial transfer of activities from one institution to another, so as to respect the general rules of the new system of union representation. Once they have been certified, associations of employees are governed by the general rules of the Labour Act as they relate to the certification process.
- 577.** The mechanisms provided for under the permanent scheme and under the transitional scheme are similar. First, it is the associations of employees that were already certified

within the institution concerned which can request certification to represent the employees of the new bargaining unit, provided they have already been certified for part of the employees of the new bargaining unit. Certification is also open to associations of employees with requests for certification still pending with the CRT. Secondly, these associations of employees may group together to request certification to represent the employees of a new bargaining unit or agree on the designation of one of them to represent those employees. They may also choose between these options, even after the requests for certification have been submitted. A vote is held only if two or more associations submit a request for certification for the same group. In this event, the association of employees with the most votes is certified to represent the employees included in the new bargaining unit.

- 578.** The Act limits and defines the bargaining units in an institution, according to which classes of personnel best meet its organizational requirements. It also ensures that the definition of those classes is the same for all the institutions in the network. In addition, it stipulates that there cannot be more than four classes of association of personnel in each institution. The Act thus guarantees that, in each of the network's institutions, there are never more than four bargaining units, four certified associations and four collective agreements.
- 579.** The Government maintains that the Act respects the principles of freedom of association inasmuch as the workers retain the right to establish and to join organizations of their own choosing, in all circumstances. It does not impose any choice on employees as to their representation within the new bargaining units but, on the contrary, affords them a number of options for expressing their preference to be represented by one association or another. All the associations concerned may submit requests to represent the employees included in a new bargaining unit. Moreover, none of the Act's provisions modifies or restricts the employees' right to establish and join organizations of their own choosing.
- 580.** Furthermore, the Act contains provisions relating to the maintenance of the workers' rights after the association that is certified to represent the employees included in a new bargaining unit has been selected. Section 86 establishes the rule of subrogation in favour of the newly certified association of employees: the rights and obligations resulting from the collective agreements of the other associations are thus transferred to the newly certified association of employees. Section 89 provides for the continued application of the collective agreements and of the local arrangements that relate to it. The personnel's working conditions are therefore maintained since the collective agreements continue to apply to all the employees until such time as new agreements come into force. For example, the wages, social benefits and the right to apply for a post, to choose one's holidays and to obtain assignments are all maintained. The right to accumulate seniority in an association of employees continues to exist, and the seniority of each person is recognized in full. In this way, the Act provides specifically for the maintenance of workers' rights under earlier collective agreements. The Government therefore concludes that these provisions respect the principles of freedom of association.
- 581.** In the case of the SPGQ (whose statutes restrict membership to professional personnel and which alleges that it could be dissolved simply by administrative decision), the Government emphasizes that members of organizations are at liberty to amend their statutes and by-laws so that other classes of personnel can apply for membership. There is therefore no legal obstacle to any such amendment should it prove necessary; the decision is up to the members of the organization concerned. Moreover, should its members so wish, the SPGQ can take advantage of one of the other scenarios contemplated in the Act, namely the designation of another association or the constitution of a new association by group.

- 582.** The Government also rejects the complainants' allegations regarding the dissolution of organizations, which are based on precedents set by the committee dealing with unilateral dissolution ordered on the initiative of the Government and have nothing to do with the situation here. In point of fact, the provisions of the Act concern neither the dissolution nor the abolition of trade union organizations. Rather, the aim is to allow employees to choose the associations that will represent them in the new bargaining units. Where an association of employees that was certified prior to the Act finds itself no longer certified to represent the employees included in a new bargaining unit, this is simply the natural and logical outcome of a democratic choice made by the employees themselves. Even if it loses its certification, an association of employees still continues to exist. Moreover, some trade union organizations may lose their certification with one bargaining unit and acquire it with others.
- 583.** The Government is quite aware that the implementation of the Act, by means of the restructuring of the bargaining units, may have repercussions on how the associations of employees as a whole are organized, but it emphasizes that any organizational changes that are made will respect the choices made by the employees.
- 584.** Traditionally, the health and social services network is a very highly unionized sector in which working conditions are governed by collective agreements that have been duly negotiated. The network comprises 219,397 unionized workers, i.e. 96 per cent of the wage earners. The Act is not designed to alter this situation and does not modify in any way the right of workers in the sector to establish and join organizations. On the contrary, following the partial implementation of the Act, the number of unionized employees increased by 5,000 to a total of 224,396. The purpose of the Act is therefore anything but the de-unionization of employees in the health and social services network.
- 585.** Freedom of association is fully protected under domestic law, specifically by the Canadian and Quebec charters of rights and freedoms and by the Labour Code. The complainants have also instituted court proceedings, backed by the majority of the union organizations in the sector, to have the Act declared unconstitutional. The Government accordingly refers to a recent decision of the CRT to the effect that the Act does not infringe the principle of freedom of association:
- Employees continue to enjoy the right that they have always had to join or not to join an association based on what they perceive as their interests. Of course, if they wish to negotiate their working conditions collectively with their employers in the social affairs sector, they have to take into account the relevant rules and regulations for certification in the sector. Moreover, the Act does not prevent such associations from being constituted, if the employees so wish, on the basis of the various professions, job titles or groups of job titles, even if it involves these associations grouping together with other associations if they want to be certified. The social affairs sector is one of the sectors with the highest level of union membership and is likely to remain so.
- 586.** Regarding the level of negotiation, negotiations in the past were held at the national level in this sector unless the parties agreed to hand over the negotiation of certain matters (other than wages) to the local and regional level. This system enabled the parties, once a collective agreement came into force, to make local or regional arrangements for implementing matters negotiated at the national level. The aim of the system was to take into account the particular nature of each institution, which may vary according to its purpose, its size, its geographical location, the territory served and the density of the population (Quebec's health and social service institutions are spread over thousands of kilometres, some areas being densely populated and others less so). There was reason to believe that this would facilitate dialogue in the search for local solutions, but since the entry into force of the system in 1985, the anticipated decentralization of negotiations on the organization of work failed to materialize. As a result, institutions had to apply highly

complex collective agreements that had been negotiated at the national level, without any consideration of how local circumstances might affect the organization of work. In 2003, the Government was constrained to intervene to ensure that users had access to efficient services and to improve the organization of work. Bearing in mind the advantages of decentralized negotiations on certain matters, it included in the new legislation a list of 26 matters (mostly linked to the organization of work) to be negotiated in future at the local or regional level. The Act sets out the conditions under which the parties are to negotiate such matters, once the certification process under the new scheme is over. No negotiations may start until the review of the bargaining units and the consequent certifications have been completed, since institutions have to know the identity of the representative that has been authorized to negotiate with them.

- 587.** The Government adds that the Act maintains the acquired rights of employees at the national level as regards remuneration and other matters covered by the collective agreement (other than those relating to the organization of work). In other words, all matters relating to remuneration, including social welfare, bonuses, disability insurance, parental rights and pensions, are to be negotiated and agreed at the national level. In the event of a breakdown in negotiations on these matters, the associations of employees have the right to strike, subject to clearly delineated rules of procedure and the maintenance of essential services. Since remuneration is negotiated at the national level, the Government, in drawing up the list of matters negotiated at the local or regional level, deliberately excluded certain aspects linked to remuneration, such as the concept of travel, voluntary transfer, bumping, daily and weekly hours of work, overtime arrangements, recall lists, availability, national holidays, movable holidays and annual leave. These matters are therefore negotiated at the national level when the corresponding remuneration is established. It follows that negotiations at the local or regional level cover the implementation of these matters in the light of the particular characteristics of each institution.
- 588.** The health and social services sector is called upon to provide the population with adequate health in a context of high costs and a shortage of manpower. In terms of the organization of work, the Government has accordingly taken steps so as not to impose employment conditions on the sector's employees but rather to encourage their determination by genuine negotiations between the institutions and the associations of employees. Under the Act, local or regional negotiations are conducted in the following manner. The institution and association enter into negotiations on matters of local and regional relevance as from the date of certification of the new association of employees; they have 24 months in which to reach agreement. Should they fail to agree on one or more matters, the parties may separately or jointly request the Minister of Labour to appoint a "mediator-arbitrator of final offers". In order to settle the matters on which no agreement has been reached, the mediator-arbitrator chooses either the final offer of the association of employees or the final offer of the institution. The offer that is selected must not entail any expenditure over and above the existing cost of implementing the matters under discussion and must guarantee that users have access to the relevant services. The mediator-arbitrator's decision then constitutes the collective agreement that is applicable between the association of employees and the institution. The matters covered by the decision cannot be renegotiated for a period of two years.
- 589.** The renegotiation of the provisions laid down in the agreements or determined by the mediator-arbitrator is governed by the procedure laid down in the Bargaining Act. This Act stipulates that provisions dealing with matters that have been negotiated and agreed at the local or regional level remain in force so long as they have not been amended, repealed or replaced by agreement between the parties, and continue to apply even though the provisions negotiated and agreed at the national level may have expired. The parties may then, at any time, renegotiate a provision of the collective agreement that relates to local or

regional matters. Should any disagreement arise in the course of those subsequent negotiations, the association of employees or the institution may request the Minister of Labour to appoint a mediator-arbitrator to settle the issue. These rules are applicable to both parties, and thus do not give rise to any imbalance in the search for a solution to disputes.

- 590.** Since the matters negotiated at the local or regional level are essentially those linked to the organization of work and determined in the light of the particular characteristics of each institution, the Government considers that this procedure affords employees adequate guarantees for the determination of their conditions of employment as they relate to such matters. These guarantees are particularly appreciable given the whole range of options available to employees in the sector, especially the right to strike in the event of a breakdown in negotiations on conditions of work linked to remuneration and to other matters with monetary implications, including the entire social welfare system. The Government therefore considers that it has taken adequate steps to ensure that employees are able to defend their economic and social interests and that the Act respects the principles of freedom of association in the area of collective bargaining.
- 591.** Regarding the holding of consultations, the Government states that trade union organizations are recognized social partners and take part in all debates affecting Quebec society. Their views are sought both on the occasion of the major consultations organized by the Government and in the course of more formal negotiations on labour relations. The Clair Commission organized very extensive consultations, notably with union organizations. In May 2001, representatives of the Ministry of Health and Social Services and of the Ministry of Labour held another series of consultations with the major union organizations on the problems posed by the multiplicity of bargaining units and the imperative need to find solutions. The unions were invited to work with the Government in seeking administrative or legislative solutions, but the outcome of these meetings was not conclusive. Further talks were held in May 2002, in the form of individual meetings with union organizations, but again there was no agreement. At the beginning of 2003, there were therefore still almost 4,000 bargaining units in the health and social services sector. In September 2003, the minister held another series of network meetings with union organizations on the proposed bills, which were placed before Parliament on 11 November 2003. Between the introduction of the bill and the adoption of Act No. 30, the National Assembly's Standing Committee on Social Affairs held individual consultations. On that occasion, the trade union associations submitted memoranda; the representatives of the CSQ, CSN, FTQ and CSD were heard by the committee on 4 December. The report on these consultations was placed before the National Assembly on 9 December 2003. The trade union organizations thus took part in consultations and hearings in the parliamentary proceedings leading up to the adoption of the Act. The Government therefore maintains that, as regards both the global issues and the drafting of specific laws, the union organizations were invited by the Government to give their views, to engage in consultations, to submit memoranda, and to attend hearings on possible solutions to problems relating to all the aspects of the organization of work in the health and social services sector.
- 592.** In conclusion, the Government submits that the Act does indeed comply with the Conventions and principles relating to freedom of association and calls for the complaint to be rejected.

C. The Committee's conclusions

- 593.** *The Committee notes that the complainant organizations allege that the Government of Quebec has, without prior consultation with the workers' organizations, modified by means of legislation the systems of union representation and collective bargaining in the*

health and social affairs sector, thereby infringing the freedom of association of the employees concerned. The Government replies that the changes in the said legislation were in response to administrative and budgetary constraints, and that the Act contested by the complainant organizations does respect the Conventions and principles relating to freedom of association, notably as regards the right of workers to establish organizations of their own choosing and their collective bargaining rights.

- 594.** *Regarding the reorganization of the structure and composition of bargaining units in the health and social services sector, the Committee notes the information and explanations provided by the Government (the difficulties posed by the multiplicity of bargaining units, the multiplication and overlapping of collective agreements, etc.) to justify the legislative measure that has been adopted. The Committee recalls that it is not for it to decide whether or not it is desirable to modify the number of bargaining units in a given sector in such circumstances, or even to restrict it to four per institution, as is the case here; such decisions are for the Government to take. In this respect, the present case is not fundamentally different from a complaint submitted from another Canadian province, on which the Committee was called upon to rule recently (Case No. 2277 (Canada/Alberta), 333rd Report of the Committee).*
- 595.** *The Committee is aware that, in the context of such a sweeping reorganization, the trade union monopoly system that characterizes labour relations in Canada – in this case in Quebec – is bound to have profound repercussions on the composition of bargaining units. Some units will disappear, others will come into being, yet others will amalgamate, and the lines of demarcation will be permanently modified. Without underestimating the organizational difficulties arising from such a major restructuring exercise, the Committee nevertheless recalls that the fundamental consideration is that, notwithstanding these changes, all employees retain their right to join a trade union, as is the case here, even though the Act concerned does define that right more restrictively than did the previous legislation.*
- 596.** *While it does take note of the concerns and fears expressed by the complainant organizations as to the impact of the Act on union membership, the Committee nevertheless observes that, in fact, the number of unionized workers increased by 5,000 following the partial implementation of the Act, and that the level of union membership in the sector is around 96 per cent. Considering that some time is needed to assess more accurately the implications of the Act in practice, the Committee requests the Government to keep it informed of developments in the trade union situation in the health and social affairs sector, specifically as regards the number of bargaining units, the associations that are certified to represent those units and the number and percentage of personnel covered.*
- 597.** *Regarding the appeals lodged against the Act concerned, the Committee notes the decision of the Labour Relations Commission (CRT), the independent body which is responsible for supervising the implementation of labour relations legislation, which concludes that the Act does not infringe the principle of freedom of association. Noting further that the constitutionality of the Act has also been challenged in the courts, the Committee requests the Government to keep it informed of the ruling to be handed down in this respect and of any other relevant ruling on the subject.*
- 598.** *Regarding the holding of consultations with workers' organizations, the Committee notes that the positions of the parties concerned are very different, if not contradictory. The complainant organizations allege that there were neither consultations nor any attempt to reach a consensus. The Government, on the other hand, gives several examples of such consultations, including the submission of memoranda by the principal organizations concerned to the relevant parliamentary committee. The Committee wishes simply to recall that, where a government seeks to alter bargaining structures in which it acts directly or*

*indirectly as employer, it is particularly important to follow an adequate consultation process, whereby all objectives perceived as being in the overall national interest can be discussed by all parties concerned. Such consultations imply that they be undertaken in good faith and that both partners have all the information necessary to make an informed decision. Such consultations should be held prior to the introduction of the legislation [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 932 and 941].*

- 599.** *Regarding the negotiation of collective agreements, the Committee notes in the first place that the workers' acquired rights have been maintained at the national level, specifically as regards remuneration and the principal social benefits. It would appear that, in this respect, the disputes settlement procedure has not been modified.*
- 600.** *The Committee notes further that the changes in the collective bargaining system introduced by the Act will have at least two serious repercussions: a reduction in the number of collective agreements (no more than four per institution) and changes in the level of negotiations – whether national or regional – in respect of certain matters. The Committee considers that a reduction in the number of collective agreements does not in itself warrant criticism from the standpoint of the principles of freedom of association. However, as regards the 26 matters which in future have to be negotiated at the local or regional level, the Committee recalls that the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and should not be imposed by law [see **Digest**, op. cit., para. 851]. The Committee requests the Government to take steps to amend the legislation so that the parties can freely determine the level of collective bargaining. The Committee invites the Government, jointly with the trade union organizations, to establish a mechanism for settling disputes over the level of collective bargaining. The Committee requests the Government to keep it informed of developments in the situation, as regards both the collective agreements applicable at the national level and the local or regional agreements.*
- 601.** *Regarding the disputes settlement procedure and the workers' recognized means of bringing pressure to bear, the Committee recalls that the right to strike may be restricted or even prohibited in essential services, i.e. those whose interruption would endanger the life, personal safety or health of the whole or part of the population, and that the hospital sector and health sector are essential services. However, even in essential services certain classes of personnel should not be deprived of that right when the possible interruption of their functions does not, in practice, have any bearing on people's life, personal safety or health. Similarly, the Committee has considered that workers who are deprived of the right to strike should be entitled to adequate protection to compensate for the limitation thereby placed on their freedom of action with regard to disputes affecting such services; restrictions on the right to strike should therefore 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., paras. 546-547].*
- 602.** *It is not clear from the allegations and the reply whether or not the new procedure, particularly as regards the mechanisms available to workers in the health and social affairs sector to compensate for the limitation or absence of the right to strike in these services which have been recognized as essential, is in conformity with the principles of freedom of association recalled above. The Committee therefore invites the Government to send it information on the matter, particularly as regards the independence of the mediator-arbitrator and the compensatory mechanisms that are available to workers in the sector who are deprived of the right to strike.*

The Committee's recommendations

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

- (a) The Committee requests the Government to keep it informed of developments in the trade union situation in the health and social affairs sector, specifically as regards the number of bargaining units, the associations that are certified to represent those units and the number and percentage of personnel covered.*
- (b) The Committee requests the Government to take steps to amend the legislation so that the parties can freely determine the level of collective bargaining. The Committee invites the Government, jointly with the trade union organizations, to establish a mechanism for settling disputes over the level of collective bargaining. The Committee requests the Government to keep it informed of developments in the collective bargaining situation in the health and social affairs sector, specifically as regards the number and nature of collective agreements concluded and the personnel and percentage of workers concerned.*
- (c) The Committee requests the Government to keep it informed of the ruling to be handed down by the competent tribunals on the constitutionality of the Act respecting bargaining units in the social affairs sector, and of any other relevant ruling on the subject.*
- (d) The Committee invites the Government to send it information on the independence of the mediator-arbitrator and the compensatory mechanisms that are available to workers in the health and social affairs sector who are deprived of the right to strike.*

Annex 1

An Act respecting bargaining units in the social affairs sector and amending the Act respecting the process of negotiation of the collective agreements in the public and parapublic sectors

Explanatory notes

This bill introduces a union representation system applicable to associations of employees and institutions in the social affairs sector whose negotiation process is governed by the Act respecting the process of negotiation of the collective agreements in the public and parapublic sectors. In addition, it amends that Act to introduce into the social affairs sector the negotiation of matters defined as necessarily being the subject of clauses negotiated and agreed at the local or regional level.

The bill first sets out the general rules applicable to certifying an association of employees to represent employees in an institution in the social affairs sector. To that end, the bill establishes the bargaining units that may be constituted on the basis of four classes of personnel. It specifies that only one association of employees may be certified to represent the employees of a bargaining unit in an institution and that only one collective agreement may be applicable to the employees in that bargaining unit.

Under the bill, a mechanism is established for the certification of an association of employees to represent the employees included in a bargaining unit following an integration of activities, an amalgamation of institutions or a partial transfer of activities. The bill sets out the special terms according to which the parties, following the certification of the new association of employees, must negotiate the matters defined as being the subject of clauses negotiated and agreed at the local or regional level.

The bill contains transitional provisions and empowers the Minister to determine when those provisions will be applicable to institutions.

Finally, the bill amends legislative provisions concerning certain health professionals to whom the Act does not apply and enacts final provisions.

DIVISION I

Introductory provisions

1. This Act introduces a union representation system applicable to associations of employees and institutions in the social affairs sector whose process of negotiation is governed by the Act respecting the process of negotiation of the collective agreements in the public and parapublic sectors (R.S.Q., chapter R-8.2).

To that end, this Act establishes classes of personnel according to which bargaining units are to be constituted, and limits their number. It also provides for a mechanism by which an association of employees may be certified to represent the employees included in a bargaining unit following an integration of activities, an amalgamation of institutions, or a partial transfer of activities from one institution to another. Finally, it sets out the special terms according to which the parties, following the certification of the new association of employees, must negotiate the matters defined as being the subject of clauses negotiated and agreed at the local or regional level.

2. The provisions of the Labour Code (R.S.Q., chapter C-27) apply, with the necessary modifications, to the extent that they are not inconsistent with the provisions of this Act.

[...]

DIVISION II

Union representation system

1. General rules

4. The bargaining units in any institution in the social affairs sector must be constituted according to the following classes of personnel:

- (1) nursing and cardio-respiratory care personnel, as defined in section 5;
- (2) paratechnical personnel and auxiliary services and trades personnel, as defined in section 6;
- (3) office personnel and administrative technicians and professionals, as defined in section 7;
- (4) health and social services technicians and professionals, as defined in section 8.

[...]

9. A bargaining unit may not include more than one class of personnel listed in section 4 and may only include employees whose home base is in the territory of a single regional board.

One single association of employees may represent within a single establishment, the employees in one bargaining unit, and one single collective agreement may be applicable to the totality of this bargaining unit.

10. It is the duty of the Commission des relations du travail, on being seized of a petition, to rule on the class of personnel to which a job title is related when the validity of the job title has been recognized by agreement between unions and management at the national level and the job title is not listed in any of Schedules 1 to 4.

Once a year, the Commission sends the Minister of Health and Social Services a list of the job titles to be added to those in Schedules 1 to 4, following decisions rendered by the Commission. The Minister publishes the list in the *Gazette officielle du Québec*. The Minister of Justice ensures that the list of job titles is updated in the schedules in the Revised Statutes of Québec, based on the published list.

[...]

DIVISION III

Determination of clauses negotiated and agreed at the local or regional level

35. From the date of certification of a new association of employees following an integration of activities or an amalgamation of institutions, the integrating institution or the new institution resulting from the amalgamation and the association of employees newly certified under section 20 negotiate the matters defined as being the subject of clauses negotiated and agreed at the local or regional level by the Act respecting the process of negotiation of the collective agreements in the public and parapublic sectors.

The parties have 24 months from the date on which the new association of employees is certified to agree on those clauses. Failing agreement within those 24 months on a matter that is the subject of clauses negotiated and agreed at the local or regional level, the institution must, in the ensuing 10 days, request the Minister of Labour to appoint a mediator-arbitrator to settle the disagreement, informing the association of employees of the request.

However, failing agreement, the parties may, during the first 12 months, jointly request the Minister of Labour to appoint a mediator-arbitrator to settle the disagreement. On the expiry of the first 12 months, either of the parties may make such a request to the Minister of Labour in the ensuing 12 months, informing the other party of the request.

36. Except where the certification of an association of employees is revoked under section 24, and despite section 9, the collective agreement of each certified association of employees referred to in paragraph 1 of section 14, in force on the day before the date on which the new association of employees is certified, and the local arrangements that relate to it continue to apply for employees covered by each of those collective agreements. The integrating institution or the new institution resulting from the amalgamation and the newly certified association of employees may, however, agree to apply the collective agreement of the newly certified association of employees and the local arrangements relating to it to all the employees included in the new bargaining unit.

From the date on which the new association of employees is certified, the collective agreement of the newly certified association of employees and the local arrangements that relate to it apply to employees who were not represented by a certified association of employees on the day preceding the date of integration or amalgamation.

As of the date of coming into force of an agreement relating to a matter negotiated and agreed at the local or regional level, the clauses negotiated and agreed at the national level and the local arrangements regarding that matter cease to apply. The institution and the newly certified association of employees may agree to bring the clauses negotiated and agreed at the local or regional level into force on different dates.

The new clauses negotiated and agreed at the national level after the date on which the new association of employees is certified take effect on the date set out in those clauses. The local arrangements relating to the clauses of the previous collective agreement, which are replaced by the new clauses, cease to apply on that date.

37. The seniority accumulated by an employee in an institution before the date on which the clauses negotiated and agreed at the local or regional level come into force is recognized up to one year per period of 12 months.

[...]

67. List of the matters negotiated and agreed at the local or regional level in the social affairs sector:

- (1) Concept of position, except concept of reserved position, and conditions of application
- (2) Concepts of unit and activity centre
- (3) Duration and conditions of probationary period
- (4) Temporarily vacant position
- (5) Concept of re-assignment and conditions of application, except remuneration
- (6) Rules applicable to employees on temporary assignment, except those relating to employees with employment security, employees on disability leave, and employees covered by the parental rights plan
- (7) Rules applicable to voluntary transfers in the facilities maintained by the institution, except those relating to employees with employment security and employees on disability leave, and those relating to remuneration
- (8) Bumping procedure (conditions of application of the general principles negotiated and agreed at the national level), except remuneration
- (9) Working hours and weekly schedule, except remuneration
- (10) Conditions governing time compensation for overtime work, recall, and standby duties, except rates and remuneration
- (11) Paid holidays, floating holidays, and annual vacation, except quanta and remuneration
- (12) Granting and conditions of leave without pay, except leave without pay under the parental rights plan and leave without pay to work in a northern institution
- (13) Human resources development, except allocated amounts and retraining of employees with employment security
- (14) Activities carried on with users within the meaning of the Act respecting health services and social services outside facilities maintained by an institution governed by that Act, or with beneficiaries within the meaning of the Act respecting health services and social services for Cree Native persons outside an institution governed by that Act
- (15) Mandate and mode of operation of local committees with respect to the matters listed in this schedule, except any release for union activities required to negotiate those matters
- (16) Rules of conduct between the parties
- (17) Posting of notices
- (18) Professional orders
- (19) Professional practice and liability
- (20) Special conditions applicable during transportation of users within the meaning of the Act respecting health services and social services or beneficiaries within the meaning of the Act respecting health services and social services for Cree Native persons
- (21) Loss or destruction of personal property
- (22) Rules to be followed when uniforms are required by the employer
- (23) Locker room and dressing room
- (24) Payment of salaries
- (25) Establishment of a savings union
- (26) Moving allowances, except the quanta.

CASE NO. 2352

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

**Complaint against the Government of Chile
presented by
the National Federation of Telephone and Telecommunication
Workers' Unions of Chile (FENATEL)**

Allegations: The complainant organization alleges hiring of workers by the Compañía de Telecomunicaciones de Chile S.A. (Chile Telecommunications Company) and other group holding companies to replace striking workers, anti-trade union practices during the 2002 strike, including police presence and the fact that the companies prevented access by trade union leaders to their premises; interference such that trade union leaders were replaced and giving preference to a trade union favourable to the company, leading to considerable loss of membership by the trade unions affiliated to the complainant organization, which suffered from an anti-trade union campaign by company executives, and pressure in the form of benefits to workers who negotiated through the trade union favourable to the employer as well as threats of dismissal of workers if they did not resign their membership; giving preference to the trade union favourable to the company in the collective bargaining process in 2003; systematic failure to honour existing collective agreements; dismissal for anti-trade union motives, including trade union leaders; loss of leave for full-time trade union officials

- 604.** The complaint is contained in a communication from the National Federation of Telephone and Telecommunication Workers' Unions of Chile (FENATEL) dated May 2004. The Government sent its observations in communications dated 12 April and 21 September 2005.
- 605.** Chile has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

606. In its communication of May 2004, the National Federation of Telephone and Telecommunication Workers' Unions of Chile (FENATEL) complains of violations of trade union rights in the following companies: Compañía de Telecomunicaciones de Chile S.A., Telefónica Gestión de Servicios Compartidos Chile S.A., Compañía de Telecomunicaciones de Chile Equipo Servicios, Compañía de Telecomunicaciones de Chile, Isapre S.A., Telefónica Empresas CTC de Chile S.A. and Compañía de Teléfonos de Chile-Transmisiones Regionales S.A., all of which are part of the CTC de Chile Group, and/or for the purposes of labour law constitute a single company and, in consequence, a single employer. According to the complainant organization, the State of Chile has not adopted the measures necessary to implement in full the provisions of Conventions Nos. 87 and 98 on freedom of association. More specifically, FENATEL alleges that during the collective bargaining process in the defendant companies in May and June 2002, the workers engaged in a legal strike which lasted 28 days. The companies hired replacement workers without authorization, for which they were sanctioned by the Inspectorate of Labour although only the recruitment of a few workers was sanctioned (the bulk of the replacement workers, in their hundreds, left the premises when the inspectors arrived). The companies prevented access by trade union leaders to the company premises, etc., in respect of which a complaint concerning anti-trade union practices was made by the municipal Inspectorate of Labour under the Directorate of Labour in Santiago Nor-Oriente, which is now being heard in the Fifth Labour Court in Santiago, case No. 5295-2003. In addition, during the industrial dispute, Telefónica was supported by the forces of law. The police cordoned off the boundaries and protected the entry of the workers who were illegally replacing the striking workers. As there was no agreement between the parties, the collective bargaining in 2002 ended when the workers invoked their right under article 369 of the Labour Code to force the company to sign a new collective agreement with the same terms as those in the contracts in force when the draft was presented. Under the law, the new contract would remain in force for 18 months. According to FENATEL, since then, the companies planned and pursued a systematic policy of anti-trade union practices, which included the following objectives:

- To drastically reduce wage costs, reducing basic wages by changing the organization of work and eliminating significant benefits from collective contracts, some of them longstanding in the company. These included a long-service increment in all cases of 40 days per year worked; payment of a fixed sum of up to 7,500,000,000 Chilean pesos (seven thousand five hundred million) to be shared annually among the workers in the group; performance-based incentives for achieving targets; staff medical service and others. For this, they needed to prevent the trade unions having renewed resort to the provisions of article 369 of the Labour Code, since that maintained unchanged the benefits that they wished to eliminate.
- To destroy the trade unions which had engaged in the strike and constituted an obstacle to reductions in wages and collective benefits, or, in the worst case, bring about changes in the trade union leadership. The leaders who had led the strike in 2002 were to be replaced by acquiescent leaders who would not oppose the plundering which the planned wage reduction would mean.
- To favour, in whatever way, a trade union organization which would support company policy. That organisation turned out to be the National Inter-company Union of Administrative and Specialist Workers in the Compañía de Teléfonos de Chile S.A., subsidiaries, successors, branches and others (SINTELFÍ).

607. FENATEL states that the planned objective was achieved in full, over a period of four months (July-October 2003), in which the FENATEL unions were stripped of some 90 per

cent of their members. Those members joined SINTELFÍ which negotiated, under wretched conditions, on behalf of rather more than 1,600 workers. Put in concrete terms: *the trade union SINTELFÍ increased its membership from 6.8 per cent of all unionized workers in July 2003 to 80 per cent in October 2003. In other words, it increased the number of its members from 370 in July to over 1,800 members in November 2003.*

608. The loss of membership was on such a scale that the FENATEL unions cannot fulfil their statutory purposes. As in the main they are inter-company unions, they had traditionally established negotiating teams from their members within each group company which required a quorum to engage in collective bargaining, a quorum which now cannot be achieved.

609. The Chairman of the Board of Telefónica, its general manager, its personnel manager and other senior executives were personally involved in the planning and execution of the anti-trade union campaign. In a letter of 9 September 2002, sent to all workers in the group, the Chairman of the Board made no secret of his animosity towards the trade union leaders who had led the strike. Those executives covered the entire country, meeting directly with unionized workers in the group, calling on them to replace the FENATEL leadership by others who were more “reasonable”. In these meetings, they addressed matters concerning industrial relations within the companies:

- the need to reduce wage costs to make the companies more competitive, which meant reducing basic wages and abolishing key benefits in collective contracts and prevent workers demanding the application of article 369 of the Labour Code in the 2003 collective bargaining round, which in turn meant they needed to bring about changes in the trade union leadership;
- they constantly denigrated officials of trade unions affiliated to the United Workers Front (FUT) (now almost all of them members of FENATEL), blaming them for the strike and the damage to the company caused by the strike. According to the Chairman of the Board of the holding, it was a case of intransigent workers who did not know how to bargain collectively and did not have any negotiating capacity and were responsible for the serious financial situation. The purpose of meeting with the staff was to inspire fear among the workers that failure to accept the measures to take the company forward would imperil the continuity of the employment relationship, which required docile leaders close to the employer.

610. In addition, executives and workers of the Telefónica companies put direct pressure on workers belonging to trade unions affiliated to the complainant organization. The pressure consisted, among other things, of: (a) workers being offered additional benefits (which were not offered to trade unions in the complainant organization) if they engaged in prior collective bargaining with SINTELFÍ, or (b) threats of dismissal if they did not give up membership of their organizations and join SINTELFÍ. The threats were in some cases veiled, insinuating that workers were putting their future source of work at risk if they remained a member of a FENATEL union, or in other cases, bare-faced and direct: “either you leave the union you now belong to and join SINTELFÍ or you will be sacked”.

611. Apart from two officials with trade union responsibilities, 60 workers of the Human Resources Management Department gave up their trade union membership. Executives of the company participated directly and personally in the campaign of pressures and threats to bring this about.

612. According to FENATEL, during the 2003 collective bargaining round, the group companies openly favoured SINTELFÍ, to which it made offers that were substantially better than those made to the FENATEL member unions. The current collective agreement

covers the great majority of unionized workers (some 1,900 and reduces the wages of some workers by over 66 per cent).

- 613.** In addition, the defendant companies have consistently failed to honour collective labour instruments. Thus, for example, an application is being heard in the courts for payment of the sum of 7,500,000,000 pesos (seven thousand five hundred million) which was to be shared among all the corporation's workers under clause 4.2 of the 1998 collective agreement. Another case involves failure to honour clause 28.2 of the current collective agreement (supplementary health insurance). Other applications are being heard for failure to comply with the stability pact known as the *Acuerdo Básico de Confianza* (ABC) (Basic Trust Agreement) (clause 50 of the collective agreement). FENATEL annexed to its complaint copies of the applications and copies of ten investigation reports relating to ten other complaints to the Inspectorate of Labour, for non-compliance with collective agreements in force in the company.
- 614.** The pressure by the company on the trade union officials was expressed, among other things, in the constant insistence that the benefit of devoting themselves full time to union matters which had been in effect for years should be abolished. For months, the personnel management sent letters to trade union officials, stating their intention to terminate the agreement whereby workers' representatives were released to provide services and work full time for the union. Finally, the pressure became unsustainable and all the FENATEL officials, apart from three, had to resume their functions in the company on 26 April 2004. In the last collective bargaining round, the companies refused special leave to FENATEL officials who were not released to provide services, while officials of the other unions received all the necessary leave to pursue the bargaining process.
- 615.** The companies concerned have dismissed thousands of workers in the last four years. But the choice of dismissed workers was based on anti-trade union criteria. FENATEL explains that its unions were linked with their members through an internal structure which envisages the existence of a body of delegates. These are members who are distinguished by their active participation in trade union activities. The fact is that in reducing their workforce, companies took special care to dismiss almost all the body of delegates. FENATEL mentions the names of 42 workers.

B. The Government's reply

- 616.** In its communications of 12 April and 21 September 2005, the Government states that the State of Chile has a series of laws which recognize, promote and protect the rights set out in Conventions Nos. 87 and 98, and that anti-trade union and unfair practices in the course of collective bargaining are particularly singled out for sanction. Likewise, Law No. 19759 of 2001 listed unfair and anti-trade union practices more precisely, increased the amount of fines and granted increased powers to the National Directorate of Labour allowing it to be a party to court proceedings on matters related to this subject. Under national legislation:
- the courts have the power to determine conduct as anti-trade union, without prejudice to the intervention of the Inspectorate of Labour as set out in article 292 of the Labour Code;
 - a. branches of the Inspectorate of Labour in the National Directorate of Labour have a duty to report facts which they consider to be anti-trade union or unfair practices and there is a presumption in law that the accompanying investigation report is true;
 - b. the reporting branch of the Inspectorate of Labour may be a party to the proceedings resulting from complaints of anti-trade union or unfair practices.

- 617.** As regards the specific allegations by the complainant organization, the Government states in relation to the alleged replacement of workers involved in the legal 28-day strike in 2002, in the context of the collective bargaining process, that after its investigation, the Inspectorate of Labour found that striking workers had been replaced before the expiry of the 15 days required by law. As the employers were not empowered to hire replacement workers, the Compañía de Telecomunicaciones de Chile S.A., Telefónica Gestión de Servicios Compartidos Chile S.A., Compañía de Telecomunicaciones de Chile Equipo Servicios, Compañía de Telecomunicaciones de Chile, Isapre Istel S.A and Telefónica Empresas CTC de Chile S.A. were fined the sum of 69 monthly tax units, equivalent to 1,721,700 Chilean pesos under administrative proceedings.
- 618.** As regards the allegation that trade union officials were prevented from carrying out their functions, the Government states that the Inspectorate of Labour instigated a complaint in respect of anti-trade union practice, in case No. 5295-2003 in the 5th Labour Court of Santiago. On 22 July 2004, the judge in that court upheld the complaint and sentenced the defendant company to a fine equivalent to 120 monthly tax units. The sentence specifically states that the defendant had engaged in anti-trade union practices, preventing free access by officials to the company's premises, and "acts of interference" in favour of trade unions which were not members of FENATEL.
- 619.** As regards the alleged attitude of the Compañía de Telecomunicaciones de Chile Group favouring a trade union organization, the Government indicates that it emerged from a series of investigation reports that there had been a series of conduct favouring some organizations to the detriment of others, a situation that was evident in the following ways: holding of prior negotiations, making offers of higher amounts than those offered to trade unions belonging to FENATEL; different treatment of FENATEL officials and those of SINTELEFI and civil engineers and failure to recognize trade union leave.
- 620.** As regards the alleged pressure on workers belonging to FENATEL to make them give up their membership, the Government states that in the investigation carried out by the Inspectorate of Labour, a large decrease in members in the personnel department was noted (of 42 members, only two retained their membership) as well as the disqualification of the officials by the company, letters addressed to workers recommending them to give up benefits acquired through collective bargaining and open calls to the workers by the company to give up their membership of the trade union and negotiate individually.
- 621.** As regards the allegation that the company terminated the agreement whereby trade union officials enjoyed trade union leave and were released from their duties, and required them to resume their functions, the Government states that the investigation by the Inspectorate of Labour found that from 1991 to 1997, the company gave full-time trade union leave with pay to FENATEL officials René Tabilo, Ricardo Campos, Pedro Sandoval and Fredy Escobar to allow them to devote all their time to their trade union work. According to the company's report, through two letters from the personnel management, the workers were told that in the light of the new financial situation of the company and its subsidiaries, the situation of trade union leave would be reviewed. Finally, the company informed the officials on 15 April 2004 that from 21 April 2004 trade union leave would be abolished, except as laid down by law (which must be not less than six hours, or eight if the organization has over 250 workers, as laid down in article 294 of the Labour Code). This point was one of the matters included in the complaint of anti-trade union practices by the administrative authority in the Fifth Labour Court in Santiago, which gave an unfavourable ruling to the union on this point. The sentence was appealed and the proceedings have not yet concluded.
- 622.** The Government points out that the matters in the complaint formulated by FENATEL were investigated, and some are the subject of pending court proceedings. The

Government states that it will inform the Committee of the progress of the court cases and includes the text of the judgement of the Fifth Labour Court of Santiago which states as follows:

(...)

4. In the light of the foregoing and after careful analysis of the related background, this court considers that the company had engaged in anti-trade union practices, prevention of free access by officials to company premises, “acts of interference” by favouring trade unions that do not belong to FENATEL and discriminating against the latter by encouraging its members to give up their membership, through disadvantageous proposals for agreements and meetings in which it inspired fear of losing their jobs in those who clung to the provisions of art. 369 of the Labour Code, specifically the members of the complainant trade unions. This conduct must be sanctioned in that it constitutes a violation of the free exercise of trade union activity.

5. Although the hiring of workers during the strike was found to have occurred, it will not be sanctioned in this court, as the Inspectorate of Labour has already sanctioned the conduct with a fine and it has not been shown that the defendant has persisted with violation subsequently. The foregoing in application of the principle of “double jeopardy”.

6. The remainder of the evidence does not change the above argument;

For these considerations and further given what is laid down in the above-mentioned decisions and the provisions of articles 289 and following of the Labour Code, it is declared:

I. That the complaint is upheld only insofar as the defendant must cease its anti-trade union conduct, allow free access to FENATEL trade union officials and any other trade union official to the company’s premises, including those situated at 48, Calle San Martin; and must also cease any form of communication intended to inspire fear of loss of jobs relating to circumstances which arise from agreements which were or are legally agreed with the trade unions in the relevant collective bargaining processes. It must also ensure that it does not act in any way such as to discriminate between the various trade unions and especially that it does not encourage members to leave trade unions which for one reason or another are inconvenient to the company.

623. The Government states that 22 union representatives have been dismissed in 2001, and 17 in 2003, due to staff reductions which affected 1,593 workers. According to the Government, fines were imposed in this respect (ten fiscal units and 7.5 million pesos) for violation of the collective agreement.

624. The Government annexes the following comments by the Compañía Telefónica de Chile (CTC) on the complaint, according to which Telefónica CTC de Chile and its subsidiaries have 22 trade unions, some of which are grouped into three federations, representing 2,650 workers. Of those, only six unions have more than 100 members and 11 have less than 30 persons each, in several cases representing less than 1 per cent of the company. The National Federation of Telephone and Telecommunication Workers’ Unions of Chile (FENATEL), in particular, consists of five trade unions, representing a total of 120 workers. CTC de Chile indicates that its results, after profits of over 300 million dollars in 1996 and 1997, turned into losses in 1999, falling to a loss of almost 200 million dollars in 2000. In subsequent years, the company has constantly sought to balance its books in a market where revenues continue to fall, despite everyone’s efforts to diversify products and improve productivity. In the first half of 2001, given the poor results, Telefónica was forced to dismiss some 1,200 workers. However, although under collective agreements those workers received compensation much higher than the legal minimum (40 days per year and without ceilings for long service), it was considered highly inadequate by the officials and had a very negative effect on industrial relations. In mid-2002, collective bargaining was opened with the company’s 22 trade unions. Agreements were reached with 11 of them, but not the other 11, among them the FENATEL unions. In fact, those trade unions decided on a strike, which they maintained for 28 days, at a time when the unions took the option of maintaining the same benefits

that they had possessed previously (article 369 of the Labour Code). The law provides that this option may only be invoked by trade unions, at any time before or during the strike.

- 625.** During the strike, there were all kinds of malicious acts, damage to executives' cars, threats (even at home) to officials and workers who had concluded agreements, attacks against offices, cutting of fibre optic cables at various points in the country, including those of other companies. In all, there were over 150 attacks on company facilities.
- 626.** The 11 trade unions which went on strike took different routes. The five FENATEL members and two others chose to continue the path of "not talking", and the other five chose the bargaining route. The bargaining began in June 2003 and agreements were reached in October 2003.
- 627.** Throughout this entire process there was no anti-trade union practice. The workers could freely choose between the option of "seeking agreement" and the option of "not negotiating". The trade unions which signed the agreement no doubt reflected the opinion of the great majority of the workers who demonstrated that desire by changing to the various unions which were talking. In this way, FENATAL, which had 490 members in June 2003 was reduced to 144 in November 2003. Thus the massive flight of members from the FENATEL unions is not the product of underhand actions by the company, but the legitimate exercise of freedom of association by workers who understood that to defend their rights and interests at that time, the path of dialogue and flexibility was more appropriate and compatible with the company's circumstances. Once the process had been concluded with the great majority of the workers, the trade unions belonging to FENATEL were offered the chance to sign the same agreement, an offer they rejected, preferring once again to rely on article 369 of the Labour Code.
- 628.** CTC de Chile adds that it is not true that the company hired replacement workers. Indeed, the Inspectorate of Labour imposed a fine in respect of 12 people (there were over 1,900 workers on strike) and the company asked for the fine to be reviewed on the grounds that it was an error. With regard to preventing access by officials to premises during the time of the strike, it should be noted that Chilean law prohibits workers from entering company premises during a strike. It is not true that CTC de Chile was supported by the forces of order. It is true that the police maintained a constant presence in the area to prevent acts of vandalism and to allow executives and workers who were not on strike to circulate freely. As regards the company strategy alleged by the complainant organization, CTC de Chile states that it cannot be an anti-trade union practice to agree new contractual conditions with trade unions. It was quite true that it was sought to reduce wage costs in the face of the impossibility of maintaining conditions which bore no relation to the market under conditions where the company had been making losses for several years in succession.
- 629.** It is not true that there was a desire to "destroy the trade unions", or "look for docile officials". It was always commented how important the trade unions were and how they should effectively represent the true interests of the workers. The workers chose freely, with all the information before them. It is not true that it was sought to favour a particular organization. The fact is that the 22 trade unions were invited to talk – some wished to do so, others did not.
- 630.** The figures provided for the SINTELFU union are wrong. The correct figures are that in July 2003 it had 744 members (19 per cent of the unionized workers) and in November 2003 this had increased to 1,586 workers (39 per cent). FENATEL was reduced to 120 members, because its members, using their right of freedom of association enshrined in the law, preferred to be represented by other organizations. Furthermore, FENATEL has

problems of obtaining a quorum to function, due to the fact that it has retained a five-union structure. The smallest of them has four members, and the next, 16 members.

631. This group of trade unions is confusing the right of any employer to explain in detail to its workers the company's situation and its consequences, with anti-trade union practices. The meetings took place in a climate of frankness and transparency with many workers and were attended by officials of the various trade unions. It is absolutely wrong that trade union officials were blamed for the economic crisis in Telefónica or that different financial benefits were offered to members of one union or another. In fact, they all had the same option. Some accepted it.
632. It is also untrue that the personnel management department pressured its workers to give up their trade union membership. For one thing, the department has 30 staff (and not 60 as stated by FENATEL) of whom three were trade union members in September 2002. In December 2003, there were two trade union members. If we also consider the staff working in the T-Gestiona company, there were 52 people, of whom 22 were trade union members in September 2002. In December 2003, there were 47 staff, and 20 trade union members.
633. The comparison made by FENATEL between the benefits provided to SINTELFÍ and those received by itself is clearly incorrect, since it compares the final position of SINTELFÍ with the initial offer to the FENATEL unions. Obviously a final offer is not the same as an initial offer.
634. Interpreting clauses in collective agreements in different ways does not mean anti-trade union practice to the extent that it is applied consistently to all the trade unions. Simply, there are different interpretations, and these are clarified as appropriate in the courts. In fact, in the case mentioned by FENATEL for alleged non-payment of 7,500,000,000 Chilean pesos, the company won its case against one of the trade unions and has lost now another in the Court of Appeal and a final decision is awaited in the Supreme Court.
635. The company has 22 trade unions, over 100 officials and over 20 who only work on trade union activities, or approximately one full-time official for every 200 workers. In the FENATEL case, which in December 2003 represented 194 workers, it had eight officials devoted entirely to trade union activities. By any standard, this seems an excessive number and lends itself to clear abuses such as those by Mr. Carlos Burgos Abarca, an official who decided not even to go to the union office, receiving a wage without doing anything for the company or the workers.
636. It seems excessive to allow 15 FENATEL officials to work full time in a bargaining process when they represent a little over 150 workers. Compare the case of SINTELFÍ, where five officials represent over 1,000 people.
637. Indeed, the persons mentioned by FENATEL were dismissed. What the trade unions do not mention is that they never provided a list of delegates or the trade union statutes to the company. If some names coincide with possible "delegates", these would not be those contemplated in the Labour Code as having trade union office, but perhaps internal delegates whose status in the company was not notified.

C. The Committee's conclusions

638. *The Committee observes that the complainant organizations presented the following allegations: hiring of workers by the Compañía de Telecomunicaciones de Chile S.A. and other group holding companies to replace strikers; anti-trade union practices during the 2002 strike, including presence of the police and the fact that the companies prevented*

access by trade union officials to company premises; interference to ensure that trade union officials were replaced and to favour a trade union which was supportive of the company, leading to a large loss of members by the trade unions affiliated to the complainant organization, which suffered from an anti-trade union campaign by the company executives; and pressure consisting of economic benefits to workers who bargained through the trade union favourable to the employer as well as threats of dismissals of those refusing to give up their membership, giving preference to the trade union supportive of the company in the 2003 collective bargaining round; systematic failure to honour collective agreements in force; dismissals for anti-trade union motives, including of trade union officials (according to the Government, 22 union delegates were dismissed in 2001, and 17 in 2003, due to staff reductions which affected 1,593 workers); and loss of full-time leave for trade union duties.

- 639.** *The Committee notes the comments of the Compañía Telefónica de Chile on the complaint in which it points out the difficult economic situation faced by the group holding companies and the fact that it reached agreement with 16 out of the 22 trade unions in the company reflecting the choice of the great majority of workers in relation to FENATEL's "no bargaining" option. According to the CTC de Chile, the "no bargaining" option explains the massive loss of members from the FENATEL trade unions (which now has only 120 members) and the increase in the members of SINTELFU (to 1,586 members). CTC de Chile denies the alleged anti-trade union practices and that it pressured workers to give up their membership. It also states that the right of any employer to explain in detail to the workers the situation in the company must not be confused with anti-trade union practices. The company emphasizes finally that the presence of the police was to prevent acts of vandalism and that during the strike there were 150 attacks against company facilities, cutting of fibre optic cables, damage to vehicles, etc. In addition, according to the company, with regard to the failure to fulfil collective agreements, court decisions had sometimes been favourable to the company and sometimes to the trade union. As to the loss of full-time trade union leave of various officials of organizations affiliated to FENATEL, the company justifies this by the drastic decline in their representativeness.*
- 640.** *The Committee notes the Government's statements concerning the imposition of sanctions on five CTC de Chile companies for non-respect of the collective agreement (ten monthly tax units and 7.5 million pesos) and for replacing strikers (69 monthly tax units equivalent to 1,721,700 Chilean pesos) and various anti-trade union practices determined by the judicial authority (5th Labour Court of Santiago) which had been previously submitted to the Inspectorate of Labour and which gave rise to a sanction by the judicial authority equivalent to 120 monthly tax units. The Committee notes that in the judgement it is indicated that CTC de Chile:*

... had engaged in anti-trade union practices, prevention of free access by officials to company premises, "acts of interference" by favouring trade unions that do not belong to FENATEL and discriminating against the latter by encouraging its members to give up their membership, through disadvantageous proposals for agreements and meetings in which it inspired fear of losing their jobs in those who clung to the provisions of art. 369 of the Labour Code, specifically the members of the complainant trade unions. This conduct must be sanctioned in that it constitutes a violation of the free exercise of trade union activity.

- 641.** *The Committee also observes that in the judgement the company is ordered to:*

... cease its anti-trade union conduct, allow free access to FENATEL trade union officials and any other trade union official to the company's premises, including those situated at 48, Calle San Martin; and must also cease any form of communication intended to inspire fear of loss of jobs relating to circumstances which arise from agreements which were or are legally agreed with the trade unions in the relevant collective bargaining processes. It must also ensure that it does not act in any way such as to discriminate between the various trade

unions and especially that it does not encourage members to leave trade unions which for one reason or another are inconvenient to the company.

- 642.** *Although it regrets the many acts of violence (as indicated in its statement as transmitted by the Government) which according to the company occurred during the 2002 strike, the Committee observes that the labour inspection and in certain cases the judicial authority in the first instance, sanctioned certain anti-union acts which took place during the industrial dispute which began in 2002 and in the subsequent collective bargaining. The Committee also observes that the judicial authority is still to decide certain appeals lodged by the company. In these circumstances, the Committee regrets the serious repercussions that these acts might have had on the level of membership of the FENATEL organizations, strongly expresses the expectation that such acts will not recur in the future and requests the Government to ensure compliance with Conventions Nos. 87 and 98 by the holding companies in the CTC de Chile Group. Moreover, taking into account the acts of violence during the strike to which the company refers, the Committee recalls that Article 8 of Convention No. 87 provides that “In exercising the rights provided in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.”*
- 643.** *The Committee notes the information provided by the Government that the labour inspection obtained an unfavourable judgement concerning the non-respect of trade union leave but that judgement has been appealed. The Committee requests the Government to keep it informed of the result of appeal proceedings, including with regard to trade union leave and the non-implementation of the clauses of the collective agreement, and to indicate whether FENATEL has lodged an appeal with respect to the dismissal of the delegates of that organization in respect of whom the company states that it was unaware of their position as delegates and that, in any event, they did not enjoy trade union status.*

The Committee’s recommendations

- 644.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee observes that the labour inspection and in certain cases the judicial authority in the first instance, sanctioned certain anti-union acts which took place during the industrial dispute which began in 2002 in the companies of the CTC de Chile Group and the subsequent collective bargaining, and regrets the serious repercussions that these acts might have had on the level of membership of the FENATEL organizations. The Committee also observes that the judicial authority is still to decide certain appeals lodged by the company and that it ruled against the recourse of the labour inspection claiming the non-compliance by the company of the trade union leave; an appeal was lodged against this ruling. The Committee strongly expresses the expectation that such anti-union acts will not recur in the future and requests the Government to ensure compliance with Conventions Nos. 87 and 98 by those companies.*
- (b) *The Committee requests the Government to keep it informed of the result of the appeals lodged with regards to this case, in particular on the appeal relating to trade union leave of FENATEL officials, or relating to the non-compliance with the clauses of the collective agreement, and to indicate whether FENATEL has lodged an appeal with respect to the dismissal of the delegates of that organization in respect of whom the company states that it*

was unaware of their position as delegates and that in any event they did not enjoy trade union status.

CASE NO. 2392

INTERIM REPORT

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

- **the Federation of Trade Unions of Chilean Television Channels and Production Companies (FETRA-TV) and**
- **the Trade Union of the Television Corporation of the Pontifical Catholic University of Chile (Channel 13 TV Union)**

Allegations: The complainants allege the replacement of workers involved in a legal strike in 2004 at the Television Corporation of the Pontifical Catholic University of Chile (Channel 13 TV); the use of staff supply companies and false contracts for provision of services instead of employment contracts, leading to a fall in union membership, for anti-union purposes; mass dismissals since 2001 and other anti-union practices; discrimination against the general secretary of the union by assigning certain operations for which he had been responsible to a contracting enterprise; pressure from the corporation for workers to abandon collective bargaining, along with economic incentives for those who were not part of the bargaining group and disincentives for members of the group; failure to comply with the provisions of the collective contract; the recent dismissal of three union members; the fact that it is impossible for the union to recruit members contracted through external enterprises; and the signing by workers of individual contracts imposed by the corporation which exclude them from collective bargaining

- 645.** The complaint is contained in a joint communication from the Federation of Trade Unions of Chilean Television Channels and Production Companies (FETRA-TV) and the Trade Union of the Television Corporation of the Pontifical Catholic University of Chile (Channel 13 TV Union) dated 14 October 2004. FETRA-TV sent additional information in a communication dated 30 March 2005.
- 646.** The Government sent its observations in communications dated 21 February, 8 March, 6, 14 and 18 April and 2 August 2005.

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

A. The complainants' allegations

648. In their communication of 14 October 2004, the Federation of Trade Unions of Chilean Television Channels and Production Companies (FETRA-TV) and the Trade Union of the Television Corporation of the Pontifical Catholic University of Chile (Channel 13 TV Union) allege that labour practices which violate union rights have taken place at the Television Corporation of the Pontifical Catholic University of Chile (Channel 13 TV), intended to weaken and eventually suppress the Channel 13 TV Union. The complainants allege mass dismissals of workers with contracts of indefinite duration since 2001 and the use of staff supply companies, which provide workers through subcontracting, to carry out the main company's functions, such as camera operators, lighting technicians, audio and video operators, stagehands, etc. The complainants state that the relevant labour inspectorate examined the situation, produced a report and imposed fines for infringement of the Labour Code. In fact, the complainants continue, in the cases mentioned, there is a relationship of subordination or dependence with the Channel 13 TV, and the alleged individual contracts that the workers have with external enterprises do not match the reality of employment, with the third party in reality becoming an "apparent employer". There exists, therefore, the "simulation" referred to in article 478 of the Labour Code. This system, in the complainants' view, constitutes an anti-union practice contrary to Conventions Nos. 87 and 98 and the Labour Code, since it has weakened the trade union and prevented exercise of the right to collective bargaining, as these workers no longer have an employment contract with Channel 13 TV; as a result, the number of union members has fallen (from 723 members in 2000 to 491 in 2004), despite the fact that the total number of people working at Channel 13 TV is around 1,000.
649. Furthermore, the complainants allege that Channel 13 TV engages in the practice of false service provision for fees (contracts for service provision), since workers are, in reality, providing services as dependent workers governed by the Labour Code. This practice affects trade union rights, since these workers are denied all the rights conferred on them by the Labour Code, such as the right to join a trade union and the right to bargain collectively.
650. Similarly, during the collective bargaining process at the Channel 13 TV begun on 20 May 2004, the workers involved exercised their right to strike, as established in article 374 of the Labour Code, in a strike starting on 13 July 2004. After the strike had begun, however, Channel 13 TV, in violation of section 381 of the Labour Code, proceeded to replace, illegally, numerous workers involved in the legal strike. This illegal replacement of workers brought the legal strike to an abrupt end, and meant that the workers engaged in collective bargaining were obliged to accept an extension of the previous collective agreement with no readjustment of salaries or benefits, as required by the provisions of section 369 of the Labour Code. Labour inspectors have confirmed these anti-union practices on the part of the corporation, following complaints to the appropriate courts.
651. In its communication of 30 March 2005, FETRA-TV states, with regard to the contracting of television channel staff through third parties, that there are currently some 300 people working at Channel 13 TV who are now permanent staff contracted through third parties. Furthermore, what the company refers to as "externalization of labour" or "subcontracting" is, in reality, contracting through intermediaries, using pseudo-employers who are no more than mere suppliers of staff. This situation is not provided for in the Labour Code, and such conduct is therefore illegal and has deprived hundreds of workers of the right to belong to a trade union and bargain collectively with Channel 13 TV. Reduction in wages

and loss of all collective benefits have occurred as a direct and provable consequence of the above, creating discrimination between workers, some of whom are contracted directly by Channel 13 TV, who belong to a union and enjoy collective benefits, and others, who perform the same work but for lower wages, with no collective benefits and no opportunity to join a trade union. The system thus functions as a mechanism to blackmail or exert undue pressure on workers belonging to the union, since, in operations with a high professional and/or pecuniary value, cheaper workers with no collective rights, such as travel, accommodation and meals during working hours, and who are less regulated, are often chosen over others, leading to a constant tacit threat of dismissal for reasons of cost.

- 652.** This has coincided with an ostensible fall in union membership. Of the above total number of workers contracted through third parties, around 40 workers are ex-members of the union, who can therefore no longer bargain collectively with the Channel 13 TV administration, since they have lost all collective benefits and are now working in the same jobs as before but for lower wages. The other 260 workers contracted have not been able to join a union or bargain collectively, either because they worked under temporary contracts for some years (and therefore not enjoying such rights despite having provided services for a long time) and were then transferred to contracts made with third parties, or because they came in directly via the latter route; all these without exception qualify as permanent Channel 13 TV staff whilst having no contractual recognition or rights stemming therefrom.
- 653.** The reduction in the number of union members has left the union with 450 members as at March 2005. This reduction is due in some cases to workers being afraid to exercise their right to join a union for fear of losing their jobs (it is a fact that, in the face of various and sustained legal procedures which last a long time but yield few or no results, feelings of impunity and defencelessness create an atmosphere of fear). In March 2005, there were still around 1,000 workers providing services to the television channel, either contracted directly by the channel or subcontracted.
- 654.** Concerning the false-fee contracts to provide services, the television channel's administration has continued to use such contracts in spite of the complaints made to the labour inspectorate; one should emphasize the complaint relating to the last round of collective bargaining, consisting of contracting replacement workers during the strike (around 300 people) without complying with the requirements laid down by law.
- 655.** Channel 13 TV was, for the sixth consecutive year, in charge of the Viña del Mar International Song Festival, one of the most important of its kind in Latin America. During this event, operational control for internal sound at Quinta Vergara, the venue in which the festival was held, was assigned to a contracting enterprise, excluding four of the television station's operators who had fulfilled that function in previous years. Among them was the secretary of the corporation's trade union, Mr. Iván Mezzano, who directly suffered financial loss and professional damage resulting from the situation. In his case, the trade union immunity established in the Labour Code was also violated.
- 656.** During the previous round of collective bargaining (June 2004) some workers were excluded from the negotiating group by having signed an annex to the individual employment contracts imposed by the enterprise preventing them from bargaining collectively, fearing for their job security. Others who were contracted by job or task were also excluded, thereby losing access to benefits which had been negotiated collectively. At present, the union is unsure how many new members could have been put under pressure to sign such annexes, since the enterprise carried out these manoeuvres without the knowledge of the union officials.

- 657.** As another form of anti-union practice by the enterprise, immediately after the end of the strike all those workers who had not been part of the bargaining group were paid a bonus of 180,000 pesos (30 July 2004), whilst those who had bargained were docked 20 per cent of their wages for the days when they had exercised their right to strike, which constitutes open discrimination between those workers who bargained collectively and those who did not.
- 658.** As a result of serious violations of the collective agreement, immediately following the legal strike of July 2004, the union was obliged to submit successive complaints (four to date) to the law courts. Three of these concerned the non-payment or partial payment of certain benefits and one concerned a group of workers (50) who, participating for the first time in the collective bargaining process, were excluded by a unilateral decision taken by the Channel 13 TV's administration from some or all of the benefits enjoyed by other members following the previous round of bargaining, in spite of the channel having accorded the same benefits to other workers not belonging to the union. As a consequence of the complaints submitted, there have recently been incidents of direct harassment of union members by the undermanagement of human resources at Channel 13 TV, from whom written personal communications have been sent to all members of the union for the explicit purpose of informing them that, as part of one of the legal procedures taking place, the enterprise has been obliged to breach confidentiality with regard to the personal data held on the worker to whom the communication is addressed, because, at the request of the union, the court ordered copies to be sent of the wage payments and contracts of each complainant. In the communications, the enterprise's undermanagement describes the union's actions as "inconvenience caused" to the enterprise; the aim of this is simply to intimidate workers who belong to the union. Coincidentally, on the same day as these communications were sent by Channel 13 TV, three union members with contracts of indefinite duration were dismissed. This policy, on the part of Channel 13 TV, has caused various members to resign and clearly demonstrates the harassment to which the union is being subjected, since this policy has caused serious concern among some of the more than 400 workers whose rights have been demanded through legal channels.

B. The Government's reply

- 659.** In its communications of 21 February, 8 March and 6, 14 and 18 April 2005, the Government states that the Chilean legislation brings together the principles of ILO Conventions Nos. 87 and 98 and provides for inspection mechanisms and administrative sanctions which demonstrate a respectable level of efficiency, so that they can impose fines in the case of infringements of labour legislation, make such infringements known to the judicial authority and ensure respect for the principles of Conventions Nos. 87 and 98.
- 660.** Similarly, Chapter IV of the Labour Code of the Republic of Chile establishes and regulates in a complete and concise manner a procedure for collective bargaining, which is not solely reserved for established trade union organizations but is also available to workers coming together for this specific purpose, in the event that they are not already members of a union.
- 661.** In the same manner, the labour legislation clearly recognizes one of the principal aims of guaranteeing freedom of association, which is to allow employers and employees to gather together in organizations independent of the public authorities with the ability to determine, through collective agreements freely entered into, salaries and other employment conditions.
- 662.** Nevertheless, in recognition of the severe problems of legitimacy experienced by enterprise trade union organizations in the face of their direct counterparts and the process of collective bargaining, the Government has instituted a series of activities at national

level, in conjunction with various ministries, with the aim of promoting and legitimizing dialogue processes within enterprises.

- 663.** As is recognized by the Federation of Trade Unions of Chilean Television Channels and Production Companies (FETRA-TV) in its submission to the ILO, the inspection mechanisms and administrative sanctions provided for in Chilean legislation demonstrate a respectable level of efficiency. Thus, in the case of the Television Corporation of the Pontifical Catholic University of Chile (Channel 13 TV), the appropriate regional labour inspectorate (the North-Eastern Labour Inspectorate) was able to visit the headquarters of the enterprise and, following due inspection, proceeded to levy for various reasons the fines provided for in the Labour Act and to inform the ordinary labour courts of the infringements; the enterprise has appealed against these administrative fines.
- 664.** Furthermore, the Government, following meetings with the parties involved in this labour dispute, cannot fail to recognize the lamentable deterioration in labour relations between Channel 13 TV and the trade union there. In this respect it should be borne in mind that strike action is very often symptomatic of deeper and more widespread problems present, and the workers' complaint has its immediate roots in a labour dispute which was not properly resolved by the parties. Thus, both the enterprise and the workers recognize that they are currently witnessing a breakdown in their relations which were, for many years, harmonious. It should be pointed out that around 90 per cent of workers at the television station belonged to the union, including the station's top directors, who, in the majority of cases, acted to promote a series of trade union initiatives.
- 665.** This harmonious relationship has deteriorated as Channel 13 TV has entered an economic crisis which it itself recognizes. Against the background of this crisis, the enterprise decided to externalize some services which workers considered fundamental, a policy which the union views as a threat to freedom of association, given that the number of trade union members at the enterprise has fallen significantly.
- 666.** This policy has exceedingly worried the Government, since the provision of services by third parties has a weak legal basis, which allows enterprises, while not flagrantly breaking the law, to pursue their production activities without acknowledging the degree of management and control needed to recognize the subordination and dependence required for an employment relationship to exist. The Government has therefore submitted a draft Act to Parliament intended to regulate this practice in order to protect workers who are the weaker party in an employment relationship.
- 667.** With regard to the replacement of workers involved in a general strike during the process of collective bargaining, the Government states that, following its inspection, the North-Eastern Labour Inspectorate was able to observe that: (1) the process of collective bargaining in question involved 509 workers at the enterprise, who voted for and carried out four days of strike action, at the end of which, on 17 July 2004, the bargaining committee invoked the provisions of section 369.2 of the Labour Code; and (2) the North-Eastern Labour Inspectorate confirmed that 120 workers had been replaced and imposed fines to a total of 5,580 monthly tax units on the enterprise, a decision which was then appealed by the enterprise before the Fourth Court of Labour Law of Santiago, which, in its first ruling given on 4 November 2004, dismissed the complaint of unfair practices made against Channel 13 TV. For its part, the Directorate of Labour, using the powers invested in it by law and procedure, appealed the decision. The television station's trade union exercised the same right. Given that legal proceedings are still ongoing, it is impossible to state whether or not the enterprise committed the alleged anti-union acts.
- 668.** With regard to the dismissal of 100 workers belonging to the union prior to the start of the collective bargaining process, the Government states that workers at the enterprise

maintain that this would have meant the enterprise engaging in practices damaging to freedom of association. The Government adds that, following inspections by the North-Eastern Labour Inspectorate, an infringement of labour legislation was reported to the Fourth Court of Labour Law of Santiago, Case No. L-2561-2004. In its first ruling, given on 26 August 2004, the circuit judge rejected the inspectorate's position, finding in favour of the Channel 13 TV.

- 669.** However, both the Directorate of Labour, through the North-Eastern Labour Inspectorate, and the trade union at the enterprise have begun appeals and annulment proceedings in respect of this decision. This means that the case is still ongoing, and it is therefore difficult to determine whether the enterprise failed to comply with legislation ensuring freedom of association.
- 670.** With regard to the simulated contracting of workers through third parties, punishable by fine under section 478.1 of the Labour Code, the Government states that, after due inspection by the Regional Labour Inspectorate for North-East Santiago, an administrative fine was imposed on the television corporation under resolutions of 21 July 2003. Specifically, administrative fines were levied against the enterprise for infringement of section 478.1 of the Labour Code, that is, simulating the contracting of workers through third parties, and for failing to declare in writing employment contracts with the workers listed in the decision to impose fines, failing to maintain a register of attendance for the purposes of recording ordinary and extraordinary hours worked in respect of the same workers, and failing to provide on payment of wages a payslip showing the amount deducted and the way in which deductions were calculated. The Pontifical Catholic University of Chile lodged a legal appeal against the administrative fines with the Sixth Court of Labour Law of Santiago. The case is now in the last phase of being examined and decided upon, and a ruling from the court is awaited.
- 671.** In its communication of 2 August 2005, the Government refers to the communication of FETRA-TV dated 30 March 2005 and states that the Channel 13 TV Union had lodged a request with the Third Court of Labour Law of Santiago in 2005. Consequently, the tribunal requested information from the Labour Directorate of the Ministry of Labour and Social Security which replied through an investigation report. The Government indicates that the allegations of FETRA-TV are, in general, the same as those made in the mentioned judicial request.
- 672.** Lastly, the Government attaches comments from Channel 13 TV, regarding the complaint, according to which workers at the enterprise have suffered no damages caused by the corporation which prevent them from exercising their union rights. Therefore, Channel 13 TV cannot easily be accused of undermining freedom of association. During 2002 and 2003 the corporation began a process, legitimate and within the law, of externalizing various functions inherent in or connected to its normal operations. This process of externalization (productive decentralization) occurred following a series of actions intended to rationalize and restructure its various dependent sections and bodies, that is, following a natural process of adapting to the changes which have occurred in the television industry, both at national and international level.
- 673.** According to the corporation, the Directorate of Labour, through its inspectors, applied different criteria to this type of externalization, which led to a fine for "simulating contracting of workers through third parties, in this case external enterprises". In Channel 13 TV's view, this fine is not only arbitrary and illegal, but also fails to reflect the reality of the situation. The television corporation has never attempted to use subterfuge in order to avoid complying with legislation, and has certainly never taken actions allowing the existence of illicit simulation to be presumed. On this basis, Channel 13 TV lodged a legal appeal against these fines with the Sixth Court of Labour Law of Santiago, Case

No. 3855-2003. This case is currently being examined for the first time, and is awaiting a ruling from the examining body.

- 674.** With regard to alleged anti-union practices during collective bargaining, according to the corporation there was in fact no contracting of new workers, nor was there any reassigning of duties which could eventually have threatened the legitimate exercise of the right to strike. Explanations were provided to the inspectors, and documented; it was explained that the last offer made to the trade union organization complied with each and every one of the requirements of section 381 of the Labour Code and that no new workers had been contracted. Furthermore, it was explained to them that those workers still dependent on Channel 13 TV were non-unionized staff who had been providing services to the corporation for some time, and who carried out duties in accordance with their respective contracts, and that in no way could they be classified as replacement staff. None of this prevented the fine in question being levied. The judicial authority found in favour of the enterprise in its first ruling and an appeal has been lodged by the Directorate of Labour. With regard to alleged employment contracts in the form of fee contracts, the corporation states that it maintains a high level of definition in its employment relations in their various forms (viz, indefinite contracts, fixed-term contracts and contracts by job, among others). The participation of workers under fee contract to provide services is exceptional in this corporation and represents a very small percentage of the total. Situations in which proceedings have been brought against Channel 13 TV in this regard have only occurred occasionally, and in several of these cases rulings were given in favour of the enterprise, expressly confirming the legality of such contracts.
- 675.** With regard to the alleged illegal dismissal of workers in order to affect the normal functioning of the trade union, according to the corporation, the labour inspectorate presented a complaint of anti-union practices to the judicial authority based on a complaint from the union; the judicial authority considered that there were no grounds for sanctioning Channel 13 TV for alleged anti-union practices, and accepted that all the dismissals in question conformed to the criteria that were strictly economic and/or for internal restructuring purposes; according to the corporation, the majority of workers who left the enterprise did so on the basis of agreements ratified by the trade union, for reasons such as early retirement or voluntary redundancy. Appeals and annulment proceedings were brought by the labour inspectorate and the union in respect of this first ruling; the annulment proceedings brought by the labour inspectorate were deemed inadmissible; the appeals proceedings are still awaiting a ruling.

C. The Committee's conclusions

- 676.** *The Committee observes that in this case the complainants allege the replacement of workers involved in a legal strike in 2004 at the Television Corporation of the Pontifical Catholic University of Chile (Channel 13 TV); the use of staff supply companies and false contracts for provision of services instead of employment contracts, leading to a fall in union membership, for anti-union purposes; mass dismissals since 2001 and other anti-union practices; discrimination against the general secretary of the union by assigning certain operations for which he had been responsible to a contracting enterprise; pressure from the corporation for workers to abandon collective bargaining, along with economic incentives for those who were not part of the bargaining group prejudicial to those who were members; failure to comply with the provisions of the collective contract; the recent dismissal of three union members; impossibility for the union to recruit members contracted through external enterprises; and the signing by workers of individual contracts imposed by the corporation which exclude them from collective bargaining.*

- 677.** *The Committee takes note of the information provided by the enterprise, according to which the process of outsourcing (using external enterprises) was carried out in accordance with the law and without any actions allowing the existence of illicit simulation to be presumed, and was intended to rationalize and restructure its various dependent sections in order to adapt to the changes which have occurred in the television industry; the enterprise therefore lodged an appeal with the judicial authority against the fines imposed by the Directorate of Labour for “simulating contracting through third parties, in this case external enterprises”; the appeal is awaiting a ruling. According to the enterprise, no new workers were contracted during the strike and those workers still dependent on the enterprise were non-unionized staff who had been providing services for some time; the judicial authority (rejecting the complaint made by the administrative authority of alleged unfair practices) found in favour of the enterprise in its first ruling (an appeal lodged by the Directorate of Labour is currently pending). With regard to the use of fee contracts (contracts to provide services), there is a very small percentage of these at the enterprise; on very rare occasions proceedings have been brought against Channel 13 TV in this regard, and in several of these cases rulings were given in favour of the enterprise, expressly confirming the legality of such contracts. With regard to the alleged illegal dismissal of workers in order to affect the normal functioning of the trade union, the labour inspectorate presented a complaint of anti-union practices to the judicial authority based on a complaint from the union. According to the enterprise, the judicial authority considered that there were no grounds for sanctioning Channel 13 TV for alleged anti-union practices and accepted that all the dismissals in question conformed to criteria that were strictly economic and/or for internal restructuring purposes; according to the enterprise, the majority of workers who left the enterprise did so on the basis of agreements ratified by the trade union, for reasons such as early retirement or voluntary redundancy. Appeals and annulment proceedings were brought by the labour inspectorate and the union in respect of this first ruling; the annulment proceedings brought by the labour inspectorate were deemed inadmissible; the appeals proceedings are still awaiting a ruling.*
- 678.** *The Committee takes note of the Government’s statements, according to which: (1) labour relations between the parties have badly deteriorated as a result of an economic crisis recognized by the enterprise, due to which it decided to outsource some services that workers considered fundamental, a policy which the union views as a threat to freedom of association, given that the number of trade union members at the enterprise has fallen significantly; (2) the Government has submitted a draft Act to Parliament to regulate this practice and protect the weaker party in employment relationships; (3) during the four-day strike called by the union, the labour inspectorate confirmed the existence of 120 replacement workers and imposed a fine of 5,580 monthly tax units on the enterprise, in respect of which the enterprise lodged an appeal with the judicial authority; the judicial authority rejected the complaint of unfair practices against the enterprise in its first ruling and the Directorate of Labour appealed the decision, as did the union, and legal proceedings are therefore continuing; (4) the labour inspectorate submitted a complaint of practices violating freedom of association to the judicial authority in respect of the dismissal of 100 workers and the labour inspectorate, following its inspection, submitted the same complaint to the judicial authority, which found in favour of the enterprise in its first ruling; the labour inspectorate and the union have brought appeals and annulment proceedings which have not yet been completed; and (5) with regard to the simulated contracting of workers through third parties, the labour inspectorate imposed an administrative fine on the enterprise; the enterprise lodged a legal appeal against the fine and the case is still awaiting a ruling.*
- 679.** *Whilst it notes the outcomes of the administrative inspections and the two first instance rulings in favour of the enterprise, the Committee requests the Government to send the text of the first instance rulings or appeal rulings handed down in connection with the various*

allegations made by the complainants on 14 October 2004, so that it may pronounce itself in full knowledge of the facts.

680. *The Committee further notes the Government's statement with regard to the additional information sent by the Federation of Trade Unions of Chilean Television Channels and Production Companies (FETRA-TV) on 30 March 2005. In this respect, the Committee notes that according to the Government, the Trade Union of the Television Corporation of the Pontifical Catholic University of Chile (Channel 13 TV Union) lodged a judicial request on these questions in 2005 and the Ministry of Labour presented to the judicial authority the corresponding investigation report; according to the Government the allegations of FETRA-TV are, in general, the same as those made in the mentioned judicial request. Nevertheless, the Committee requests the Government to send additional observations on the allegations concerning discrimination against the general secretary of the union committed by assigning certain operations for which he had been responsible to a contracting enterprise; pressure from the corporation for workers to abandon collective bargaining, along with economic incentives for those who were not part of the bargaining group prejudicial to those who were members; failure to comply with the provisions of the collective contract; the recent dismissal of three union members; impossibility for the union to recruit members contracted through external enterprises; and the signing by workers of individual contracts imposed by the corporation which exclude them from collective bargaining. The Committee requests the Government to communicate the judgement pronounced on the recent judicial request lodged on these issues.*

The Committee's recommendations

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

- (a) While noting that the first instance rulings which are currently the object of an appeal found that the dismissals of workers in Channel 13 TV were based on strictly economic criteria and/or internal restructuring, the Committee requests the Government to send the text of the first instance rulings or appeal rulings handed down in connection with the various allegations made by the complainants in a communication of 14 October 2004 so that it may pronounce itself in full knowledge of the facts.*
- (b) The Committee requests the Government to send additional observations on the information sent by the Federation of Trade Unions of Chilean Television Channels and Production Companies (FETRA-TV) on 30 March 2005, concerning discrimination against the general secretary of the union by assigning certain operations for which he had been responsible to a contracting enterprise; pressure from the corporation for workers to abandon collective bargaining, along with economic incentives for those who were not part of the bargaining group prejudicial to those who were members; failure to comply with the provisions of the collective contract; the recent dismissal of three union members; impossibility for the union to recruit members contracted by external enterprises; and the signing by workers of individual contracts imposed by the corporation which exclude them from collective bargaining. The Committee also requests the Government to communicate the judgement pronounced on the judicial request regarding these issues.*

CASE NO. 2068

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

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

- the General Confederation of Democratic Workers (CGTD)
- the General Confederation of Democratic Workers (CGTD), Antioquia branch
- the Single Confederation of Workers of Colombia (CUT), Antioquia executive subcommittee and
- 25 other trade unions

Allegations: Denial of trade union leave and violation of the collective agreement in the Fabricato enterprise presented by SINTRATEXTIL; non-fulfilment of agreements between the Enka enterprise and SINTRATEXTIL; refusal to reinstate dismissed ASEINPEC trade union leaders, murder of four trade union officials, dismissal of union leaders and members in the Municipality of Puerto Berrío, presented by the CGTD

- 682.** The Committee last examined this case at its November 2004 meeting [see 335th Report, paras. 732-750] and submitted an interim report to the Governing Body.
- 683.** The Employees' Association of the National Penitentiary and Prison Institute (ASEINPEC) sent additional information in a communication dated 5 February 2005 and new allegations in a communication in August 2005. The Single Confederation of Workers (CUT) presented additional information in a communication dated 4 April 2005.
- 684.** The Government sent its observations in communications dated 2, 7 and 13 September 2005.
- 685.** Colombia has ratified the Freedom of Association and Protection of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. Previous examination of the case

- 686.** At its November 2004 meeting, the Committee made the following recommendations [see 335th Report, para. 750]:
- (a) As regards the allegations presented by SINTRATEXTIL, to the effect that in the Fabricato enterprise trade union leave is denied and trade union leaders are denied access to the enterprise, in respect of which the Antioquia Territorial Directorate left the parties free to bring the case before the courts, the Committee requests the Government to inform it whether the trade union has initiated judicial proceedings.

- (b) As regards the violation of the collective agreement in the Fabricato enterprise, the Committee requests the Government to keep it informed of the final outcome of the three pending administrative investigations and to ensure effective compliance with the collective agreement in the enterprise.
- (c) As regards the allegations concerning non-compliance of the agreements concluded between the president of the Enka enterprise and the trade union, violations of the collective agreement through the conclusion of contracts with companies to conduct work covered by the collective agreement, and distribution of the hardest tasks to unionized workers, in respect of which the Antioquia Territorial Directorate carried out an administrative investigation and acquitted the enterprise, the Committee requests the Government to keep it informed of any judicial appeal lodged by the trade union against this administrative decision.
- (d) As regards the remaining allegations presented by SINTRATEXIL, referring to dismissals on the grounds of restructuring, in violation of a collective agreement, in the Coltejer enterprise and favouritism towards one of the enterprise trade unions to the detriment of the industry union, as well as violation of the collective agreement in the Textiles Rionegro enterprise, the Committee urges the Government to send its observations without delay.
- (e) As regards the refusal of INPEC to return the trade union offices as ordered by the judicial authority, and the remaining allegations concerning threats, sanctions, disciplinary proceedings and transfers involving ASEINPEC union leaders, the Committee strongly urges the Government to take steps to ensure that the ASEINPEC offices are returned without delay, as ordered by the judicial authority, and to send its observations concerning the remaining allegations.
- (f) As regards the murders of trade union officials Jesús Arley Escobar, Fabio Humberto Burbano Córdoba, Jorge Ignacio Bohada Palencia and Jaime García, the Committee deeply regrets that, despite the time which has elapsed since the events occurred and the request of the Committee in its 333rd Report, the Government has not sent its observations, and once again strongly urges it to take the necessary steps without delay to ensure that the investigations allow those responsible for these murders to be punished in the near future and to keep it informed in this respect.
- (g) The Committee requests the Government to provide its observations concerning the additional information submitted by the CGTD, Antioquia branch, in its communication dated 23 September 2004.

(These are allegations concerning the dismissal of leaders and members in the municipality of Puerto Berrío – 57 members, including the members of the Executive Committee of the Union of Puerto Berrío Municipal Workers and 32 members of the Puerto Berrío Municipal Employee’s Association – the Union of Puerto Berrío Municipal Workers (SINTRAMUNICIPALES), regarding which the union states that, after the investigation carried out by the Labour and Social Security Inspectorate into the town hall, the municipality was sanctioned and the ordinary jurisdiction ordered that 18 dismissed union leaders be reinstated, denying the reinstatement of the workers who were merely union members.)

B. New allegations

- 687.** In its communication dated 4 April 2005, the Single Confederation of Workers (CUT) presented additional information about the allegations examined by the Committee at previous meetings regarding the mass dismissal in 1992 of SOFASA workers who were members of SINTRAUTO. The CUT indicates that those allegations were not taken into account during previous examinations of the case by the Committee on Freedom of Association.
- 688.** Regarding the allegations presented by the Employees’ Association of the National Penitentiary and Prison Institute (ASEINPEC) concerning the dismissal of union leaders in

violation of trade union immunity (according to the original allegations contained in the 328th Report of the Committee, paragraph 145, because of a peaceful one-day action in support of prison security, conducted by ASEINPEC in all of the country's prisons, the Director-General of the National Penitentiary and Prison Institute (INPEC) proceeded, on 16 May 2000, to dismiss from their posts 80 trade union leaders who were members of the National Governing Council and section councils in order to eliminate the trade union. The Cundinamarca regional director fined INPEC 50 statutory minimum wages through Administrative Decree No. 01072 dated 24 July 2001 and the directorate general of INPEC issued Decree No. 02101 dated 6 July 2001 referring to the ruling handed down by the High Court of the Judicial District of the Department of Quindío that ordered the reinstatement of the INPEC civil servants), according to the trade union, although most of the union leaders were reinstated, Henry Buyucue Penagos, Germán Amaya Patiño, Gustavo Gutiérrez Rojas, Harold Nieto Rengifo, Luis Fernando Gutiérrez Santos, Pedro Laureano Rengifo and Jairo Alberto Pérez Santander have not yet been reinstated. Regarding the return of union offices, the trade union reports that they have already been handed back.

C. The Government's reply

- 689.** In its communications of 2, 7 and 13 September 2005, the Government sent the following observations.
- 690.** Paragraph (a) of the recommendations in the 335th Report: regarding the allegations presented by SINTRATEXTIL, to the effect that in the Fabricato enterprise trade union leave is denied and trade union leaders are denied access to the enterprise, in respect of which the Committee requested the Government to inform it whether the trade union had initiated judicial proceedings, according to information supplied by the vice-president of industrial relations of Fabricato-Tejicondor, union leaders are granted both paid and unpaid leave (the list of permits granted is attached). In total, the enterprise grants its four unions 47,000 hours of leave.
- 691.** Paragraph (b) of the recommendations: regarding the final outcome of the investigations undertaken by the Antioquia Territorial Directorate, as regards the violation of the collective agreement in the Fabricato enterprise, the Government reports that two of the investigations were closed for lack of legal grounds according to decisions dated 17 August 2004 and 5 April 2005. In accordance with Decision No. 2360 of 16 September 2004, the Fabricato-Tejicondor enterprise was fined five statutory minimum wages, totalling one million seven hundred and ninety thousand pesos (1,790,000), for violating the collective labour agreement. This decision is final, given that the enterprise's fine was upheld after an appeal.
- 692.** Paragraph (c) of the recommendations: as regards the allegations concerning non-compliance with the agreements concluded between the president of the Enka enterprise and the trade union, violations of the collective agreement through the conclusion of contracts with companies to conduct work covered by the collective agreement, and distribution of the hardest tasks to unionized workers, according to a communication signed by the first deputy legal representative of Enka, to date SINTRATEXTIL has not brought legal action.
- 693.** However, according to the case brought against Enka by SINTRATEXTIL for violation of the right to organize, the territorial directorate of Antioquia opened an investigation, which led to Decision No. 230 of 9 February 2005, which determines that the Ministry of Social Protection does not have the jurisdiction to rule on the matter, as it involved legal questions, which administrative civil servants are prohibited from addressing. The SINTRATEXTIL union lodged appeals for reversal to the higher court against the

aforementioned Decision; the rulings are contained in Decision No. 0707 of 6 April 2005 and No. 1773 of 5 August 2005 confirming Decree No. 230. In addition, in accordance with the provisions of article 333 of the Political Constitution, enterprises have economic freedom to hire personnel as long as they respect the rights of the workers.

- 694.** Paragraph (d) of the recommendations: as regards the remaining allegations presented by SINTRATEXTIL, referring to dismissals on the grounds of restructuring, in violation of a collective agreement, in the Coltejer enterprise and favouritism towards one of the enterprise trade unions to the detriment of the industry union, as well as violation of the collective agreement in the Textiles Rionegro enterprise, according to a communication signed by the director of human resources at Coltejer, in the past ten years no workers have been dismissed in a manner incompatible with the agreement, given that any retirements from the enterprise are by mutual agreement, through the early retirement procedure.
- 695.** Regarding favouritism towards one of the unions, the Government states that no such favouritism exists, as the enterprise has a good relationship with both trade unions (SINALTRADIHITEXCO-SINTRATEXTIL). As regards the violation of the agreement, the Government indicates that it is very important to clarify the alleged violation, i.e. to indicate what it consisted of.
- 696.** Paragraph (e) of the recommendations: as regards the refusal of INPEC to return the trade union offices as ordered by the judicial authority, and the remaining allegations concerning threats, sanctions, disciplinary proceedings and transfers involving the Employees' Association of the National Penitentiary and Prison Institute (ASEINPEC) union leaders, according to the director general of INPEC, the office given to the trade union ASEINPEC is functioning, in the premises of the enterprise, and its use and service has been guaranteed since the beginning of the current administration.
- 697.** Regarding the decisions handed down by the various authorities (judicial and administrative), according to the director of INPEC's statement, these have been strictly enforced, and the reinstatements ordered in the various rulings have been carried out. Consequently, INPEC does not currently have any rulings to enforce. However, the director of INPEC notes that the current administration has not violated any of the rules protecting the immunity of civil servants, but rather has maintained the best possible relations with both trade unions.
- 698.** Paragraph (g) of the recommendations: regarding the allegations of the dismissal of union leaders and members in the Municipality of Puerto Berrío – 57 members, including members of the Executive Committee of the Union of Puerto Berrío Municipal Workers and 32 members of the Puerto Berrío Municipal Employees' Association – it should be noted that, in accordance with the provisions of the Political Constitution, the restructuring has legal and constitutional grounds, as has been explained on a number of occasions, which is why the Decrees ordering the restructuring are completely legal and their legality is supervised by the administrative judicial authority. If the workers thought at the time that there were irregularities in a Decree, they should have petitioned the administrative judicial authority for confidentiality to be lifted. The Government has the constitutional authority to create, merge and eliminate posts as required by the administration; it can also modify the structure of public bodies, subject to the general principles and rules of the law. The main objective of the restructuring is to ensure that public bodies are viable, in conformity with the constitutional principles of efficiency and effectiveness, the purpose of which is to provide the community with optimum service. The restructuring process requires eliminating posts; this does not have anything to do with the workers themselves, that is whether or not they belong to a trade union, as indicated in the ruling of 21 August 2001 handed down by the High Court of Medellín, Labour Chamber:

Furthermore, the Labour Chamber is of the opinion that, in this case, the constitutional right to freedom of association has not been infringed, insofar as the collective dismissal of workers in the Municipality of Puerto Berrío (Ant.) was not carried out with the aim of weakening or eliminating the trade union of which the workers in that Municipality were members, or at least that any proof to this effect is noticeably lacking, and that they were dismissed in October, November and December 1999, after the recognition and payment of damages.

It should be noted that, in accordance with the aforementioned ruling, the dismissed workers were paid statutory damages. The Government concludes therefore that the workers were made redundant because of the restructuring process.

699. Regarding the CUT's allegation of collective dismissal at SOFASA, the Government states that it has already replied sufficiently to all the allegations presented and that these allegations date back many years, making it impossible to supply further information.

D. The Committee's conclusions

700. *The Committee recalls that the allegations pending concern the denial of trade union leave, the violation and non-fulfilment of collective agreements, the dismissal of union leaders and members, the refusal to return union offices and the murder of four trade union officials.*
701. *Regarding paragraph (f) of the recommendations concerning the murders of trade union officials Jesús Arley Escobar, Fabio Humberto Burbano Córdoba, Jorge Ignacio Bohada Palencia and Jaime García, the Committee once again deeply regrets that, despite the time which has elapsed since the events occurred and the request of the Committee in its 333rd Report, the Government has not sent any new information about the investigations that are under way, and once again strongly urges it to take the necessary steps without delay to ensure that the investigations allow those responsible for these murders to be identified and adequately punished in the near future and to keep it informed in this respect.*
702. *Regarding paragraph (a) of the recommendations concerning the allegations presented by SINTRATEXIL, to the effect that in the Fabricato enterprise trade union leave is denied and trade union leaders are denied access to the enterprise, the Committee recalls that, in its previous examination of the case, it had requested the Government to inform it whether the trade union had initiated judicial proceedings. The Committee notes the Government's statement that the enterprise reports that union leaders were granted both paid and unpaid leave and that in total the enterprise granted its four unions 47,000 hours of leave. Taking account of this information, the Committee will not pursue the examination of these allegations, unless the complainant provides further information.*
703. *Regarding paragraph (b) of the recommendations concerning violation of the collective agreement in the Fabricato enterprise, the Committee notes the Government's information that two of the investigations were closed and that in the third Decision No. 2360 was handed down, fining the Fabricato-Tejicondor enterprise five statutory minimum wages, totalling one million seven hundred and ninety thousand (1,790,000) pesos, for violating the collective labour agreement, and that the Decision stands.*
704. *Regarding paragraph (c) of the recommendations concerning the allegations of non-compliance with the agreements concluded between the president of the Enka enterprise and the trade union, violation of the collective agreement through the conclusion of contracts with companies to conduct work covered by the collective agreement, and distribution of the hardest tasks to unionized workers, in regard to which*

the Committee had requested the Government to keep it informed of any judicial appeal lodged by the trade union against the decision of the Antioquia Territorial Directorate absolving the enterprise of responsibility, the Committee notes that, according to the Government, the SINTRATEXIL union has not brought any legal action to date.

- 705.** *Regarding paragraph (d) of the recommendations concerning allegations presented by SINTRATEXIL referring to dismissals on the grounds of restructuring, in violation of a collective agreement, in the Coltejer enterprise, the Committee notes the Government's statement that, according to information provided by the enterprise, in the past ten years no workers have been dismissed in a manner incompatible with the agreement and that any current retirements from the enterprise are by mutual agreement with the workers through the early retirement procedure. Regarding favouritism towards one of the enterprise unions to the detriment of the industry union, the Government states that, according to the enterprise, no such favouritism exists, and it has a good relationship with both trade unions that are represented there, SINALTRADIHITEXCO and SINTRATEXIL. The Committee requests the Government to ensure that the principles of freedom of association are fully respected in the enterprise, particularly as regards the non-interference of the enterprise in favour of a union.*
- 706.** *Regarding the violation of the collective agreement in the Textiles Rionegro enterprise, the Committee regrets that the Government has not sent its observations on the matter and requests that it promptly take measures to guarantee the full application of the existing collective agreement in the enterprise.*
- 707.** *Regarding paragraph (e) of the recommendations, concerning the refusal of INPEC to return the trade union offices as ordered by the judicial authority, the Committee notes with interest that, according to both the complainant and the Government, the offices have already been returned to the trade union.*
- 708.** *Regarding the allegations concerning the dismissal of the Employees' Association of the National Penitentiary and Prison Institute (ASEINPEC) union leaders in violation of trade union immunity, the Committee notes that, according to the trade union, although most of the union leaders were reinstated, Henry Buyucue Penagos, Germán Amaya Patiño, Gustavo Gutiérrez Rojas, Harold Nieto Rengifo, Luis Fernando Gutiérrez Santos, Pedro Laureano Rengifo and Jairo Alberto Pérez Santander have not yet been reinstated. The Committee notes the Government's indication that, according to the director of INPEC's statement, the decisions handed down by the various authorities (judicial and administrative) have been strictly enforced, the reinstatements ordered in the various rulings have been carried out and that, consequently, INPEC does not currently have any rulings to enforce. The Committee observes a discrepancy between the allegations presented and the information given to the Government by INPEC. Therefore, the Committee requests the Government to carry out an independent investigation to determine whether the union leaders dismissed in violation of union immunity for participating in a one-day action in support of prison security in 2000 have all been reinstated, as ordered by judicial and administrative rulings. The Committee requests the Government to keep it informed in this respect.*
- 709.** *Regarding paragraph (g) of the recommendations concerning the allegations of the dismissal of union leaders and members in the Municipality of Puerto Berrío – 57 members, including members of the Executive Committee of the Union of Puerto Berrío Municipal Workers and 32 members of the Puerto Berrío Municipal Employees' Association – the Committee notes the General Confederation of Democratic Workers' (CGTD) indication that, after the investigation carried out by the Labour and Social Security Inspectorate into the town hall, the municipality was sanctioned and the ordinary jurisdiction ordered that 18 dismissed union leaders be reinstated, denying the*

reinstatement of the workers who were merely union members. The Committee notes the Government's statement that, in accordance with the provisions of the Political Constitution, the restructuring has legal and constitutional grounds, the main objective being to ensure that public bodies are viable, in conformity with the constitutional principles of efficiency and effectiveness, the purpose of which is to provide the community with optimum service, and that in any restructuring process it is necessary to eliminate posts, but this does not have anything to do with whether or not the worker belongs to a trade union. The Committee observes that the allegations concern collective dismissals in the context of restructuring and also that trade union leaders were dismissed without their trade union immunity having been lifted, then were reinstated by a judicial order, while the municipality was sanctioned. Although, according to the Government, this was a result of the general restructuring process, in view of the fact that the Labour Inspector sanctioned the municipality for the collective dismissal, in particular that of the union leaders, the Committee requests the Government to take measures to carry out an independent investigation to determine whether, in the restructuring process, the workers who were merely union members were the object of anti-union discrimination. The Committee requests the Government to keep it informed in this respect.

- 710.** *Regarding the allegations presented by the Single Confederation of Workers (CUT) concerning the mass dismissal in 1992 of SOFASA workers who were members of SINTRAUTO, Envigado executive subcommittee, the Committee recalls that, as a consequence of those mass dismissals, the Envigado executive subcommittee of SINTRAUTO, of which the SOFASA workers were members, has disappeared. In 1996, the national trade union instituted judicial proceedings against the enterprise for non-compliance with the collective agreement, without the participation of the Envigado executive subcommittee, as it no longer existed. In 1997, the national trade union underwent conciliation with the enterprise, accepting compensation of 17 million pesos for non-compliance with the collective agreement, and a clause was included in the conciliation agreement stating that there was no other action pending against the enterprise (the Government sent a copy of the conciliation agreement) [see the 325th Report of the Committee, para. 331]. According to the CUT, the conciliation did not make reference to the matter of the mass dismissals, and hence it considers that the dispute remains pending in this respect. It also adds that the clause to the effect that there was no other action pending against the enterprise reflected the fact that, at the time, all the internal appeals initiated by the complainant had been completed. The Committee notes that, according to the Government, these allegations date back many years and therefore it is difficult to provide more information than that which has already been sent. The Committee, while observing that the dismissals took place more than ten years ago, requests the Government to ensure that the workers involved have been fully compensated. In this context, the Committee requests the complainant to send the Government a full list of the workers affected.*

The Committee's recommendations

- 711.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *Concerning the murders of trade union officials Jesús Arley Escobar, Fabio Humberto Burbano Córdoba, Jorge Ignacio Bohada Palencia and Jaime García, the Committee once again strongly urges the Government to take the necessary steps without delay to ensure that the investigations allow those responsible for these murders to be identified and adequately punished in the near future and to keep it informed in this respect.*

- (b) Regarding favouritism towards one of the enterprise unions to the detriment of the industry union, the Committee requests the Government to ensure that the principles of freedom of association are fully respected in the enterprise, particularly as regards the non-interference of the enterprise in favour of a union.*
- (c) Regarding the violation of the collective agreement in the Textiles Rionegro enterprise, while regretting that the Government has not sent its observations on the matter, the Committee requests that it promptly take measures to guarantee the full application of the existing collective agreement in the enterprise.*
- (d) Regarding the allegations presented by ASEINPEC concerning the dismissal of union leaders in violation of trade union immunity, the Committee requests the Government to carry out an independent investigation to determine whether the union leaders dismissed in violation of union immunity for participating in a one-day action in support of prison security in 2000 have all been reinstated as ordered by judicial and administrative rulings and requests the Government to keep it informed in this respect.*
- (e) Regarding the allegations of the dismissal of union leaders and members in the Municipality of Puerto Berrío – 57 members, including members of the Executive Committee of the Union of Puerto Berrío Municipal Workers and 32 members of the Puerto Berrío Municipal Employees' Association – in view of the fact that the Labour Inspector sanctioned the municipality for the collective dismissal, in particular that of the union leaders, the Committee requests the Government to take measures to carry out an independent investigation to determine whether, in the restructuring process, the workers who were merely union members were the object of anti-union discrimination and to keep it informed in this respect.*
- (f) As regards the SINTRAUTRO members dismissed in 1992 from the SOFASA enterprise, who, according to the CUT, were not included in the 1997 conciliation agreement, the Committee, while observing that the dismissals took place more than ten years ago, requests the Government to ensure that the workers involved have been fully compensated. In this context, the Committee requests the complainant to send the Government a full list of the workers affected.*

CASE NO. 2363

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

**Complaint against the Government of Colombia
presented by
the Workers' Central Organization (CUT)**

Allegations: the Workers' Central Organization (CUT) alleges refusal to enter the Union of Employees and Workers in the Ministry of External Relations (UNISEMREX) on the trade union register, a disciplinary measure imposed on Ms. Luz Marina Hache Contreras, a union official from the National Association of Civil Servants and Employees in the Judicial Branch (ASONAL JUDICIAL) for participation in a strike, and refusal to negotiate a list of demands and grant union leave

712. The complaint is contained in communications from the Workers' Central Organization (CUT) dated 18 June 2004.
713. The Government sent its observations in communications dated 28 January and 5 May 2005.
714. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainant's allegations

715. In its communications of 18 June 2004, the Workers' Central Organization (CUT) alleges, firstly, that the Labour and Social Security Inspectorate, a component of the Ministry of Social Protection, refused to register the document establishing the union, the list of members of the executive board and the statutes of the Union of Employees and Workers in the Ministry of External Relations (UNISEMREX), an organization formed on 30 January 2004. According to the complainant, resolution No. 739 of 20 February 2004 rejected the request for registration on the basis that certain of its statutory provisions would contravene legislation.
716. The CUT alleges, secondly, that on 17 September 2002 it convened a one-day industrial action against pension, labour and tax reform, joined by the National Association of Civil Servants and Employees in the Judicial Branch (ASONAL JUDICIAL). In carrying out this action, the members of ASONAL JUDICIAL ceased their activities. The Government, through the Ministry of Labour, declared the action to be illegal, despite the fact that throughout the day only activities which did not affect people's liberty and security were suspended, and a minimum service was maintained to ensure that decisions affecting the freedom of persons who had been tried and detained, could be taken.

- 717.** The complainant alleges that, while the workers were carrying out their protest action, the Attorney-General arrived and ordered the workers to resume their activities, threatening them with dismissal and using violence to clear his path. In response to his attitude, union official Ms. Luz Marina Hache Contreras requested the Attorney-General to cease his demands that they leave the area, to which the Attorney-General responded that the said official no longer worked at the organization.
- 718.** On 10 October 2002, two officials from the Attorney-General's Office filed a complaint against the union official on the grounds that she had hindered them in carrying out their duties, employing coercion to make them stop working and join the protest, not allowing them to enter the offices and verbally abusing those who succeeded in entering. The complainant organization states that, on 17 December 2003, by means of resolution No. 001436, the Office of Oversight Services of the Attorney-General's Office brought charges against the union official. On 24 February 2004, by means of resolution No. 0011, the Office of Oversight Services, Complaints and Claims of the Attorney-General's Office sanctioned the official with a period of sixty (60) days' suspension and an equal period of special incapacity. An appeal was lodged against this resolution with an ad hoc Attorney-General and with the Public Prosecutor, as the Attorney-General could not act in the matter, being an interested party.
- 719.** The complainant states that, by means of resolution No. 0612 of 5 May 2004, the Deputy Public Prosecutor decided not to intervene in the appeal process, considering that due process was not affected.
- 720.** Thirdly, the complainant alleges that, on 13 November 2001, ASONAL JUDICIAL presented a list of demands but that, two years later, there had still been no response to it from the Government. Lastly, the complainant alleges that union leave has not been granted to officials to carry out their functions.

B. The Government's reply

- 721.** In its communications of 28 January and 5 May 2005, the Government states, with regard to the allegations made by ASONAL JUDICIAL concerning the sanctions imposed on the union treasurer, Ms. Luz Marina Hache Contreras, that the suspension for a period of sixty (60) days and an equal period of special incapacity was not the result of ceasing activities but of conduct and behaviour which fell outside the bounds of legitimate trade union activity, and consequently outside the protective framework provided by Conventions Nos. 87 and 98. The Government states that, on 16 September 2002, members of the union ASONAL JUDICIAL carried out a day of protest in which Ms. Hache, the union treasurer, participated.
- 722.** Ms. Hache padlocked the access doors to the main parking area, thus obstructing both entry and exit and thereby curtailing the fundamental right to freedom of movement of everyone who was in the Inurbe building, which houses ten local attorney units. The conduct displayed by Ms. Hache occurred at the workplace and during the working day. The protest day did not consist of a meeting at the union's premises, but of this type of conduct during working hours in the buildings housing the offices of the Attorney-General's Office.
- 723.** The Government recalls that the Committee on Freedom of Association has on several occasions stated that, although holders of trade union office do not, by virtue of their position, have the right to transgress legal provisions in force, these provisions should not infringe the basic guarantees of freedom of association. The Government considers that the right to subject a civil servant whose conduct goes beyond the concept of legitimate trade union activity to a disciplinary investigation does not constitute an infringement of the

“basic guarantees” in this area. Naturally, sanctioning the act of curtailing the fundamental rights of citizens, such as their freedom of movement, is not a threat to freedom of association, since the union mandate conferred on Ms. Hache does not grant her immunity in respect of these regulations, nor does it permit her to transgress them.

- 724.** Secondly, the Government recalls that the Committee on Freedom of Association has also indicated the limits placed on the exercise of freedom of association when carrying out public protests: although the right of holding trade union meetings is an essential aspect of trade union rights, the organizations concerned must observe the general provisions relating to public meetings, which are applicable to all. This principle is contained in Article 8 of Convention No. 87, which provides that workers and their organizations, like other persons or organized collectivities, shall respect the law of the land.
- 725.** The Government considers that padlocking the entry and exit doors of a public building when the building is in use is a criminal act, since such behaviour could potentially endanger the lives or safety of hundreds or thousands of innocent people, who have no connection with the reasons for the protest. This behaviour was the subject of a disciplinary investigation by the Attorney-General’s Office, which imposed sanctions against the civil servant in question through resolution No. 011 of 24 February 2004, a decision which was appealed before an ad hoc Attorney-General and the Public Prosecutor, challenging the Attorney-General for being an interested party. According to the report of the Attorney-General’s Office (which the Government attached to its reply), the Supreme Court accepted the challenge on 1 April 2004, but the Deputy Public Prosecutor did not exercise his power to overturn the decision since he considered that due process had been observed. According to the report of the Attorney-General’s Office, an action for protection of constitutional rights [*tutela*] has been brought against the decision.
- 726.** The Government also recalls that the Committee has stated that the right to hold trade union meetings cannot be interpreted as relieving organizations from the obligation to comply with reasonable formalities when they wish to make use of public premises. The Government states that the union did not observe any formalities before proceeding to close the building.
- 727.** The Government recalls that on one occasion when, according to the findings of a court, one of the essential reasons for the dismissal of a trade union official was that he had performed certain trade union activities in his employer’s time, using the personnel of his employer for trade union purposes and using his business position to exercise improper pressure on another employee – all this without the consent of his employer (49th Report, Case No. 213), the Committee considered that, when trade union activities are carried on in this way, it is not possible for the person concerned to invoke the protection of Convention No. 98 or to contend that, in the event of dismissal, his legitimate trade union rights have been infringed.
- 728.** The activities carried out by Ms. Hache took place on a working day, during working hours and at the employer’s premises, in this case the Attorney-General’s Office, without the employer’s consent.
- 729.** With regard to the allegations regarding the refusal by the Labour Inspectorate to register the document establishing the union, the list of members of the executive board and the statutes of the Union of Employees and Workers in the Ministry of External Relations (UNISEMREX), the Government indicates that, by resolution No. 739 of 20 February 2004, the Ministry of Social Protection refused the registration on the grounds that the statutes are contrary to the Political Constitution and that the appeals lodged against this decision were rejected. The decision of the Ministry of Social Protection was based on the following considerations:

- (a) section 12, paragraph 17, of the statutes, which includes among the competences of the General Assembly the carrying out of a strike ballot in the cases provided for in the law, is contrary to article 56 of the Constitution, and sections 416 and 430 of the Substantive Labour Code, which prohibit public employees from declaring a strike;
- (b) section 18 of the statutes, which provides that, in order to be a member of the executive board, one must be of Colombian nationality and not having been sentenced for a common crime for ten years preceding the election, retains the right to organize freely entrenched in article 39 of the Constitution, with regard to nationality (section 384 of the Substantive Labour Code was declared unconstitutional by decision C-385 of 2000 and derogated from by section 9 of Act No. 584 of 2000, because it was discriminatory vis-à-vis foreign workers);
- (c) section 232, paragraph 4, of the statutes, which refers to collective bargaining by public employees, contravenes section 416 of the Substantive Labour Code, which expressly prohibits public employees from negotiating a list of claims and concluding collective agreements;
- (d) section 23, paragraph 13, of the statutes refers to the designation of the Commission of Complaints, where the latter has not been constituted, without taking into account that this competence does not exclusively belong to a trade union organization, not even the majority one, but pertains to all trade unions which function in an enterprise;
- (e) section 42 of the statutes provides that, if a member is sentenced to imprisonment for crimes which are not of a political character, this will be a cause of expulsion from the trade union. This article is contrary to the right to organize freely established in article 39 of the Constitution.

C. The Committee's conclusions

730. *The Committee notes that this case concerns: (1) the refusal of the Labour Inspectorate to register the document establishing the union, the list of members of the executive board and the statutes of the Union of Employees and Workers in the Ministry of External Relations (UNISEMREX) on the basis that certain provisions in the statutes would contravene legislation; (2) the imposition of two months' suspension and an equal period of special incapacity on Ms. Luz Marina Hache Contreras, an official of ASONAL JUDICIAL, for her conduct during a strike held on 17 September 2002; (3) the refusal by the Government to negotiate the list of demands presented by ASONAL JUDICIAL in November 2001; and (4) the denial of trade union leave to members of ASONAL JUDICIAL.*

731. *Concerning the Labour Inspectorate's refusal to register the document establishing the union, the list of members of the executive board and the statutes of UNISEMREX on the basis that certain provisions in the statutes would contravene legislation, the Committee notes that, according to the Government, the registration was rejected by resolution No. 739 of 20 February 2004 on the grounds that the statutes were contrary to the Constitution and Colombian legislation. In particular, the Government refers to sections: 12, paragraph 17; 18; 23, paragraphs 4 and 13; and 42. According to the Government, section 12, paragraph 17, establishes the competence of the General Assembly to carry out a strike ballot, whereas public employees do not have this right, under article 56 of the Political Constitution and sections 416 and 430 of the Substantive Labour Code. The Committee recalls in this respect that the right to strike may be restricted or prohibited only for public servants exercising authority in the name of the State [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 534]. The Committee notes in this respect that both article 56 of the Constitution and*

the Labour Code, which prohibit strikes by public employees generally, are in violation of Convention No. 87.

- 732.** *As for section 18 of the statutes, which provides that, in order to be a member of the executive board, one must be of Colombian origin and not have been sentenced for a common crime for ten years preceding the election, the Committee notes that, according to the Government, this provision restricts the right to organize. In this respect, the Committee recalls that Article 3 of Convention No. 87 establishes the right of organizations to draw up their statutes in full freedom. The same principle applies to section 42 of the statutes, which provides that, if a member is sentenced to prison, this shall be a reason for expulsion from the trade union. The Committee considers therefore that neither section 18 nor section 42 of the statutes were contrary to the provisions of the Convention and that they should not by consequence be an obstacle to the registration of the statutes in question.*
- 733.** *As for section 23, paragraph 4, of the statutes, which refers to collective bargaining by public employees, the Committee notes that, according to the Government, this section violates section 416 of the Substantive Labour Code, which expressly prohibits public employees from negotiating lists of claims and concluding collective agreements. In this respect, the Committee has already indicated on various occasions that, even though collective bargaining in the public service can be subject to specific modalities, the right to bargain collectively has been recognized in general for all public employees on the basis of the ratification of Conventions Nos. 151 and 154. In these conditions, the Committee requests the Government to take the necessary measures to modify the legislative provisions so that public employees can enjoy the rights flowing from the Conventions ratified by Colombia including the right to collective bargaining and the right to strike. Taking into account that the sections of the statutes which raise objections are not contrary to Convention No. 87, the Committee requests the Government to proceed without delay to the registration of the Constitution, the list of executive board members and the statutes of the Union of Employees and Workers in the Ministry of External Relations (UNISEMREX).*
- 734.** *Regarding the allegations concerning the sanctions of two months' suspension and an equal period of special incapacity imposed on Ms. Luz Marina Hache Contreras for taking part in strike action on 17 September 2002, the Committee notes the information submitted by the Government, according to which, in exercising her right to strike, Ms. Hache Contreras padlocked the access doors to the main parking area of the building, which houses ten local attorney units, thereby endangering the lives and safety of the persons within the building and curtailing the freedom of movement and freedom to work of those wishing to enter or leave the building. According to the Government, this constitutes an abuse of the right to strike and is liable to sanctions. The Committee notes that the complainant organization lodged an appeal against this decision before an ad hoc Attorney-General and the Public Prosecutor, claiming that the Attorney-General was himself a party to the dispute. This claim was upheld by the Supreme Court of Justice on 1 April 2004. However, the Deputy Public Prosecutor decided not to intervene in the process, considering that due process had not been violated. The complainant organization brought an action for protection of constitutional rights [tutela] in respect of this decision. Firstly, the Committee observes that there is a discrepancy between the allegations made and the observations of the Government with regard to the reasons given for the sanctions. Secondly, the Committee notes that the information submitted by the Government does not give the result of the appeal or the tutela action brought by ASONAL JUDICIAL in respect of the decision to impose the sanctions, which would make it possible to determine the nature of the aforementioned reasons more accurately. In these circumstances, recalling that the principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike, and that all penalties in respect of illegitimate*

actions linked to strikes should be proportionate to the offence or fault committed [see *Digest*, op. cit., paras. 598 and 599] the Committee requests the Government to inform it of the outcome of the appeal lodged in respect of the decision to impose sanctions on Ms. Luz Marina Hache Contreras and to send it a copy of the ruling.

- 735.** *The Committee regrets that the Government has not sent its observations with respect to the allegations concerning the refusal of the Government to negotiate the list of demands presented by ASONAL JUDICIAL in 2001. The Committee recalls that, while some categories of public officials already enjoyed the right to collective bargaining in accordance with Convention No. 98, that right was extended to cover all public officials in general with the ratification of Convention No. 154 on 8 December 2000. This being the case, and recalling that collective bargaining in public administration allows for specific methods of application, the Committee requests the Government to take the necessary measures to ensure that the right of public officials to bargain collectively in accordance with the provisions of the Convention ratified is respected.*
- 736.** *With regard to the allegations concerning the refusal to grant trade union leave, and recalling that Article 6.1 of Convention No. 151, which Colombia has also ratified, states that “such facilities shall be afforded to the representatives of recognised public employees’ organisations as may be appropriate in order to enable them to carry out their functions promptly and efficiently, both during and outside their hours of work”, the Committee requests the Government to take the necessary steps to ensure that trade union leaders in the public administration are able to make use of the facilities necessary to carry out their functions in accordance with Convention No. 151.*

The Committee’s recommendations

- 737.** *In light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *With regard to the allegations regarding the refusal by the Labour Inspectorate to register the document establishing the union, the list of members of the executive board and the statutes of the Union of Employees and Workers in the Ministry of External Relations (UNISEMREX), the Committee requests the Government to take the necessary measures to modify the legislative provisions so that public employees can enjoy the rights flowing from the Conventions ratified by Colombia including the right to collective bargaining and the right to strike. Taking into account that the sections of the statutes which raise objections are not contrary to Convention No. 87, the Committee requests the Government to proceed without delay to the registration of the Constitution, the list of executive board members and the statutes of the Union of Employees and Workers in the Ministry of External Relations (UNISEMREX).*
- (b) *Regarding the allegations concerning the sanctions of two months’ suspension and an equal period of special incapacity imposed on Ms. Luz Marina Hache Contreras, the Committee requests the Government to inform it of the outcome of the appeal lodged in respect of the decision to impose sanctions on Ms. Luz Marina Hache Contreras and to send a copy of the ruling.*
- (c) *With respect to the allegations concerning the refusal of the Government to negotiate the list of demands presented by ASONAL JUDICIAL in 2001, the*

Committee requests the Government to take the necessary measures to ensure that the right of public officials to bargain collectively is respected, in accordance with the provisions of Convention No. 154, which it has ratified.

- (d) *With regard to the allegations concerning the refusal to grant trade union leave, the Committee requests the Government to take the necessary steps to ensure that trade union leaders in the public administration are able to make use of the facilities necessary to carry out their functions in accordance with Convention No. 151.*

CASE NO. 2384

INTERIM REPORT

Complaints against the Government of Colombia presented by

- **the Workers' Unitary Central (CUT) and**
- **the Trade Union of Workers and Employees in Public and Autonomous Services and Decentralized Institutions of Colombia (SINTRAEMSDES)**

Allegations: The Workers' Unitary Central (CUT) alleges the dismissal of 54 workers belonging to the Trade Union of Public Employees of the Medellín Municipal Sports and Recreation Institute (ASINDER) three days after the union was founded and refusal to register the new committee of the Trade Union of Workers at the Cartagena Communications Company (SINTRATELECARTAGENA) as a result of the company going into liquidation. The Trade Union of Workers and Employees in Public and Autonomous Services and Decentralized Institutions of Colombia (SINTRAEMSDES) alleges the dismissal of the president of the union, Mr. Rafael León Padilla, three days after having entered the new committee on the trade union register

738. The complaint is contained in communications from the Workers' Unitary Central (CUT) dated 3 August 2004 and 16 March 2005 and in a communication from the Trade Union of Workers and Employees in Public and Autonomous Services and Decentralized Institutions of Colombia (SINTRAEMSDES) of May 2005.

739. The Government sent its observations in a communication dated 2 May 2005.

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

A. The complainants' allegations

- 741.** In its communication of 3 August 2004 the Workers' Unitary Central (CUT) alleges that, on 28 January 2001, the Trade Union of Public Employees of the Medellín Municipal Sports and Recreation Institute (ASINDER) was founded. Three days later, on 31 January 2001, in accordance with Act No. 617 of 2000 on economic rationalization, the Medellín Municipal Authority dismissed 54 workers belonging to the union, thus leaving it with only nine members, which is less than the minimum number required by legislation for a union to exist. According to the complainant, the dismissals were carried out without having lifted the trade union immunity which protected all the workers by virtue of their status as founder members of the union.
- 742.** The complainant adds that the restructuring process which led to the 54 workers being dismissed was not undertaken in the due manner, since the technical studies required by law were not carried out. Furthermore, according to the complainant, the dismissed workers were replaced by workers contracted to provide services, who are thus unable to join a trade union because no employment relationship exists. An action for protection of constitutional rights [*tutela*] was brought against the decision before the Twentieth Municipal Criminal Court of Medellín, which ordered the reinstatement of the dismissed workers. This decision was confirmed at appeal. A second *tutela* action was then brought by the Medellín Municipal Sports and Recreation Institute (INDER) before the Superior Council, which overturned the earlier rulings. However, annulment proceedings were brought in respect of this decision by the trade union and the appeals authority before the Sectional Council of the Judicature, which annulled the decision of the Superior Council, and in the end the *tutela* ruling was archived. The dismissed workers then brought a special action of trade union immunity before the ordinary courts, which was rejected because the court considered that the workers were aware that their posts would eventually be abolished as a result of Act No. 617 of 2000, and that founding and belonging to ASINDER served the sole purpose of protecting its members with founder member immunity, which constitutes an abuse of law. The complainant states that it has appealed against this decision, and that the appeal is pending.
- 743.** In its communication of 16 March 2005, the CUT alleges refusal to register the committee of the Trade Union of Workers at the Cartagena Communications Company (SINTRATELECARTAGENA) based on a legal opinion given by the Ministry of Social Protection, in accordance with which the committees of trade unions operating at public institutions which have gone into liquidation cannot be registered.
- 744.** In its communication of May 2005, the Trade Union of Workers and Employees in Public and Autonomous Services and Decentralized Institutions of Colombia (SINTRAEMSDDES) alleges that on 4 August 1997 Mr. Rafael León Padilla, president of the committee of the Cartagena branch of the union, was dismissed by the district public services enterprises of Cartagena, which had gone into liquidation. Mr. Padilla had been re-elected president on 20 July 1997.
- 745.** The complainant alleges that Mr. Padilla brought legal proceedings for violation of trade union immunity and that the Eighth Labour Court of the Cartagena Circuit gave a ruling recognizing trade union immunity and allowing compensation for dismissal but did not order his reinstatement, since the enterprise had gone into liquidation. The union states, however, that the enterprise had reserved some posts for trusted employees. The first ruling was overturned by the Superior Court of Justice of Cartagena, rendering Mr. Padilla's situation even worse by denying him trade union immunity, the corresponding compensation, and reinstatement. This decision was then contested by the Supreme Court on the grounds of errors of form, and the Superior Court was ordered to give another ruling. In the end, the Superior Court for the district upheld the original ruling of the

Eighth Labour Court of the Circuit, meaning that Mr. Padilla's reinstatement was not recognized. Subsequent proceedings brought by Mr. Padilla were rejected.

B. The Government's reply

746. In its communication of 2 May 2005, the Government states, with regard to the dismissal of 54 workers belonging to ASINDER as part of the restructuring process carried out in the Medellín Municipal Sports and Recreation Institute (INDER), that Act No. 617 to rationalize costs involved the abolition of certain posts, regardless of whether the staff employed in those posts were members of a union. The Government underlines that the common interest takes precedence in restructuring processes, taking account of the needs of public institutions whilst attempting to guarantee stability for workers, and, where that is not possible, to pay compensation. The Government adds that, before the restructuring, and in accordance with section 41 of Act No. 443 of 1998, a technical study was carried out which demonstrated the necessity of the restructuring process. The Government attaches copies of resolution No. 017, of 23 January 2001, which ordered the abolition of certain posts at INDER, and the minutes of the interdisciplinary committee's meetings to analyse staffing and changes to the staff of INDER held on 19, 20, 21 and 26 January 2001, at which the committee established the need to reduce the number of staff because the planned budget for 2001 was three times smaller than for 2000, and that, in accordance with Act No. 617 of 2000, regional institutions should be financed exclusively from their current income. Based on the technical study, the final plan for restructuring took account not only of workers' pension liabilities but also the amount of compensation to be paid to those who would be affected by the abolition of jobs and a plan to reinsert them into the labour market. The Government also attaches a copy of the minutes of the committee meeting to analyse the curricula vitae of staff employed in jobs which might be abolished, at which the criteria for deciding which employees would be dismissed were determined. The jobs abolished were those most recently created; where two or more jobs were created at the same time, qualifications were taken into account.
747. Furthermore, the Government states that it is legal for public bodies to contract workers to provide services and that this practice is usually employed to fill vacancies whilst the process laid down in law for filling posts begins. However, according to the Government, this practice has not been used by INDER; rather, it has named staff to fill posts on a temporary basis but not those posts affected by the restructuring.
748. With regard to trade union immunity, the Government underlines that, under both constitutional and ordinary jurisprudence, trade union immunity must not be abused, and that in this case the trade union was founded in an effort to guarantee job security and avoid posts being abolished.

C. The Committee's conclusions

749. *The Committee observes that this case concerns: (1) the dismissal of 54 workers belonging to the Trade Union of Public Employees of the Medellín Municipal Sports and Recreation Institute (ASINDER) three days after the union was founded; (2) the refusal to register the new committee of the Trade Union of Workers at the Cartagena Communications Company (SINTRATELECARTAGENA) as a result of the company going into liquidation alleged by the Workers' Unitary Central (CUT); and (3) the allegations presented by the Trade Union of Workers and Employees in Public and Autonomous Services and Decentralized Institutions of Colombia (SINTRAEMSDES) concerning the dismissal of the president of the union three days after having entered the new committee on the trade union register.*

- 750.** *With regard to the dismissal of 54 workers belonging to ASINDER without having lifted the trade union immunity that protected founder members of the union, the Committee notes that, according to the allegations, the union was founded on 28 January 2001, that the collective dismissal took place on 31 January 2001, i.e. three days after the union was founded, without any request for lifting the trade union immunity and without the technical studies required by law having been carried out, and that, following the collective dismissal, INDER contracted new workers under services contracts, a practice which means that such workers do not enjoy the right to join a trade union.*
- 751.** *The Committee notes that, according to the Government, the dismissals were necessary for the restructuring of the Institute brought about by the operational budget having been reduced by two-thirds, and were not based on whether the workers dismissed were union members or not; that this restructuring was provided for within the framework of Act No. 617 of 2000 on economic rationalization; and that technical studies examining compensation and reinsertion programmes for dismissed workers were undertaken before the collective dismissal took place. The Committee notes that the Government denies that staff were subsequently contracted under service provision contracts and states that in fact staff were named to fill posts on a temporary basis but not those posts affected by the restructuring.*
- 752.** *The Committee further notes that the tutela proceedings brought in respect of the dismissals resulted in a reinstatement order for the dismissed workers, a decision which was contested by INDER by means of a new tutela action, and that both rulings were overturned by the Superior Council of the Judicature. In the end, the reinstatement action brought by the dismissed workers before the ordinary courts was rejected, and an appeal is ongoing. In these circumstances, the Committee requests the Government to keep it informed of the final appeal ruling.*
- 753.** *The Committee recalls that it can examine allegations concerning economic rationalization programmes and restructuring processes, whether or not they imply redundancies or the transfer of enterprises or services from the public to the private sector, only in so far as they might have given rise to acts of discrimination or interference against trade unions. In any case, it is a matter of regret if, in the rationalization and staff-reduction process, there is no attempt to consult or try to reach an agreement with the trade union organizations [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 935]. The Committee observes that the Government has not indicated that consultations have taken place with the trade union on the restructuring of INDER and the Committee trusts that the Government will ensure such consultations shall occur if future restructuring were to take place.*
- 754.** *With regard to the refusal to register the new committee of the Trade Union of Workers at the Cartagena Communications Company (SINTRATELECARTAGENA) as a result of the company going into liquidation and the allegations presented by the Trade Union of Workers and Employees in Public and Autonomous Services and Decentralized Institutions of Colombia (SINTRAEMSDES) concerning the dismissal of the president of the union three days after having entered the new committee on the trade union register, the Committee regrets that the Government has not sent its observations in this regard and requests it to do so without delay.*

The Committee's recommendations

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

- (a) *With regard to the alleged dismissal of 54 members of the Trade Union of Public Employees of the Medellín Municipal Sports and Recreation Institute (ASINDER) three days after the union was founded without lifting the trade union immunity, the Committee requests the Government to keep it informed on the appeals proceedings brought in respect of the decision of the ordinary courts rejecting the workers' reinstatement.*
- (b) *With regard to the alleged refusal to register the new committee of the Trade Union of Workers at the Cartagena Communications Company (SINTRATELECARTAGENA) as a result of the company going into liquidation, the Committee requests the Government to send its observations in this regard without delay.*
- (c) *With regard to the alleged dismissal of the president of the Trade Union of Workers and Employees in Public and Autonomous Services and Decentralized Institutions of Colombia (SINTRAEMSDES) three days after having entered the new committee on the trade union register, the Committee requests the Government to send its observations in this regard without delay.*

CASE NO. 2385

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

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

— **the Rerum Novarum Confederation of Workers (CTRN) and
the Trade Union of Workers and Retirees of the National Registry
(SITRARENA)**

supported by

— **the International Confederation of Free Trade Unions (ICFTU)**

Allegations: Making conditions of work and employment in the public sector subject to the directives of an external body (the National Certification Commission), excessive delays in the collective bargaining process attributable to the authorities; amendment of agreed clauses by the National Certification Commission; proceedings for unconstitutionality in the courts instigated by the Libertarian Party and the Ombudsman against the agreements concluded between the parties

- 756.** The complaint is contained in a letter from the Rerum Novarum Confederation of Workers (CTRN) and the Union of Workers and Retirees of the National Registry (SITRARENA) dated 26 July 2004. The International Confederation of Free Trade Unions (ICFTU) associated itself with the complaint in its letter of 22 September 2004.

- 757.** The Government replied in letters dated 2 and 19 May 2005.
- 758.** Costa Rica has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 759.** In its letter of 26 July 2004 (with which the International Confederation of Free Trade Unions (ICFTU) associated itself in its letter of 22 September 2004), the Rerum Novarum Confederation of Workers (CTRN) and its affiliated organization, the Trade Union of Workers and Retirees of the National Registry (SITRARENA), allege that in Costa Rica there is a kind of conspiracy involving the three Powers of the Republic (Executive Power, Legislative Power and Judicial Power) since they pursue a policy of ignoring the rights of freedom of association and collective bargaining. This orchestrated attack on trade union freedoms has been joined by the Ombudsman, the Civil Service Regulatory Authority (ARESEP) and certain groups of political parties which have deputies in the Legislative Assembly, such as the Libertarian Party which, from its narrow standpoint, regards collective bargaining as the privilege of a few workers.
- 760.** The complainant organizations recall the conclusions and recommendations of the Committee on Freedom of Association in Case No. 2030 relating to the collective bargaining process in the National Registry in 1997, under the regulations on collective bargaining for civil servants (Governing Council Agreement No. 162). On that occasion, drawing the Government's attention that approval by the authorities of collective agreements signed by the parties in order for them to enter into force is contrary to Convention No. 98, the Committee urged the Government to ensure that the National Authorization and Ratification Commission did not alter the content of what had been definitively agreed between the parties. The complainant organizations state that at present the text applicable to collective bargaining in the public sector is Executive Decree No. 29576-MTSS of 15 June 2001.
- 761.** Almost a year after the examination by the Committee on Freedom of Association of Case No. 2030, in the 2000 bargaining round, the parties concluded the bargaining process and signed the corresponding agreement. The collective agreement was then filed with the Public Sector Certification Commission, in the Office of the President of the Commission, the Minister of Labour, for approval. Strangely, at the same time, the members of the Administrative Board of the National Registry (of which the Minister of Justice is president) signed a final and parallel document which they sent to the National Certification Commission objecting to clauses which had already been signed by their representatives requesting that certain clauses which had already been agreed should not be approved, and a document other than the one negotiated be issued. Rather than refuse the request of the employers' representatives of the National Registry, the Minister of Labour did what he was asked. Thus, the majority of the clauses of the collective agreement were mutilated and the text signed by the parties was changed, and subsequently approved by the Commission's resolution No. 001-2000 of 21 November 2000. In the light of the foregoing, it can be seen that the National Certification Commission is a body whose actions contravene Convention No. 98.
- 762.** Although SITRARENA lodged an appeal against the resolution, the National Certification Commission took almost a year and a half to reach a decision, in resolution No. 02-0002 of 10 July 2002, leaving the collective agreement equally mutilated and with some of the agreed clauses changed. During the time when the National Certification Commission delayed in reaching resolution No. 02-0002, the Administration of the National Registry did not apply the agreement on the grounds that SITRARENA had challenged it. This

delay meant that the approved text only came into effect just prior to its expiry (22 November 2002), i.e. it was only applied for five months.

- 763.** By way of example, among the most important changes, it was agreed between the parties that half-time trade union leave would be granted to four SITRARENA representatives, but resolution No. 001-2000 only allowed half-time leave for two, thus cutting out two of those agreed. In addition, different and reduced powers were assigned to the joint bipartite organ, the Industrial Relations Board.
- 764.** As regards the years 2002 to 2004, the complainant organizations allege that SITRARENA submitted a new collective agreement to the Minister of Justice, the National Certification Commission and the Minister of Labour. A month after the expiry of the previous collective agreement, SITRARENA had to denounce the previous agreement under article 64 of the Labour Code, and submit a new agreement with the clauses that it wished to negotiate. Although a bargaining process took place, up to the time of the submission of the complaint, it has not been possible to conclude it. Indeed, the present Minister of Justice insisted that before entering into negotiations, authorization from the National Certification Commission was required, a process which lasted for over six months before the Commission issued a document in which it indicated to the employers' representatives, prior to the collective bargaining process, which clauses it could or must negotiate (Decision No. 7-2003 of the National Certification Commission). The trade union had to exert pressure by means of a strike. It was after the strike in the National Registry by SITRARENA, on 16 September 2003, that the collective bargaining process began, which was not an open process as shown by the minutes of each bargaining session, since the employers' representatives indicated in each clause that the Commission had not authorized them to negotiate and thus they were unable to do so.
- 765.** Under the decree of 2001, prior to the bargaining process, a body external to the bargaining process analyses the clauses and indicates which of them can or must be negotiated, which in the opinion of the complainants is in violation of the international Conventions of the ILO. The National Public Sector Authorizing Commission is composed only of members of the Executive Power (ministers and their representatives) and some officials of public institutions such as the Director of the Civil Service and the Budget Authority.
- 766.** In addition, in the bargaining, the Minister of Justice adduces that clause 89, which refers to equality of posts, should not be negotiated. That clause states: "Staff of the National Registry who perform the same functions and assume the same civil, penal and administrative responsibilities should received the same basic wage." This is without prejudice to any incentives or bonuses awarded for academic requirements in different levels or groups within the respective grades. The effect of the foregoing is to ensure equivalence between the basic wage of officials working as registrars, certifying officers, technical assistants, registry assistants and computer technicians. Specifically, although the Public Sector Authorizing Commission authorized this clause to be negotiated, the Minister refused and sent a note to the Civil Service asking whether it was possible to proceed with that clause, despite the fact that the Director of the Civil Service is one of the officials who signed the decision of the National Certification Commission authorizing negotiation of clause 89. The subordinates of the Minister of Justice then indicate that as there is an action pending, it is not possible to negotiate.
- 767.** In addition, deputies in the Legislative Power, members of the Libertarian Party, claim that any clause which exceeds the rights contained in the Costa Rican Labour Code, and which violates principles of equality and reasonableness are "unreasonable and disproportionate privileges". These deputies lodged a claim of unconstitutionality with the Constitutional Chamber of the Supreme Court of Justice (IVth Chamber) to delete articles of the agreement which had been agreed from the National Registry collective agreement, and

requested that holidays, trade union leave for officials, leave to attend training seminars, leave to attend general assemblies, celebration of the Registry Officials Day, among others, should be abolished. This application was admitted for consideration in the Constitutional Chamber but it is not known what the outcome will be.

768. Nevertheless, it should be noted that there have already been decisions of the Constitutional Chamber which accept the view of the Ombudsman's Office that collective bargaining in the public sector is unconstitutional, and ordering the deletion of certain articles of collective agreements, negotiated between the parties, in state enterprises, which established rights in favour of workers which they had enjoyed for over 20 years. A technical assistance mission which visited the country stated in its report that under such circumstances, the mission considered that it was very likely that the decisions of the Constitutional Chamber had placed Costa Rica in a situation where it was in breach of Convention No. 98 with regard to the right of collective bargaining in the public sector, since it only allows public servants engaged in the administration of the State to be excluded from its scope (Article 6). The mission drew these problems to the attention of the Committee of Experts. The complainant organizations indicate the danger that constitutional chambers of supreme courts do not apply the ILO Conventions.

769. As indicated, the conspiracy by the Powers of the Costa Rican State repeats the anti-trade union conduct of failure to comply with the rights of free association and collective bargaining in Costa Rica, making use of state institutions which ignore acquired labour rights and which suppress clauses resulting from collective bargaining. There is now an attempt, through the Constitutional Court, to suppress several clauses of the collective agreement concluded between the trade union SITRARENA and the state institution, the National Registry.

770. In summary, to negotiate in the public sector, an external body (the National Certification Commission) must issue a decision to start the process, and may bar certain clauses. Even though the Administrative Board authorized certain officials to negotiate, following the bargaining process it requested the elimination of some of the clauses which had been signed. Then the National Certification Commission mutilated the clauses and issued resolutions with clauses which were not those that had been negotiated. Furthermore, the Ombudsman's Office and certain members of Congress filed an application in the Constitutional Chamber to delete clauses which had already been negotiated and approved.

B. The Government's reply

771. In its letters of 2 and 19 May 2005, the Government states that the allegations provide an inexact account of the facts and some are omitted. The assertion by the complainants concerning a supposed conspiracy between the Executive Power, the Legislature and the Judiciary to ignore trade union rights is totally alien to the truth. The Government refers in this regard to its replies in Cases Nos. 2030 (closed since 2001), 2084 and 2104 which show all the efforts made by the Executive Power, before the Legislative Power and the Judicial Power, in defence of freedom of association (the Government reproduces the relevant replies to the Committee on these cases and the various initiatives and actions before the Legislative Power and the Judicial Power).

772. Recently, the Government received technical assistance from a member of the Committee of Experts, and in 2004, in the face of the divergence between national law and practice, and the ILO standards noted by the ILO supervisory organs, requested the establishment of a forum for dialogue between experts and officials of the ILO and the State, including the Ombudsman's Office and the Office of the Attorney-General of the Republic, with a view to finding a solution compatible with the situation in Costa Rica and the principles of the basic Conventions relating to the right of collective bargaining of public servants not

engaged in the administration of the State, a point on which the Government invokes the fact that there is an action in another case, as the same matter arises in Case No. 2104. In this connection, it should be noted that the necessary meetings have already taken place with deputies and judges, with a view to defending the right of collective bargaining in the public sector in both arenas. On the first place, some draft laws have been submitted and recommended for adoption including, among other things, approval of ILO Conventions Nos. 151 and 154 on the promotion of collective bargaining in the public sector; reform of article 192 of the Constitution the purpose of which is to legalize the right to conclude collective agreements in the public sector; the Public Sector Collective Bargaining Bill; and the elevation to the status of law of the current Decree No. 29576-MTSS, which regulates dispute settlement and collective bargaining for public servants, among other things. In addition, in response to the actions for unconstitutionality seeking the annulment of certain clauses in collective agreements, the Government has presented appropriate legal assistance in defence of the right of collective bargaining in the public sector, all of which has been duly reported to the Committee on Freedom of Association, in particular in the context of Case No. 2104. Thus, the Government has confidence in the outcome of the Dialogue Process promoted by the expert, Mr. Rodríguez Piñeiro, with the public authorities (Legislative Assembly, Judicial Power, Office of the Ombudsman, Office of the Attorney-General of the Republic), as well as the principal workers' and employers' organizations so that through exchange of information and experience the special situation in Costa Rica can be discussed, analysed and resolved, and a solution can be found that reflects the reality of Costa Rica and the principles that inspire the fundamental Conventions of the ILO.

- 773.** The Government reiterates that, notwithstanding the foregoing, collective bargaining has taken place unhindered throughout the public sector under Regulation No. 29576-MTSS of 31 May 2001 on collective bargaining in the public sector.
- 774.** The Government wishes to reiterate clearly that the institution of collective bargaining in the public sector is not in danger in Costa Rica. At the moment, what is being discussed is whether certain clauses which are considered an abuse by the Ombudsman's Office and an opposition political party (which are taking legal action against certain clauses) should be declared void. What is being discussed now is whether the abuse of a right is permitted under the Constitution. This is the basic discussion and the Government remains hopeful of resolving it with technical assistance from the ILO, thanks to the recent visit by the abovementioned expert in line with the recommendations of the ILO's supervisory organs.
- 775.** The Government also states, with reference to the allegations concerning 2002-04, that these were matters which occurred before the present Administration took office and there are no documents in its records relating to the negotiations on collective bargaining held in 2002. The Government indicates that in accordance with resolution No. 001-2000 of the National Commission for the Authorization and Ratification of Collective Bargaining in the Public Sector, of 21 November 2000, the Commission approved the collective agreement signed by the Trade Union of Workers of the National Registry (SITRARENA) and the National Registry. SITRARENA appealed against that resolution to the National Certification Commission, that appeal being decided by resolution No. 002-2002 of 4 April 2002. The Government does not know in what form the records of the collective bargaining in 2000 were signed. The term of that collective agreement was determined by the National Certification Commission mentioned above.
- 776.** As regards the allegations relating to the period 2002-04, the Government points out that the appointment of Mrs. Patricia Vega as Minister of Justice dates from 25 November 2002, so it is not certain that she personally received the denunciation of the collective agreement. Indeed, according to the information provided by the trade union itself in its complaint, and the relevant documents in the Ministry of Justice, the document in which

the trade union requests a new collective bargaining round, the denunciation was delivered to José Miguel Villalobos, the then Minister, on 21 October 2002. This document was also sent to the Industrial Relations Office in the Ministry of Labour, with a view to starting the process of renegotiating the clauses which had been denounced, on the same date as indicated above. Prior to the appointment of Mrs. Vega, the Administrative Board of the National Registry had made the preliminary arrangements and had appointed its negotiators in the Bargaining Committee so that the bargaining process could begin as soon as it had been authorized by the Commission on Public Sector Collective Bargaining Policy. In this regard, the Government provided Decision No. J0409 of the Administrative Board of the National Registry, of 20 September 2002, which lists the appointments. In accordance with the guidelines laid down in Decree No. 29576-MTSS, (Regulations on public sector collective bargaining), when denunciation of a collective agreement is filed and negotiation of a new agreement is proposed, it is an essential requirement for the Administration that the Commission on Public Sector Collective Bargaining Policy undertakes a preliminary analysis of the proposals and authorizes the employers' representatives to negotiate the proposed clauses. On this point, article 13 of the decree in question states:

Article 13. The following are powers and duties of the Commission:

- (a) To receive the request for negotiation together with the draft collective agreement, an opinion of the interested organization on its content and scope, and nomination of a senior representative who shall be a member of the Commission. This must all be done within fifteen days.
- (b) To define negotiating policies in the specific case, taking into account the legal and budgetary possibilities. To this end, it shall issue relevant directives to the negotiators nominated by the interested organization through its representative on the Commission. This must all be done within one month from the receipt of the request for negotiation.
- (c) To maintain the necessary contact with the employers' bargaining team during the negotiations, to ensure the decisions necessary for the continuity and finalization of the process in accordance with the law ...

777. This Commission is thus a body which issues directives to the Administration which is to engage in collective bargaining. Of course, in no way can this situation be interpreted as a limitation on the actions of the trade union. Quite the contrary, Decree No. 29576-MTSS establishes a procedure which fast-tracks and facilitates the taking of decisions within the Administration, taking into consideration aspects ranging from the legality of the proposed bargaining points to the appropriateness and relevance of adopting certain decisions, indicating to the negotiating administration what it can negotiate and what not. On this point, the international Conventions establish general rules for the conduct of bargaining between employers and trade unions, but nowhere do they oblige the employer to accept and negotiate each of the trade union's demands on its own terms, since that would be tantamount to saying that between workers and employers, there is no negotiation but only imposition by one of the parties, which is totally alien to the spirit of collective bargaining and the international instruments.

778. In the framework of the decree under discussion, the document proposed for negotiation was submitted to the Commission on Public Sector Collective Bargaining Policy so that, in accordance with its powers, it could indicate to the National Registry the specific guidelines and directives for the pending bargaining round.

779. At the same time, given the change of Minister of Justice, the Administrative Board of the National Registry substituted the employers' representatives in the collective bargaining round, under Decision No. J.020 in its regular session No. 2-2002 of 16 January 2003. The Commission on Public Sector Collective Bargaining Policy issued the directives to be followed by the public administration in decision No. 007-2003 of 1 July 2003. In the light

of the above, the Minister of Justice called on the trade union to proceed with the collective bargaining process, inviting it to the first session on 8 July 2003, in letter DM-1231-06-2003, dated 1 July 2003. Thus it is not true that the Minister of Justice refused to allow the collective bargaining, since it was at the initiative of her office that the bargaining round began. Nor is it true that the trade union was forced to resort to a protest action or strike to force her office to open discussions since, as has been shown, the bargaining process was initiated well before the date indicated by the trade union.

780. Article 11 of the Constitution states:

Civil servants are merely trustees of authority. They are under an obligation to fulfil the duties required of them by law and may not assume powers unto themselves that are not contained in the law. They must swear to observe and uphold the Constitution and laws. The public administration in the broad sense shall be subject to evaluation of performance and accountability, with the consequent personal responsibility of civil servants in the performance of their duties. The law shall lay down means to ensure that control of performance and accountability operates as a system that covers all public institutions.

In this regard, and by the legal nature of the National Register as a public sector body, the above regulation establishes a series of procedures according to which the State must act in the case of collective bargaining.

781. It should be noted that nowhere does the above regulation set restrictions on trade unions other than those derived from the Constitution and the law, such as demonstrating their proper representativeness to negotiate a collective agreement. On the contrary, as can be seen from the text quoted above, the regulation seeks to express the will of the administration to negotiate, which must of necessity be expressed by the state bodies which have the legal authority to do so.

782. This aspect is set out in article 12 of the Regulations which establishes the composition of the Policy Commission as follows:

Article 12. A Commission on Public Sector Collective Bargaining Policy shall be established, composed of:

- (a) The Minister of Labour and Social Security or the Vice-Minister, presiding.
- (b) The Minister of the Treasury or the Vice-Minister.
- (c) The Minister of the Presidency or the Vice-Minister.
- (d) The Director General of the Civil Service or his temporary substitute in the office.
- (e) A representative at senior level of the entity which is to negotiate the collective agreement.

783. The participation of each of these bodies reflects the different responsibilities exercised within the action of the State. For example, the presence of the Minister or Vice-Minister of the Treasury is intended to ensure, prior to negotiation with the trade unions, that there is sufficient budgetary provision to meet the costs implications of the bargaining process. This, of course, is an internal consideration to guide the action of the administration, but in no way affects the action of the trade union.

784. It is not true, therefore, that SITRARENA had to take industrial action to force the Public Policy Commission to pronounce itself on the request for negotiation and to overturn the directives to the National Registry. The industrial action to which the members of SITRARENA refer occurred on 16 September 2003, by which time the bargaining arrangements were already in hand in the National Registry. Moreover, the industrial action did not relate to the start of collective bargaining but the payment of bonuses which

were included in the collective bargaining process which had already begun. It should be clarified that although the clauses in question were included for information in the collective bargaining round, they had not yet been discussed at the time of the industrial action, because from the start of the bargaining round in July 2003, both sides, employers and trade unions, had agreed that the clauses proposed by the trade union would be negotiated in the same order as they had been presented. In this respect, the clauses which contained the benefits in question were clauses 88 and 89 of the text proposed by the trade union, and had thus not been addressed in September 2003.

- 785.** The Commission on Public Sector Collective Bargaining Policy issues directives on the form in which collective agreements should be negotiated and therefore the assertion of SITRARENA that the Commission is an external body must be totally refuted, since, under the principle of legality explained above, the State has a segregation of powers and functions which must be respected at all times. Thus, it is not true that the Commission is an external body, since, as has been shown, it is composed of the competent state bodies with power to take legal decisions under the Costa Rican system.
- 786.** The Government reiterates that bargaining does not consist of imposing on either of the parties the obligation to negotiate the clauses as presented. If one of the parties cannot negotiate certain matters because they are outside the law, the other cannot force it to agree to do so. Despite this, it seems that the trade union is forgetting this spirit and claims, for example, that the Administration should negotiate clauses which are clearly illegal, such as, for example, using a plot of land belonging to the Ministry of Justice which was purchased with public funds to build a leisure centre for trade union employees. The Costa Rican State cannot allocate public funds for purposes other than those established or designated by law (in Costa Rica this can only be done through a law and not a collective agreement). The Government is faced with an impossibility in terms of public priorities. Indeed, the Government has assumed a series of obligations relating to human rights for prisoners, obligations which by their importance and their character of basic subsistence needs, rank higher in the interests of the State.
- 787.** This is just one example of the clauses which the Government disagreed with in the bargaining process from the outset. They are clearly aspects which do not directly or indirectly affect the trade union rights of SITRARENA, much less its members. It is a normal assessment which any employer, at the start of a collective bargaining process, must make of its interests and needs.
- 788.** The Government also states that it is not true that the Minister of Justice refused to negotiate the case of wage differentials between registrars and certifying officers.
- 789.** From the start of the current round, on her own initiative, and without the need for intervention by SITRARENA, the Minister of Justice took steps to determine the situation in the matter of wage differentials between registrars and certifying officers.
- 790.** This was because the wage differentials between the various grades of registrars and certifying officers based on their different academic qualifications had been a matter for debate for many years. Thus, the system of wage grades in the Costa Rican Civil Service included a wage differential based on employees' academic qualifications, with higher remuneration for higher levels of education.
- 791.** This situation led to inconsistency among workers in the National Registry who indicated that, although there was a marked academic differentiation between one level and another, there being workers who have not completed secondary school alongside others who have finished university, the wage must be the same because the work they perform is similar.

- 792.** These inconsistencies were submitted to the courts, when a large group of workers in the National Registry lodged an industrial claim to force the State to establish equality of basic wages for registrars and certifying officers, irrespective of their vocational training.
- 793.** Against this background and to allow her to take the appropriate decisions, the Minister of Justice held a series of meetings to analyse the legality of what the trade union was requesting in the collective bargaining, and she sought the advice of the Directorate-General of the Civil Service, the department which legally analyses and classifies posts in the Civil Service, to which National Registry workers belong.
- 794.** In this connection, on 12 August 2003, the Head of the National Registry sent a request to the Director of the Civil Service asking him to indicate the procedure to be followed in that case. That was because under articles 191 and 192 of the Constitution, state employees' wages were a matter for a special body, the Civil Service.
- 795.** In the light of the foregoing, the Minister of Justice could not negotiate on wages because she did not have authority to set wages for workers in the Civil Service. In the light of this, internal negotiations were initiated with the competent department to find a legal solution to satisfy, to the extent possible, the workers' claims. As a result of the investigation, the Director-General of the Civil Service, in Memorandum No. DG-459-2003 of 1 September 2003, expressed his agreement to seek mechanisms to allow the trade union proposal to be examined, proposing a channel of communication between the Ministry of Justice and the Civil Service to undertake the necessary official studies. Despite the foregoing, the Directorate-General of the Civil Service made the study subject to there not being any pending proceedings on this point in the courts, on the basis that the Civil Service would have to await a court decision since it could not decide on a matter of litigation. In the light of the reply of the Director of the Civil Service, the Attorney-General of the Republic was consulted as to whether there were any pending proceedings on the matters to be examined. The Attorney-General stated that there were proceedings pending in the courts on this matter, namely an ordinary employment action by Eduardo Alvarado Miranda and others against the State, an action which was mentioned at the beginning of this section. As can be seen from the above, all these actions occurred prior to the industrial action of 16 September 2003, thus it is reiterated that it is not true that there was no wish to negotiate clause 89 of the draft collective agreement.
- 796.** One of the goals of the industrial action of 16 September 2003 was that: "The basic wage of all classes of posts in the National Registry at different levels should be the same as the highest basic wage for the respective grade, such that any employee in the National Registry who performs the same tasks or functions as another employee receives the same basic wage, albeit without prejudice to any additions or bonuses in respect of each employee's personal academic qualifications." There was no request in that document to open collective bargaining since, as indicated above, that had already commenced and the bargaining committee made up of the trade union and the employers' representatives had been meeting regularly every Tuesday since 8 July. The document that led to the lifting of the industrial action of 16 September clearly established the circumstances in which both parties, workers and Ministry of Justice, were to negotiate the clause in article 89 on wage differentials.
- 797.** That document stated expressly:

The workers' representatives undertake to withdraw the pending legal actions relating to basic wages of registrars and certifying officers. For her part, the Minister undertakes to take steps to ensure that the Civil Service, within two months from today, carries out a technical study into the matter. This study shall be prepared as a draft which will not be published until the legal actions concerned have been withdrawn. As soon as the study has been completed and the legal actions withdrawn, article 89 of the draft collective agreement will be negotiated.

- 798.** The Minister of Justice sent the request for the study to the Civil Service as she had undertaken to do. Despite that, the workers who had commenced legal actions did not wish to withdraw them, for which reason, as of today, legal proceedings on this matter are ongoing. In this respect, the Government sends Decision No. 498 of the Employment Court, against which the workers lodged an appeal in the Second Chamber of the Supreme Court of Justice. The Government also sends the reply of the Office of the Attorney-General of the Republic in the hearing of the appeal in the Second Chamber.
- 799.** As can be seen from the court proceedings, the State has not taken any action to extend or delay a judicial decision on the matter which would facilitate the negotiation of clause 89. On the contrary, it was the workers who decided to continue with the court action, a decision which the Government has always respected. The Government points out that after several months of bargaining, the process was concluded without any negotiation of clause 89 under the agreement reached on 16 September 2003. Despite that, on 29 July 2004, SITRARENA issued a new call to industrial action in support of a request to negotiate clause 89, despite the fact that it was the workers' representatives who had failed to comply with the agreement adopted on 16 September 2003.
- 800.** On 30 July 2004, a document headed "Undertakings of the Bargaining Table" was signed, in which it was agreed to restart the dialogue on the much mentioned clause 89. In the course of over a month of bargaining, a clause was arrived at which largely met the concerns of both sides. All that remained was to define the final sentence relating to the legal and constitutional authority assigned to the Civil Service Directorate as discussed above. Although the legal procedure requires wage matters in public employment to be dealt with by the Civil Service Directorate, the trade union objected to the document, which had achieved consensus on the substance, being transmitted to the competent department. With this clause almost finished, the bargaining committee met again and reached a proposed consensus. The proposal was that due to the restriction on the representation allowed to the employer members, it should be accepted by the Administrative Board of the Registry in order that it should be finally accepted by the employers' representatives. The clause stated:

Agreement No. 1

The basic wage, grade and group of officials of the National Registry who perform the same functions and assume the same responsibilities of a civil, penal and administrative character shall be as follows:

Assistant registrar grade: in this grade there will only be an assistant registrar which will include the current groups A, B and C.

Technical assistant grade: in this grade there will only be a technical assistant which will include the current groups A and B.

Technical certifying officer grade: in this grade there will only be a technical certifying officer which will include the current groups A and B.

The grade of Graduate Certifying Officer will remain.

The highest basic wage will be maintained for the foregoing grades.

For registry work: There will be two grades of post: Registrar 1, which will include the current groups A and B, and Registrar 2, which will be differentiated technically and the wage gap between the grades will be the smallest in the National Registry wage scale under the present system, maintaining the basic wage of Registrar C for the grade of Registrar 2.

The above is without prejudice to any incentives or bonuses for academic qualifications held by different levels or groups in the respective grades.

Following its approval, the Civil Service will undertake an examination of the negotiated parts of this article, in so far as these fall within its purview.

- 801.** The Administrative Board of the National Registry approved the negotiated clause recommending an editorial change to the end of the last paragraph which provided certainty and made the wording clearer. The clause recommended by the Administrative Board read as follows:

The basic wage, grade and group of officials of the National Registry who perform the same functions and assume the same responsibilities of a civil, penal and administrative character shall be as follows:

Assistant registrar grade: in this grade there will only be an assistant registrar which will include the current groups A, B and C.

Technical assistant grade: in this grade there will only be a technical assistant which will include the current groups A and B.

Technical certifying officer grade: in this grade there will only be a technical certifying officer which will include the current groups A and B.

The grade of Graduate Certifying Officer will remain.

The highest basic wage will be maintained for the foregoing grades.

For registry work: There will be two grades of post: Registrar 1, which will include the current groups A and B, and Registrar 2, which will be differentiated technically and the wage gap between the grades will be the smallest in the National Registry wage scale under the present system, maintaining the basic wage of Registrar C for the grade of Registrar 2.

The above is without prejudice to any incentives or bonuses for academic qualifications held by different levels or groups in the respective grades.

Following its approval, the Civil Service will undertake an examination of the negotiated parts of this article, in so far as these fall within its purview, in accordance with the provisions of article 13 of the Civil Service Statute.

- 802.** As can be seen from both agreements, the change proposed in the text is not an amendment of the substance, but simply makes direct reference to a legal provision which must be observed even when it is not expressly stated, since otherwise there could be a violation of article 56 of the Corruption and Unlawful Enrichment in the Civil Service Act, Law No. 8422, which states specifically that:

A civil servant who, representing the Public Administration and in its name, grants or allows benefits in the course of his duties, in violation of the applicable legislation, shall be sentenced to a prison term of three months to two years.

- 803.** It should be recalled that the staff of the National Registry are civil servants, whose actions are strictly regulated by the principle of legality, and the funds with which they negotiate are public funds which by their nature are also closely controlled as to the manner in which they are used.

- 804.** With the agreement of the Administrative Board of the National Registry, the Vice-Minister of Justice informed the trade union on 17 November 2004 that the collective bargaining stage was over, and invited them to the formal signing of the document. The trade union was also asked to provide a copy of the approval by the General Assembly of the Trade Union of Workers in the National Registry of the negotiated text, so as to conclude the final document. However, despite the concern of the Ministry of Justice to bring the process to a close, the trade union, as of today, has still not provided the approval of the General Assembly of SITRARENA of the text negotiated by its representatives, although the Administration does have the approval of its Administrative Board on the negotiated text.

- 805.** According to the SITRARENA newsletter of 3 March 2005, a General Assembly was being convened to consider the matter on 4 March 2005, but it is not known what happened.
- 806.** The foregoing shows that it is not true that the Ministry of Justice categorically refused to negotiate clause 89, since the delays in the matter are due to the failure of the trade union to fulfil its obligations under the agreement and the failure of the supreme organ of the trade union, its General Assembly, to approve the document negotiated by the bargaining committee.
- 807.** As regards the fact that the Libertarian Party is challenging some of the clauses of the collective agreement in the Costa Rican Constitutional Court (Constitutional Chamber), the Government points out that in Costa Rica, the democratic system which has been established allows those concerned to question administrative acts by civil servants and that collective agreements, being acts in which civil servants are involved as civil servants on behalf of the State, are capable of being reviewed in the courts when any individual considers that they violate Costa Rican law.
- 808.** This does not mean, of course, that it is sought to violate the right of collective bargaining of trade union members. As indicated, the review reflects the necessary compliance with the principle of legality which governs the administrative system and which, as the Constitution indicates, makes the acts of civil servants subject to review in order to evaluate the action of those civil servants.
- 809.** In the specific case to which the trade union refers, the Libertarian Party, a political party legally constituted in accordance with Costa Rican legislation, challenged certain clauses of the collective agreement because it considered them to be contrary to the principles of equality, rationality, reasonableness and proportionality enshrined in the Constitution. Despite what was claimed, it is not true that there is a “conspiracy” between the other Powers of the Republic against SITRARENA. Moreover, the Director General of the National Registry argued strongly in the hearing granted him by the Constitutional Chamber relating to the action that the Constitutional Court should “declare the action for unconstitutionality inadmissible, since the violations of the law in question concerned direct and individual injury and were not a matter of general public interest. If the Constitutional Chamber decided that the action was admissible, he requested that it should be declared void in all its aspects, based on the arguments expressed”. The National Registry thus defended the collective agreement at national level, so it is not true that there is a “conspiracy” against the trade union.
- 810.** As regards the hypothetical appeal by deputies of the Libertarian Party relating to the collective bargaining that began in November 2002, the allegation by the trade union is not clear, since it merely indicates or suggests that there were decisions of the Constitutional Court, without indicating clearly which resolutions or cases it considered to be directly relevant to it. Given this lack of clarity, the trade union’s argument can be considered to be merely speculative, since there has been no decision of the Constitutional Chamber. Moreover, it is not correct to accuse the Government of unlawful actions on the basis of speculation and considerations by the trade union not supported by actual facts and simply insinuated without providing the relevant evidence.
- 811.** Costa Rica is a country which respects the international conventions of international organizations to which it is a party. In this regard, it should be noted that article 7 of the Constitution places such international instruments ahead of laws. Article 7 of the Constitution states that: “Public treaties, international conventions and agreements duly approved by the Legislative Assembly shall from the date of their promulgation or the date designated therein take precedence over laws” In addition, the Constitutional

Chamber, in its case law, recognizes the importance of international instruments, when it states that, “as recognised in the case law of this Chamber, human rights instruments in force in Costa Rica not only have equivalent status to the Constitution, but to the extent that they grant greater rights or guarantees to persons, they take precedence over the Constitution” (Constitutional Chamber, Decision No. 2313-1995). In the light of the above, the fear claimed by the trade union members is incomprehensible, given that national legislation is clear on the status and importance of international treaties, a status recognized by the Constitutional Court.

C. The Committee’s conclusions

- 812.** *The Committee observes that in the present case, the allegations of the complainant organizations refer to subjection of the agreements on conditions of work and employment in the public sector to the directives of an external body (the National Certification Commission), excessive delays in the collective bargaining process attributable to the authorities; amendment of the agreed clauses by the National Certification Commission; proceedings for unconstitutionality in the courts instigated by the Libertarian Party and the Ombudsman against the agreements concluded between the parties. The trade union organizations consider that there is a kind of conspiracy involving the three Powers of the State against the rights of freedom of association and collective bargaining.*
- 813.** *The Committee notes the Government’s statements and observes that it invokes the pending cases, to the extent that the question of collective bargaining in the public sector was addressed in Cases Nos. 2030 and 2104, currently before the Committee. The Committee will take this statement into account but some allegations are new or show that certain problems previously indicated by the Committee persist. In this respect, the Committee observes that indeed the complainant organizations refer to the Committee’s conclusions in Case No. 2030 formulated in March 2000 on the process of collective bargaining in the National Registry begun in 1997 under the regulations on collective bargaining for civil servants (Governing Council Decision No. 162), conclusions in which the Committee had criticized the approval of collective agreements by the Commission on Public Sector Certification [see 320th Report, paras. 593-597]. The complainant organizations also refer in the present case to the collective bargaining round in 2000 in the National Registry when, according to the allegations, the said National Certification Commission instituted by agreement No. 162 altered the result of the collective bargaining, and the judicial proceedings delayed the application of the text thus approved so that it was only in effect for five months. The Government indicates in this regard that the allegations concerning the collective bargaining in 2000 occurred before the present Administration took office, and that there were no documents in its records relating to that bargaining round and the Government did not know in what form the record of the collective bargaining was signed. In these circumstances, since the Government has not denied the allegations, the Committee regrets that the National Certification Commission altered the result of the collective bargaining in 2000 and that the delay in proceedings relating to the appeals filed by the trade union meant that the approved text was only in effect for five months, but observes that the said National Certification Commission ceased to exist as a result of the new collective bargaining system in the public sector (Executive Decree No. 29576 MTSS of 15 June 2001), which the Committee welcomes. The allegations relating to the collective bargaining begun in 2002 will be examined later, but the Committee will first consider certain questions of a general character.*
- 814.** *The Committee notes that the Government denies the allegation that there is a conspiracy by the Powers of the State against freedom of association and collective bargaining. The complainant organizations refer expressly to the conclusions of an ILO technical assistance mission in 2001 which questioned the situation of collective bargaining in the public sector on the basis of certain restrictive judgements of the Constitutional Chamber*

of the Supreme Court of Justice in relation to civil servants, and the very common practice of the Ombudsman and deputies of the Libertarian Party of filing actions for unconstitutionality against clauses in collective agreements in the public sector, for example on matters such as trade union leave, holidays, training leave, etc. from the point of view of the principles of equality, rationality, reasonableness and proportionality under the Constitution. The Committee notes that the Government refers to a series of bills (reform of legislation and the Constitution, ratification of Conventions Nos. 151 and 154) at the initiative of the Judicial Power and in the framework of judicial proceedings (appropriate assistance to defend the right of collective bargaining against actions for unconstitutionality) and the results of a technical assistance mission (“dialogue process”) recently undertaken by a member of the Committee of Experts relating to the right of collective bargaining in the public sector. The Committee notes the Government’s statement that under the new regulation No. 29576-MTSS of 31 May 2001 collective bargaining took place unhindered throughout the public sector, and that what is currently being discussed is whether certain clauses that the Ombudsman’s Office and a political party consider to be an abuse should be declared void, a discussion which the Government hopes to resolve following the recent technical assistance mission by a member of the Committee of Experts.

- 815.** *The Committee concludes that, in the light of the foregoing, although there is no conspiracy by the Powers of the State against collective bargaining, the result of the many government initiatives (presentation of bills, initiatives to ratify Conventions Nos. 151 and 154, initiatives in the courts, assistance in judicial proceedings, etc.) shows that the Government’s efforts, which it has been deploying for two years, have not materialized in laws of the Congress of the Republic. New regulations on collective bargaining in the public sector are based on a mere executive decree of 2001, subsequent to decisions of the Supreme Court of Justice which questioned the right of collective bargaining of civil servants. Thus, the present situation is somewhat confused and needs to be clarified. Additional guarantees are also required to avoid the more or less systematic use of the recourse of unconstitutionality against collective agreements in the public sector by the Ombudsman’s Office and the Libertarian Party. The Committee notes that the Government qualifies as possible speculation and hypothetical any actions for unconstitutionality by the Libertarian Party against the last collective agreement in the National Registry to which the complainant organizations refer. The Committee observes, however, that the complainant organizations have sent as an annex an action for unconstitutionality by the Libertarian Party dated 19 March 2004 against the SITRARENA collective agreement. The Committee will continue to address these questions in the framework of its examination of case No. 2104.*
- 816.** *With regard to the collective bargaining begun in 2002 in the National Registry, the Committee notes the allegations of the complainant organizations that: (1) the bargaining process had not been concluded on the date of the submission of the complaint (24 July 2004), firstly, because the National Certification Commission (“Commission on Public Sector Collective Bargaining Policy” according to the Government’s terminology and the 2001 Regulations) took over six months to decide on the clauses which could be negotiated and that the bargaining process only began after the strike on 16 September 2003; (2) the employers’ representatives refused to negotiate clauses which had not been authorized by the said Commission (consisting of ministers and their representatives and other authorities) or other clauses authorized, e.g. clause 89 on equality of basic wages for civil servants who perform the same task for the same remuneration; in the latter case the Minister of Justice consulted the Director of the Civil Service (despite the fact that he was a member of the said Commission) on whether the clause could be considered; subsequently, the Minister’s subordinates indicated that as there was an action pending, it could not be negotiated; (3) through the Constitutional Chamber (at the instigation of the*

Office of the Ombudsman and the Libertarian Party) it was sought to suppress various clauses of the collective agreement in the National Registry.

817. *The Committee notes the Government's extensive statements concerning the allegations relating to the collective bargaining begun in 2002 in the National Registry and in particular that:*

- (1) *the Minister of Justice did not refuse to negotiate and the trade union did not need to strike or exert pressure to force the Minister to open discussions; on 21 October 2002, the trade union requested a new collective bargaining round and prior to that the Minister of Justice had appointed negotiators on behalf of the National Registry for the purpose of negotiating as soon as the Commission on Public Sector Collective Bargaining Policy issued the relevant instructions or guidelines;*
- (2) *on 16 January 2003, the Minister of Justice changed and the new Minister substituted the employers' representatives; on 1 July 2003, the Policy Commission issued negotiating directives, and on 8 July 2003 the new Minister called on the trade union to continue the collective bargaining process, with the parties meeting every Tuesday;*
- (3) *the industrial action on 16 September was therefore not for the purpose of starting the collective bargaining as the complainants allege, but payment of bonuses (clauses 88 and 89 of the list of claims, which had not been negotiated because the clauses were to be negotiated in the same order as they had been presented); the clause on equality of wages for registrars and certifying officers (clause 89) was a question which the workers had submitted to the courts and the Minister of Justice decided to consult the Directorate-General of the Civil Service seeking to find a legal solution to the workers' claims; only after that did the industrial action take place (16 September 2003) following which the parties signed a document whereby the industrial action would be lifted and the workers would withdraw the pending legal proceedings (which they never did) and the negotiation of clause 89 would take place after a technical review by the Civil Service. The Committee notes that according to the Government's statements, the bargaining process ended months later, apart from the negotiation of the agreement (the document) adopted on 16 September 2003 relating to clause 89 which continued to be the subject of negotiations given the legal implications of this matter for the employer's side, until a proposed consensus was finally reached to be submitted to the Administrative Board of the National Registry. The Board approved the clause recommending an editorial change. On 17 November 2004, the trade union was invited to sign the document and to provide a copy of the approval thereof by the General Assembly of the trade union. However, that approval was never sent.*

818. *In these circumstances, the Committee concludes that the Minister of Justice did not refuse to negotiate and finds that the bargaining began before the strike of 16 September 2003. The Committee observes that the denunciation of the previous collective agreement and the submission of the bargaining claim occurred on 21 October 2002, that the employer's side appointed negotiators in anticipation of the future collective bargaining, that on 16 January 2003 the new Minister of Justice appointed new negotiators, that the Commission on Public Sector Collective Bargaining Policy established in the executive decree of 2001 issued directives for the negotiations on 1 July 2003, that on 8 July 2003, the Minister convened the parties to continue the process and that according to the Government, the trade union was informed on 17 November 2004 that the bargaining process was concluded and invited the trade union to the formal signing. The Committee regrets that the opening of discussions between the parties was delayed by seven months from the submission of the list of claims due to the delay by the Policy Commission in issuing the bargaining directives and requests the Government to take measures to ensure that the said body issues its directives in a reasonable time. The Committee wishes to point*

out that there can be no objection to the intervention by this government body through “directives” to the negotiators on the employers’ side provided that its purpose, as stated by the Government, is to comply with budgetary rules and the principle of legality, and to the extent that collective bargaining in the public administration may be subject to special arrangements. Unlike the former National Certification Commission, the Policy Commission gives instructions and directives to the negotiators on the employers’ side but does not approve the agreements. However, the Committee observes that it is apparent from the documentation sent by the complainant organizations and the Government that the Commission on Bargaining Policy did not authorize a large number of draft clauses presented by the trade union for the purposes of negotiation, invoking the principle of legality. The Committee requests the Government to indicate whether the decisions of the Commission on Bargaining Policy can be appealed to the judicial authority or to an independent body.

819. *As regards the delay in the collective bargaining process due to the different positions of the parties on clause 89, the Committee observes that the trade union was entitled to hold a strike in support of its claims and that there were in fact effective negotiations on the question, thus there is no reason to criticize either party. However, given that the collective bargaining process lasted some two years according to the Government’s statements, the Committee suggests that it should seek ILO technical assistance to accelerate the dispute settlement mechanisms for collective bargaining in the public sector, in particular bearing in mind that according to the Government’s statements, the result of the collective bargaining did not come into effect (the trade union did not sign the final relevant document sent by the Ministry of Justice).*

820. *The Committee requests the Government to send it full information on the possible signing of the document sent by the Ministry of Justice to the trade union and invites the complainant organizations to explain the reasons why the trade union has not yet signed it.*

The Committee’s recommendations

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

(a) Observing that the new collective bargaining regulations in the public sector are based on a mere executive decree in 2001, subsequent to decisions of the Supreme Court of Justice which questioned the right of collective bargaining of civil servants, so that the present situation is somewhat confused and needs to be clarified, and considering that additional guarantees are also required to avoid the more or less systematic use of the recourse of unconstitutionality against collective agreements in the public sector by the Ombudsman’s Office and the Libertarian Party, the Committee will continue to address these questions in the framework of its examination of Case No. 2104.

(b) The Committee regrets that the opening of discussions between the parties was delayed by seven months from the submission of the list of claims in October 2002 due to the delay by the Commission on Bargaining Policy in issuing the bargaining directives and requests the Government to take measures to ensure that the said body issues its directives in a reasonable time.

- (c) *The Committee observes that it is apparent from the documentation sent by the complainant organizations and the Government that the Commission on Bargaining Policy did not authorize a large number of draft clauses presented by the trade union for the purposes of negotiation, invoking the principle of legality. The Committee requests the Government to indicate whether the decisions of the Commission on Bargaining Policy can be appealed to the judicial authority or to an independent body.*
- (d) *The Committee suggests that the Government should seek ILO technical assistance to accelerate the dispute settlement mechanisms for collective bargaining in the public sector.*
- (e) *The Committee requests the Government to send it full information on the possible signing of the document sent by the Ministry of Justice to the trade union and invites the complainant organizations to explain the reasons why the trade union has not yet signed it.*

CASE NO. 2376

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

**Complaint against the Government of Côte d'Ivoire
presented by
the Confederation of Free Trade Unions of Côte d'Ivoire "Dignity"**

Allegations: The complainant alleges that the employer, the Autonomous Port of Abidjan, dismissed the General Secretary of the Port Workers' Union, even though he is not accused of any professional misconduct and the board of the labour inspectorate has ordered his reinstatement. The employer also immediately evicted the union leader from his staff housing, even though the interim court had decided that it was not competent to rule on the matter of eviction because the final administrative decision was not yet known

822. The Confederation of Free Trade Unions of Côte d'Ivoire "Dignity" presented this complaint in a communication dated 10 July 2004.
823. As the Government did not respond, the Committee had to postpone the examination of the case twice. At its May-June 2005 meeting [see 337th Report, para. 10], the Committee addressed an urgent appeal to the Government indicating that, according to the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it might submit a report on the substance of the matter at the next session, even if the requested information or observations had not been received in time. To date, the Government has not sent any information.

824. Côte d'Ivoire 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

825. In its communication of 10 July 2004, the Confederation of Free Trade Unions of Côte d'Ivoire "Dignity" presented the following allegations. In July 2000, Mr. Matou Thompson, an employee of the Autonomous Port of Abidjan, was elected General Secretary of the Port Workers' Union. In this role, he inherited two files concerning portworkers: the first was about the management of social assistance funds and the second concerned the port agents' mutual housing fund. These two structures were set up on the initiative of workers, who finance them through at-source deductions from salaries. The complainant alleges that these structures, managed by company directors, members of the autonomous port authority and leaders of the "rival" union SUTRAPA (the Single Union of Workers of the Autonomous Port of Abidjan), have allowed serious irregularities in their operation. Under these circumstances, Mr. Thompson made efforts to improve the management of these structures.

826. According to the complainant, under the pretext that the press had reported these matters, the port authority decided, on 16 July 2002, to end Mr. Thompson's contract, a decision following on from authorization granted by the sub-management of the Vridi labour inspectorate responsible for this area. At the end of a hierarchical appeal lodged on 2 August 2002 against the dismissal, the board of the labour inspectorate ordered that Mr. Thompson be reinstated. However, according to the complainant, even before the ruling had been made on the aforementioned appeal, the port authority of the Autonomous Port of Abidjan had immediately proceeded to evict, in violent and traumatic conditions, the union leader and members of his family from the staff housing that they were living in. The complainant states that the case has been submitted to the interim judge, who stated that he was not competent to hear the eviction case, as the final administrative decision was not yet known.

827. The complainant believes, in the light of the foregoing, that the union leader was not accused of any professional misconduct but rather was dismissed for having denounced the bad management of the social assistance fund and the mutual housing fund by members of the autonomous port authority and leaders of the "rival" union SUTRAPA.

B. The Committee's conclusions

828. *The Committee regrets that, despite the time that has passed since the complaint was presented, the Government has not responded to the allegations made by the complainant, although it has been invited several times, including by urgent appeal, to present its comments and observations on this case. The Committee expresses its expectation that the Government will be more cooperative in the future.*

829. *Under these circumstances, according to the applicable procedural rule [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee is obliged to submit a report on the substance of the matter without being able to take account of the information awaited from the Government.*

830. *The Committee reminds the Government that the purpose of the whole procedure established by the International Labour Organization to examine allegations of violations of freedom of association is to promote respect for trade union rights in law and in fact.*

The Committee remains confident that, if the procedure protects governments against unreasonable accusations, governments on their side should recognize the importance for their own reputation of formulating, so as to allow objective examination, detailed replies to allegations brought against them [see First Report of the Committee, para. 31].

- 831.** *The Committee notes that the complaint is based on allegations of violations of freedom of association against the General Secretary of the Union of Workers of the Autonomous Port of Abidjan. The Committee also notes that, following a hierarchical appeal against the decision to dismiss Mr. Thompson, the board of the labour inspectorate ordered his reinstatement.*
- 832.** *The Committee recalls that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, including dismissal, and that 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 [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 702 and 724]. The Committee also draws attention to the Workers' Representatives Convention, 1971 (No. 135), ratified by Côte d'Ivoire, and the Workers' Representatives Recommendation, 1971 (No. 143), in which it is expressly established that workers' representatives in the undertaking should enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as workers' representatives or on union membership, or participation in union activities in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements [see **Digest**, op. cit., para 732].*
- 833.** *As the complainant indicates that the board of the labour inspectorate ordered Mr. Thompson's reinstatement following a hierarchical appeal lodged in August 2002 against the decision to dismiss him, and in the absence of any observations from the Government, the Committee urges the Government to ensure that the union leader has been reinstated in his post without loss of salary or of any of the benefits to which he is entitled, including housing. The Committee requests the Government to keep it informed of developments and to forward copies of all judicial decisions made in this case.*

The Committee's recommendations

- 834.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee regrets that the Government has not responded to the allegations made by the complainant and expresses its expectation that it will be more cooperative in future.*
 - (b) The Committee requests the Government to ensure that the union leader is reinstated in his post, in accordance with the decision of the board of the labour inspectorate, with no loss of salary or of any of the benefits to which he is entitled, including housing. The Committee requests the Government to keep it informed of developments and to forward copies of all judicial decisions made in this case.*

CASE NO. 2387

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

**Complaint against the Government of Georgia
presented by
— the Georgian Trade Union Amalgamation (GTUA)
supported by
— the International Confederation of Free Trade Unions (ICFTU)**

Allegations: The complainant alleges that the Government interferes in its activities, in particular by forcing the trade union to return its property to the State, intimidating the trade union leaders by publicly and privately threatening them with imprisonment and making derogatory statements in the mass media

- 835.** The complaint is contained in communications dated 29 September and 10 December 2004 and 25 May 2005 from the Georgian Trade Union Amalgamation (GTUA). In a communication dated 25 March 2005, the International Confederation of Free Trade Unions (ICFTU) associated itself with the complaint and provided additional information. The ICFTU provided further additional information in a communication dated 23 September 2005.
- 836.** The Committee has been obliged to postpone its examination of the case on two occasions [see 335th and 336th Reports, paras. 5 and 6, respectively]. At its meeting in May-June 2005 [see 337th Report, para. 10], the Committee issued an urgent appeal to the Government, indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it could present a report on the substance of the case at its next meeting even if the information or observations requested had not been received in due time. No reply from the Government has been received so far.
- 837.** Georgia 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

- 838.** In their communications of 29 September and 10 December 2004, and 25 March and 25 May 2005, the Georgian Trade Union Amalgamation (GTUA) and the International Confederation of Free Trade Unions (ICFTU) alleged the Government's interference in the GTUA internal affairs. More particularly, they alleged that the Government seized trade union assets, intimidated the GTUA leaders by publicly and privately threatening them with imprisonment and made derogatory statements in the mass media about the GTUA. They further indicated that despite the repeated attempts of the GTUA to resolve the matters through constructive dialogue, the state authorities continued to ignore them.

- 839.** The GTUA alleged that after the Rose Revolution in November 2003, the property, which the GTUA had acquired following the collapse of the USSR and the old soviet trade union system, became the target of the new Government. The authorities question the rights of trade unions to continue to use property dating back to the soviet era. The GTUA had repeatedly pointed out that the Georgian Constitution protects property rights and the Trade Unions Act and Constitution allow trade unions to own property. Moreover, in summer 2003, the Supreme Court of Georgia ruled that the GTUA was the legitimate successor and owner of the trade union property of the USSR Central Council of Trade Unions. These arguments did not, however, seem to carry much weight with the new authorities.
- 840.** On 21 June 2004, during a session of the Parliamentary Office, the Parliamentary Legal Affairs Committee was requested to examine the question of property belonging to the GTUA with a view to paving the way for its confiscation. On 13 July 2004, the Legal Affairs Committee asked the chairperson of the GTUA, Mr. Irakli Tugushi, to provide information on all assets owned by the unions.
- 841.** According to the complainants, the authorities also used force and intimidation. On 3 August 2004, Mr. Tugushi was met by four officials of the State Security Service, who brought him to the Office of the Prosecutor-General. There, he was informed that on 7 July 2004, the Office of the Prosecutor-General had received material pertaining to a piece of investigative journalism – a videocassette recording of a Georgian TV programme “60 minutes” dated from 1999. In the programme, a number of leaders of the GTUA-affiliated trade unions were accused of illegally acquiring property and embezzlement. On the basis of the contents of the broadcast, criminal proceedings were initiated in July 2004 under section 182 of the Georgian Penal Code (“Misappropriation and embezzlement”). The complainants stated that in 1999, the GTUA took legal action against the producers of the programme to protect its honour, dignity and reputation. The dispute was resolved following a public acknowledgement that the programme was biased and based on uncorroborated evidence.
- 842.** On 29 July, the Director of the Investigations Department of the Office of the Prosecutor-General ordered an audit of all financial and economic activities of the GTUA. The official order required that: (1) a documentary audit be carried out of all GTUA’s financial and economic activities; (2) the audit be entrusted to the special investigation centre of the Ministry of Justice; and (3) the legality of the accounting and the ownership of the GTUA’s principal assets between 1 January 1992 and 1 July 2004 be determined and that the GTUA’s revenues for the period in question be reviewed. Judicial approval for the audit was given on 9 August 2004. The auditing commission carried out a meticulous study of the assets and finances of the GTUA-affiliated unions and produced an interim report on 2 November 2004. The report stated that the “the GTUA was the lawful owner of its assets, which it used in a manner consistent with the Constitution and laws of Georgia”. The Director of the Investigations Department was, however, not satisfied with this conclusion and asked the court to extend the court order of 9 August 2004 and to change the membership of the Commission. The district court granted this request on 11 November 2004 and the audit continued. The GTUA’s basic documents (records, accounts, etc.) have been seized and placed under seal, and the office of Ms. Londa Sikharulidze, the GTUA deputy chairperson, had been sealed. On 6 December 2004, the district court in Tbilisi granted another request to carry out a financial audit of the economic structure of the GTUA’s health and recreational association “Profkurort”, which managed the GTUA’s holiday facilities. All relevant financial documents were seized and the office of the enterprise director was closed and sealed off. On 23 February 2005, the same court satisfied a request of the Director of the Serious Crimes Investigations Department of the Office of the Prosecutor-General to seize the accounts of all facilities owned by the GTUA (sanatoria, resorts, sports and holiday facilities, and others). Documents were seized from 104 such facilities. As appears from

the ICFTU's communication, also in February, Ms. Sikharulidze and the manager of the "Kurortinvest" had been questioned in the Prosecutor-General's office. The GTUA deputy chairperson had been unambiguously told that she could be arrested next time.

- 843.** The complainants furthermore alleged that the President of Georgia declared on national TV, that the unions were "useless, mafia-type organizations" and demanded that they hand over their assets to the State without delay; failure to do so, would mean that the Prosecutor-General would be instructed to investigate the activities of the GTUA and its chairperson. According to the complainants, the President used the following language: "If the unions do not hand over their assets in Borzhomi – and elsewhere – within a week, their leaders will be brought to the Prosecutor's office in handcuffs". The complainant submitted that the authorities adopted an attitude implacable hostility towards the unions. Despite the repeated appeals by the GTUA, the Government refused to have a dialogue with the union and instead have embarked on the path of prosecution and blackmail.
- 844.** In its communication of 25 March 2005, the ICFTU submitted that letters of international solidarity only made the authorities increase their pressure on trade unions. In its assessment of the situation, the ICFTU stated that the GTUA had been prepared to discuss the question of assets and to return most of them, provided that negotiations were carried out in a legal, honest and responsible manner. The actions taken by the authorities appeared to demonstrate that they considered to be preferable to force the GTUA leaders to make decisions against the GTUA interests and to waive the assets rather than to achieve the same goal through transparent negotiations. The ICFTU raised suspicions about the ultimate goal of the attacks on the GTUA – which, according to this organization, may not be limited to getting hold of trade union possessions, but aimed rather to discredit the GTUA and break the trade union movement from inside.
- 845.** The complainants further alleged that on 12 February 2005, Mr. Tugushi was summoned by the Minister of Economics and was told to give all the GTUA property to the State, with the exception of the GTUA offices. The ICFTU pointed out in this respect that the property to be given to the State would include the Palace of Culture, the venue of trade union congresses and councils that had been returned to the GTUA by decision of the constitutional court. The Minister came up with the theory that the GTUA property was amassed under pressure, since during the USSR times, workers had been forced to join trade unions. According to the ICFTU, this indicated that international labour standards, human rights and the rule of law were sacrificed to what appeared to be the financial interests of the State.
- 846.** Apart from the never-ending financial audits and inspections, the state authorities have been using various other means of putting pressure on the unions in order to coerce them into handing over their assets. Knowing that if they nationalized union assets, they would be obliged to pay a reasonable sum in compensation, the Government sought a way of appropriating the assets by other means. Also, aware of previous attempts of the GTUA to defend its rights by appealing to the Supreme Court, the constitutional court and the ILO Committee on Freedom of Association, the authorities have sought to use methods that could not be challenged in those bodies. On 19 February 2005, the Parliamentary Legal Affairs Committee drew up a bill to amend the Trade Unions Act. This bill provided for compulsory re-registration of trade union members by 15 March 2005. The bill passed at its first reading. In its communication, the ICFTU stated that as of 14 March 2005, the new legislation was not yet adopted but that it had been explained to the GTUA that the re-registration of trade union members would be introduced in one way or another, depending on whether the GTUA gave its assets to the State. According to the ICFTU, the text of the amendment left no doubt that it aimed to intimidate trade unions and create chaos in the GTUA. The amendment would add a new chapter comprising a single section called "transitional provision" at the very end of the Trade Unions Act and this provision would consist of a single line as follows: "The registration of trade union members must be

accomplished by 15 March 2005.” There were no rules provided for the process of registration, entities or institutions responsible for registration, no provisions authorizing the Government or any government institution to issue by-laws, no procedure to contest the results of the re-registration and no personal data protection clause. The explanatory memorandum did not provide any reason for the re-registration except the fact that the number of civil servants had decreased, so re-registration was necessary for the protection of trade union members. Another bill, “on trade union assets”, which would allow the seizure of trade union assets, was also drafted.

- 847.** Furthermore, emphasizing the lack of dialogue on social-economic issues, the ICFTU stated that amendments to the labour laws that made dismissals easier were adopted in June 2004 without any form of consultation with the GTUA. Though some meetings on the new draft Labour Code took place in spring 2004, the Code was currently rushed through without involving the trade unions. The ICFTU expressed its concern that the reforms of labour and trade union legislation without involving the workers’ representatives may result in socially unacceptable legislation and unrest which would hold back the country’s development.
- 848.** On 19 February 2005, Mr. Lasha Chichinadze, the GTUA deputy chairperson, was arrested by the financial police and charged with a criminal offence under section 182 of the Penal Code (appropriation of assets belonging to another person or persons with the intention of unlawfully taking possession of them by means involving deception). This section provided for fines or community service for periods of between 170 and 200 hours, or corrective labour for up to two years, or detention for up to three months, or loss of liberty for up to three years. His apartment was searched on the same day. During the search, only trade union material was seized, including an inventory of union assets. According to the complainants, that only confirmed their suspicion that the arrest of Mr. Chichinadze was a deliberately provocative act intended to intimidate the GTUA’s leaders and to force the union to sign away its assets.
- 849.** A financial police investigator of the Ministry of Finance applied to the Supreme Court to authorize preventive detention of Mr. Chichinadze. On 22 February 2005, a public hearing was held during which, a Supreme Court judge acknowledged that while the evidence suggested that there were grounds for indicting Mr. Chichinadze, they were insufficient to warrant preventive detention. Mr. Chichinadze was released. However, the prosecutor lodged an appeal against this ruling in the Criminal Division of the Supreme Court. On 25 February 2005, the ruling of 22 February was reviewed. The presiding judge set aside the Supreme Court ruling of 22 February and ordered that Mr. Chichinadze be held in preventive detention for three months.
- 850.** In the circumstances of such pressure, the GTUA council met on 25 February 2005. The council was obliged to take a decision about the transfer without compensation of the greater part of its holiday and sports facilities. An agreement to that effect was concluded with the Ministry of Economic Development on 27 February 2005. Under the terms of the agreement, some 102 items of the GTUA real estate (as over 90 per cent of its property) were transferred to the Government. The agreement contained a clause according to which, the property transferred did not include seven properties in Tbilisi and a number of holiday facilities. Immediately after the agreement was signed, all inspections at entities transferred to the state ownership ceased. However, inspections continued at the entities and facilities remaining in the GTUA’s ownership. In its communication of 23 September 2005, the ICFTU submitted that in order to strengthen its rights to the confiscated property, on 1 March 2005, the Ministry of Finance submitted an application to the court to confirm that the GTUA had not followed the agreed procedure for the transfer of property to the State and that the State was the rightful owner of the property. A court hearing was scheduled for 7 March 2005, i.e. before the completion of the one-month term specified in the property transfer contract. The GTUA, knowing that in the absence of an independent

judicial system, the State would obtain the required court ruling, and fearing the legal charges related to the compulsory execution (which constitute 7 per cent of the suit sum, and would, in this case, amount to millions of lari), was forced into an amicable agreement. Hence, the GTUA confirmed the property transfer in court.

- 851.** In the same communication, the ICFTU stated that during Mr. Chichinadze's imprisonment, no attempt was made to make progress in investigating the charges against him. In fact, the investigators never talked to or interrogated the prisoner. A day before the end of Mr. Chichinadze's three-month preventive detention, the Prosecutor requested an extension of his detention. Despite the previous intervention by the chairperson of the Parliamentary Human Rights Committee, who drew the attention of the Prosecutor-General to a number of inaccuracies and uncorroborated allegations in the case of Mr. Chichinadze, as well as interventions by the Georgian Human Rights Commissioner, by the head of the Office of the People's Defender and by the GTUA, offering to stand bail for Mr. Chichinadze in a sum of 679,124 lari (US\$377,300), on 18 May 2005, the court extended Mr. Chichinadze's detention by two months. On 23 May 2005, the Supreme Court upheld this decision.
- 852.** On the same day, 23 May 2005, the President of Georgia, Mikhail Saakashvili, made another statement on national television that the Georgian unions had not yet transferred the sports centre "Stormy Petrel" ("Burevestnik") in Tbilisi and demanded that the sports centre in question be handed over to the State.
- 853.** As a result of such pressure, the GTUA council's meeting held on 21 June 2005 voted to hand over the rest of the GTUA property to the State. The action was seen as the only possible way to protect people and trade unions. The GTUA retained only a few pieces of real estate property. The GTUA was also to hand over the building in Tbilisi where its offices and the offices of the industry sector unions were located. Within several days of the decision to transfer the second portion of the trade union property, all investigations into the GTUA's financial affairs stopped. Prosecution officers returned the keys from Ms. Sikharulidze's office which had been kept sealed before and returned all documents seized from the office.
- 854.** In its last communication, the ICFTU also stated that on 9 July 2005, two weeks after signing the contract on granting the GTUA property to the State, Mr. Chichinadze was released on bail. The court hearing to consider his application to be released on bail took place on a Saturday evening and was closed to journalists and the general public. The secrecy of the hearings was a condition of Mr. Chichinadze's release, as he and his lawyers had been told. According to the ICFTU, the fact that Mr. Chichinadze was released soon after the signing of the contract concerning the complete transfer of the GTUA property to the Georgia Government and the fact that the court was satisfied with a negligible deposit of only 5,000 lari to secure his release, confirmed that Mr. Chichinadze's detention had been used by the State authorities as a means of exerting pressure on the GTUA to make it hand over the property. The Prosecutor's office offered to end the case on the grounds that the crime was not dangerous. Mr. Chichinadze requested for the case to be referred to the court to determine whether there was a crime. Prosecution officers opposed the referral. An admission by a court that there was no crime would be indirect proof of the fact that all agreements were signed under pressure and with use of force.
- 855.** According to the ICFTU, the Georgian authorities were now selling off the property handed over by the GTUA. Three establishments have already been sold. According to the GTUA estimates, they were sold at a price which was clearly lower than the market value. For example, the "Batumi" holiday resort, which attracted offers of \$3 million to the GTUA, was sold for the official sum of \$970,000.
- 856.** On 1 September 2005, the Mayor of Tbilisi, Mr. Ugulava, met the GTUA president and asked the GTUA to yield the Palace of Culture to the city of Tbilisi. This was the only

building of the GTUA in Tbilisi and where the GTUA was to move after giving away the House of Unions (which accommodated the GTUA and sectoral unions) to the State. In return, Mr. Ugulava offered two buildings to the GTUA, the total value of which was less than half of the value of the Palace of Culture. The GTUA refused.

857. The complainants also alleged that, on 4 November 2004, the Minister of Defence issued Order No. 323 rescinding a Ministry of Defence order issued in 1999 allocating premises for the use of the GTUA Committee for Armed Forces personnel. On 7 December 2004, the Ministry of Defence applied to the Vakesaburtalin court to annul the registration of the union representing armed forces personnel. The complaints pointed out that, under the terms of the Georgian Constitution, every citizen has the right to establish a union. The GTUA appealed to the Parliamentary Defence and Security Committee, and the Minister of Defence. No reply was ever received and the case was still pending in court.

B. The Committee's conclusions

858. *The Committee regrets that, despite the time that has elapsed since the complaint was first presented, the Government has not replied to any of the complainants' allegations, although it has been invited on several occasions, including by means of an urgent appeal, to present its comments and observations on the case. The Committee strongly urges the Government to be more cooperative in the future.*

859. *Under these circumstances, and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee finds itself obliged to present a report on the substance of the case without the benefit of the information which it had hoped to receive from the Government.*

860. *The Committee recalls that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for this freedom in law and in fact. The Committee remains confident, that, if the procedure protects governments from unreasonable accusations, governments on their side will recognize the importance of formulating, for objective examination, detailed replies concerning allegations made against them [see First Report of the Committee, para. 31].*

861. *The Committee notes that the complainants in this case alleged that the Government interfered in the GTUA internal affairs. More particularly, they alleged that the Government was trying to seize trade union assets. To this end, it used various means of pressure: intimidating statements addressed to the GTUA, drafting of legislation violating trade union rights, arrest and detention of GTUA leaders, numerous audits of the GTUA financial activities and overall refusal of the Government to have a constructive dialogue with the GTUA. The Committee recalls that at its March 2003 meeting, the Committee examined Case No. 2144 concerning a complaint presented by the same trade organization [see 330th Report, paras. 692-720]. The allegations in that case also concerned seizing of trade union property and interference in trade union matters. The Committee deeply regrets that since this case was examined, the Government did not provide any information on the effect given to the Committee's recommendation*

862. *The Committee also notes the allegations that trade unions were generally not involved in the drafting of the new Labour Code. As concerns the drafting of the bill amending the Trade Unions Act, which provided for compulsory re-registration of trade union members, and the Bill on Trade Union Assets, which would allow a seizure of trade union assets, the Committee notes that not only the legislation was drafted without any consultation with the trade unions but also that once the GTUA agreed to transfer a substantial part of its property to the State, the work on drafting and amending trade union legislation was stopped. In these circumstances, the Committee cannot rule out the contentions made by*

the complainants that the legislative powers were used as a means of pressure to settle the question of trade union property. The Committee recalls that in Case No. 2144, it had stressed that Article 3 of Convention No. 87 provided that workers' organizations have the right to organize their administration and activities and to formulate their programmes without any interference from the authorities. It reminded the Government that if it intended to reconsider the legislation in force, it should hold full and frank consultations with the social partners [see 330th Report, para. 717]. The Committee once again requests the Government to ensure that these principles are respected without delay. The Committee further requests the Government to keep it informed of the current status of the abovementioned bills and of any changes brought to the legislation regulating trade union rights and their activities.

- 863.** *The Committee further notes that criminal charges were brought against the chairperson of the GTUA, Mr. I. Tugushi, and his deputy, Mr. L. Chichinadze. Mr. Tugushi was accused of misappropriation and embezzlement in July 2004 and the charges were based on a recording of a TV programme dated from 1999, which was later publicly admitted by the producers of the programme to be biased. In cases involving the arrest, detention or sentencing of a trade union official, the Committee, taking the view that individuals have the right to be presumed innocent until found guilty, has considered that it was incumbent upon the Government to show that the measures it had taken were in no way occasioned by the trade union activities of the individual concerned [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 65]. The Committee therefore requests the Government to either provide information demonstrating that the charges brought against Mr. Tugushi were not due to his legitimate trade union activities and have him rapidly brought to trial or drop the charges against him. The Committee requests the Government to keep it informed in this respect.*
- 864.** *As regards, Mr. Chichinadze, the Committee notes that he was accused of fraud (section 182 of the Penal Code) and had spent five months in preventive detention. The Committee notes that the chairperson of the Parliamentary Human Rights Committee and the Georgian Human Rights Commissioner pointed to the inaccuracies and uncorroborated allegations in his case. The Committee notes that according to the communication of the ICFTU of 23 September 2005, Mr. Chichinadze was released and the Prosecutor's office offered to end the case on the grounds that the crime was not dangerous. The Committee further notes that Mr. Chichinadze requested for the case to be referred to the court to determine whether there had been a crime but this initiative met opposition from the prosecution. Firstly, the Committee points out that, although the exercise of trade union activity or holding of trade union office does not provide immunity as regards the application of ordinary criminal law, the continued detention of trade unionists without bringing them to trial may constitute a serious impediment to the exercise of trade union rights. The prolonged preventive detention of a person without bringing him or her to trial is a practice, which involves an inherent danger of abuse; for this reason it is subject to criticism [see **Digest**, op. cit., paras. 87 and 90]. Secondly, considering that no criminal record should be maintained against Mr. Chichinadze in these circumstances, the Committee requests the Government to indicate whether Mr. Chichinadze has been cleared of all charges of fraud brought against him and if not, to take immediate action to do so or refer the case to the court, as requested by Mr. Chichinadze. The Committee requests the Government to keep it informed in this respect.*
- 865.** *As concerns the audits carried out into the financial activities of the GTUA, the Committee notes that, unsatisfied by the conclusions of the commission that conducted the first audit in August 2004, the Government requested the second audit by a different commission. For the purpose of the second audit conducted in November 2004, the GTUA's documents were seized. The office of the then vice-chairperson of the union was sealed. The Committee recalls that the occupation or sealing of trade union premises should be subject to*

independent judicial review before being undertaken by the authorities in view of the significant risk that such measures may paralyse trade union activities [see *Digest*, op. cit., para. 183]. The Committee notes that another audit was conducted in December 2004 and concerned the health and recreational association “Profkurort” belonging to the GTUA. Again, all relevant documents were seized and the office of the director of the enterprise managing the GTUA’s health and recreational facilities was sealed. On 23 February 2005, another audit of all recreational facilities owned by the GTUA was authorized. Documents were seized from 104 such facilities. In these circumstances, and in the light of the anti-union atmosphere (where threats against the GTUA are made publicly) and of the fact that these allegations have not been denied by the Government, the Committee is bound to conclude that the numerous financial audits were employed as a means of pressuring the GTUA to hand over its property to the State. The Committee recalls that as regards certain measures of administrative control over trade union assets, such as financial audits and investigations, the Committee considers that these should be applied only in exceptional cases, when justified by grave circumstances (for instance, presumed irregularities in the annual statement or irregularities reported by members of the organization), in order to preclude the danger of excessive intervention by the authorities which might hamper a union’s exercise of the right to organize its administration freely, and also to avoid harmful and perhaps unjustified publicity of the disclosure of information which might be confidential [see *Digest*, op. cit., para. 444]. The Committee requests the Government to ensure the application of this principle. Noting that the documents seized from the GTUA have not been returned and that no formal accusations have been brought against the GTUA, the Committee considers that the trade union documents in question should be returned to the GTUA and requests the Government to keep it informed of the measures taken in this regard.

- 866.** *The Committee notes the ICFTU’s statement that the Georgian authorities were now selling off the property handed over by the GTUA for a considerably lower price than its market value. Three establishments were already sold. The Committee further notes that the GTUA was recently requested by the authorities to yield the Palace of Culture, its only building in Tbilisi where the GTUA was to move after giving away the House of Unions to the State. In return, it was offered two buildings, the total value of which, according to the complainants, was less than half the value of the Palace of Culture. The GTUA refused.*
- 867.** *In examining this case of assignment of trade union property, that the GTUA acquired as a successor of the soviet trade unions, 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 Georgian trade unions (state subsidies and contributions from their members), the nature of the functions of trade unions in a post-soviet area and the democratization process. The Committee nevertheless condemns the anti-union tactics, pressure and intimidation the Government chose to use in dealing with this issue. The Committee regrets that the Government has so far refused all dialogue with GTUA. The Committee emphasizes the importance, for the preservation of a country’s social harmony, of constructive dialogue between public authorities and trade union organizations. It therefore urges the Government to engage in consultations with the trade union organizations concerned in order to settle the questions of the assignment of property. 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.*
- 868.** *Finally, as concerns the right to organize members of the armed forces, the Committee notes that the complainants provided no information on the membership of the union representing armed forces personnel. In these circumstances, the Committee would recall that although Article 9 of Convention No. 87 authorizes the exclusion from the right to organize of the armed forces, civilians working in the services of the army should have the right to form trade unions.*

The Committee's recommendations

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

- (a) *The Committee regrets that, despite the time that has elapsed since the complaint was first presented, the Government has not replied to any of the complainants' allegations. The Committee strongly urges the Government to be more cooperative in the future.*
- (b) *The Committee stresses that Article 3 of Convention No. 87 provides that workers' organizations have the right to organize their administration and activities and to formulate their programmes without any interference from the authorities. It reminds the Government that if it intended to reconsider the legislation in force, it should hold full and frank consultation with the social partners. The Committee once again requests the Government to ensure that these principles are respected without delay. The Committee further requests the Government to keep it informed of the current status of the bill amending the Trade Unions Act and of the bill on trade union assets, and of any changes brought to the legislation regulating trade union rights and their activities.*
- (c) *As concerns the criminal charges brought against two trade union leaders:*
 - *the Committee requests the Government to either provide information demonstrating that the charges brought against Mr. Tugushi were not due to his legitimate trade union activities and have him rapidly brought to trial or drop the charges against him;*
 - *considering that no criminal record should be maintained against Mr. Chichinadze, the Committee requests the Government to indicate whether he has been cleared of all charges of fraud brought against him and, if not, to take immediate action to do so or refer the case to the court, as requested by Mr. Chichinadze.*

The Committee requests the Government to keep it informed in this respect.

- (d) *The Committee considers that financial audits should be carried out only in exceptional cases, when justified by grave circumstances, in order to preclude the danger of excessive intervention by the authorities which might hamper a union's exercise of the right to organize its administration freely, and also to avoid harmful and perhaps unjustified publicity of the disclosure of information which might be confidential. The Committee requests the Government to ensure the application of this principle.*
- (e) *Noting the documents seized from the GTUA have not been returned and that no formal accusations have been brought against the GTUA, the Committee considers that the trade union documents in question should be returned to the GTUA and requests the Government to keep it informed of the measures taken in this regard.*

- (f) *The Committee condemns the anti-union tactics, pressure and intimidation the Government chose to use in dealing with this issue and regrets that the Government has so far refused all dialogue with the GTUA. The Committee therefore invites the Government to engage in consultations with trade union organizations concerned in order to settle the question of the assignment of property. 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.*

CASE NO. 2298

INTERIM REPORT

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

- **the Trade Union Confederation of Guatemala (CUSG) and**
- **the Trade Union of Workers of the Guatemalan Telecommunications Enterprise (SUNTRAG)**

Allegations: Metropolitan Gas Enterprise and other enterprises belonging to the TOMZA Corporation: The complainants allege the illegal dismissal of 13 trade unionists following reorganization of the trade union; the enterprise demanded that workers withdraw from the trade union under threat of dismissal; at the beginning of the dispute four trade union officers received death threats. Guatemalan Telecommunications Enterprise: According to the allegations, the President of the Republic announced that the enterprise would be closed, disregarding the fact that court proceedings were under way concerning a collective labour dispute relating to refusal to negotiate a new collective agreement; in order to weaken this workers' movement and destroy the trade union, the enterprise decided to implement a voluntary retirement plan for all the workers, but in fact they are being obliged to resign on the pretext that they will be paid all of their employment benefits. Municipality of Retalhuleu: According to the allegations, the municipality has failed to comply with the minimum wage in the case of 20 workers and with the provisions of the collective agreement

- 870.** The complaints are contained in communications from the Trade Union Confederation of Guatemala (CUSG) dated 12 May and 17 September 2003 and the Trade Union of Workers of the Guatemalan Telecommunications Enterprise (SUNTRAG) dated 4 March

2004. The CUSG sent additional information in communications dated 10 October 2003 and 6 February 2004.

- 871.** The Government sent its observations in communications dated 9 January and 29 April 2004 and 16 March 2005.
- 872.** Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 873.** In its communications dated 12 May and 17 September 2003, the Trade Union Confederation of Guatemala (CUSG) alleges that 13 trade unionists (mentioned by name) were dismissed from enterprises belonging to the TOMZA group after 92 workers met to reorganize the Trade Union of Gas Bottling, Transport, Distribution and Maintenance Workers; furthermore, five workers were compelled under threat to sign their resignations; once they have received their benefits, they do not have the right to be reinstated. However, as regards the allegations of dismissal, the CUSG reports that prior to the dismissals a collective dispute had been referred to the courts (and consequently, according to the law, no worker can be dismissed without court authorization). In addition, the officers of the new trade union executive committee, Julio César Montugar, Juan Carlos Aguilar, Francisco Velásquez and Agustín Sandoval Gómez, received death threats (the latter was threatened by three persons armed with guns). Complaints were filed with the competent authorities concerning the abovementioned acts (the relevant documents are attached).
- 874.** The CUSG alleges further that the municipality of Retalhuleu violated the provisions of labour law on the minimum wage (by not paying 20 workers), as well as 24 provisions of the collective agreement concerning financial benefits, the joint committee, vacancies, etc. without the mayor or members of the municipal corporation seeking a solution to these problems, or agreeing to meet with the trade union.
- 875.** In its communication of 10 October 2003, the CUSG provides additional information and reports that the judicial authority ordered the immediate reinstatement of the workers dismissed by the Metropolitan Gas (Guategas) enterprise of the TOMZA group, but that the latter refused to comply with this order despite various requests by the authority responsible for enforcing the court order. The enterprises of the TOMZA group have subjected the trade union members who were not dismissed to constant threats, intimidation, harassment and persecution. They have been ordered to withdraw from the trade union under threat of dismissal; truck drivers and sales assistants have been kept at the workplace to carry out maintenance work, changing their working conditions completely, as well as other acts aimed at demoralizing the workers.
- 876.** In its communication dated 6 February 2004, and in a communication from the International Confederation of Free Trade Unions (ICFTU) dated 3 June 2004 in support of the complaint, the CUSG emphasizes that the slowness and lack of coercive power of the labour courts and Ministry of Labour led the workers to give up the struggle they had started after having been manipulated by the director-general of the TOMZA SA corporation, who took advantage of conciliatory efforts aimed at reaching a prompt settlement of the dispute; no agreement was reached because the corporation maintained its stance of getting rid of all the staff and disorganizing the trade union. The director-general of the corporation began talks directly with the trade union officers, and the latter were manipulated to the extent that they were compelled to issue a (paid) press communiqué drafted and paid for by the director-general, as a prerequisite for solving the problem of

reinstatement and payment of benefits to the dismissed workers. Driven to despair, the workers accepted the conditions dictated by the enterprise, by publishing the (paid) press communiqué, and accepting payment of 40 per cent of their unpaid wages, non-recognition of the trade union by the enterprise and payment of their compensation and/or employment benefits in return for resigning from the enterprise, while the director-general undertook to subsequently rehire a group of selected workers in order to make the international community believe that the problem had been solved. The CUSG sends relevant documents.

877. In addition, in a communication dated 4 March 2004, the Trade Union of Workers of the Guatemalan Telecommunications Enterprise (SUNTRAG) alleges that the President of the Republic of Guatemala announced in the national printed media that the Guatemalan Telecommunications Enterprise (GUATEL) would be closed, disregarding the fact that the enterprise is involved in a socio-economic collective dispute for having refused to negotiate a new collective agreement on conditions of work and social welfare, in proceedings currently before the Third Labour and Social Welfare Court of the first economic zone.

878. Moreover, the manager of GUATEL decided to introduce a voluntary retirement scheme so that all of the workers employed in GUATEL would adhere to it for the sole purpose of weakening the workers' movement (a circular addressed to the entire staff is attached). The retirement scheme is not in fact voluntary, since the workers are being obliged to resign on the pretext that they will be paid all of their employment benefits; moreover, the retirement scheme has not received the authorization of the court handling the socio-economic labour dispute (in these circumstances, any termination of an employment contract requires court authorization, according to the legislation); in addition, these workers received the promise that they would be rehired, with different conditions of work and lower remuneration. A comparison of the list of persons who have already adhered to the retirement scheme with the names on the GUATEL payroll in 2003 and 2004 shows that the aim is to destroy the Trade Union of Workers of GUATEL for the sole purpose of curtailing freedom of association. GUATEL has illegally ceased its activities up to now with the aim of demoralizing the workers. Moreover, the enterprise has failed to pay wages and stopped giving work, although no court has authorized a lockout. Lastly, it does not have any intention of negotiating a new collective agreement on conditions of work and social welfare and the existing agreement is not being applied.

879. According to SUNTRAG, 260 workers have adhered to the voluntary retirement scheme; it attaches a circular issued by the management of the enterprise on 26 February 2004, reproduced below:

The entire staff of the enterprise is hereby informed of the following:

Based on a detailed financial analysis of the institution carried out by the management, it has been determined that revenue to date is not sufficient to pay the workers' wages for the second half of the month of February; projections of revenue indicate that this can be paid around the third week of March this year.

This Administration has found GUATEL to be in a critical financial situation as a result of several years of mismanagement and wastage of resources, which now prevents this institution from meeting its labour and other obligations. Accordingly, the Council of Ministers, based on the report presented by management on 24 February, decided to authorize the Ministry of Public Finance to provide as a loan the necessary resources to be used exclusively for paying employment benefits under the voluntary retirement scheme for the entire staff of GUATEL.

As a result, and based on the resolution adopted by the Board of Directors yesterday, the abovementioned voluntary retirement programme must be adhered to by all the staff of the institution, beginning on 1 March this year, without exception.

All the staff will be notified by the Human Resources Directorate of the day and time when they will be called in to sign the documents giving effect to the voluntary retirement programme in order to begin the procedure for payment of the employment benefits due.

Voluntary retirement benefits will be paid upon presentation of the inventory form indicating that all of the property and documentation (both hard-copy and electronic) entrusted to staff have been received by the inventory officer.

B. The Government's reply

- 880.** In its communications of 9 January and 29 April 2004 and 16 March 2005, the Government states that a complaint was filed against the TOMZA corporation by the officers of the trade union of that corporation with the judicial authority, which on 8 July 2003 allowed the socio-economic collective dispute. The TOMZA corporation filed an appeal for nullity on grounds of violation of the law and of procedure against the decision of 8 July 2003, stating that there was a collective agreement on conditions of work in force and that proceedings could not be brought against the enterprise under the abovementioned collective dispute.
- 881.** On 5 November 2003, the Ministry of Labour and Social Welfare, at the request of the judicial authority, informed the Sixth Judge that the collective agreement on conditions of work between the TOMZA corporation and its workers had not been denounced and was still in force; on 11 November 2003, the judicial authority rejected the socio-economic collective dispute.
- 882.** On 29 January 2004, the parties were summoned before a conciliation board, at which the complainants (the trade union officers) requested a conciliation board for 10 February 2004, which they then did not attend, informing the judicial authority that they would abandon the action and filing notice of abandonment of proceedings on behalf of the workers' assembly. On 25 February 2004, the judicial authority approved the abandonment of proceedings and hence the case is closed.
- 883.** As regards the allegations concerning the municipality of Retalhuleu, the Government states in its communication of 9 January 2004 that the labour inspectorate undertook conciliation concerning violation of the collective agreement and withholding of wages, but since conciliation was not possible in some cases, the workers were informed of their right to seek redress in the courts. Moreover, the Fourth Chamber of the Court of Appeals of Mazatenango upheld the appeal filed by the workers against the judgement in the first instance which had declared the strike illegal and accordingly revoked that ruling, rejecting the proceedings concerning an illegal strike brought by the employer. The Government adds in its communication of 16 March 2005 that the dispute has been settled, enclosing an agreement between the Trade Union of Workers of the Municipality of Retalhuleu and the municipality, concluded with the assistance of the mediation board of the Ministry of Labour and Social Welfare. The agreement also provides for the reinstatement of 119 dismissed workers, which has been verified; the parties undertake to work in harmony and abstain from reprisals, and to refer any future disputes to the negotiating committee of the Ministry of Labour so that a solution can be found to any future problems through dialogue.

C. The Committee's conclusions

Allegations concerning the Metropolitan Gas Enterprise and other enterprises belonging to the TOMZA corporation

884. *The Committee observes that the complainants allege the illegal dismissal of 13 trade unionists following reorganization of the trade union, despite the fact that a collective dispute had been filed with the judicial authority prior to the dismissals; the judicial authority ordered the reinstatement of the dismissed workers but the enterprise did not comply with the order and demanded that the workers withdraw from the trade union under threat of dismissal; the trade union officers were subsequently manipulated by the director-general of the corporation and signed a press communiqué accepting payment of 40 per cent of their unpaid wages, non-recognition of the trade union and payment of compensation in return for resigning from the enterprise; at the beginning of the dispute four trade union officers received death threats.*
885. *The Committee notes the information provided by the Government according to which: (1) the judicial authority rejected the socio-economic dispute filed by the trade union officers after it was informed that the collective agreement on conditions of work signed by the trade union had not been denounced; (2) the trade union officers, on behalf of the assembly, filed notice of abandonment of all the actions that had been brought, which was approved by the judicial authority on 4 March 2004. While taking note of the abandonment of proceedings, the Committee regrets that the Government has not sent observations on the alleged non-compliance by the enterprise with the reinstatement orders issued by the judicial authority, on the alleged manipulation of the trade union officers, or on the alleged threats of dismissal against workers who did not withdraw from the trade union. Given that there can be no judicial ruling on these issues after the abandonment of proceedings by the trade union officers, the Committee will not continue its examination of these allegations. However, the Committee cannot fail to note with regret that the preliminary reinstatement orders of the judicial authority were not carried out. The Committee trusts that the Government will take steps to ensure compliance with the preliminary reinstatement orders issued by the judicial authority.*
886. *The Committee observes that the Government has not replied to the allegations concerning the death threats allegedly received by trade union officers Julio César Montugar, Juan Carlos Aguilar, Francisco Velásquez and Agustín Sandoval Gómez. The Committee notes nonetheless that according to the documentation forwarded by the complainants, these cases have been referred to the competent authority. The Committee emphasizes the seriousness of these allegations and requests the Government to ensure that an independent inquiry is promptly carried out into the matter and to inform it of the outcome of such inquiry. The Committee emphasizes that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 47].*

Allegations concerning the municipality of Retalhuleu

887. *The Committee observes that according to the allegations the municipality has failed to pay the minimum wage in respect of 20 workers and has not complied with the provisions of the collective agreement. The Committee notes the information provided by the Government to the effect that the dispute which arose in the municipality has been settled with the assistance of the mediation board of the Ministry of Labour and Social Welfare. The Committee observes with interest that the agreement concluded also provides for reinstatement of 119 dismissed workers (which was carried out); the parties undertake to work in harmony and abstain from reprisals, and to refer any future disputes to the negotiating committee of the Ministry of Labour so that a solution can be found to any future problems through dialogue.*

Allegations concerning the Guatemalan Telecommunications Enterprise

888. *The Committee observes that according to the allegations, the President of the Republic announced that the enterprise would be closed, disregarding the fact that a collective dispute on conditions of work concerning refusal by the enterprise to negotiate a new collective agreement was pending before the judicial authority. In addition, the enterprise, with the aim of weakening the workers' movement and destroying the trade union, decided to implement a voluntary retirement scheme for all the workers, but in fact the workers were being obliged to resign, with payment of all their employment benefits (the complainants attach a circular in support of their allegations) and the legislation is being infringed, since once a collective dispute has been referred to the judicial authority, any termination of a contract requires court authorization. Moreover, the workers have received a promise that they will be rehired with different conditions and lower wages, and the enterprise is currently involved in a stoppage of its activities despite the fact that no judicial authority has authorized this.*

889. *The Committee regrets that the Government has not sent its observations on these allegations and urges it to do so without delay.*

The Committee's recommendations

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

- (a) The Committee observes that the Government has not replied to the allegations concerning the death threats allegedly received by trade union leaders Julio César Montugar, Juan Carlos Aguilar, Francisco Velásquez and Agustín Sandoval Gómez, and that, according to the allegations, these cases have been referred to the competent authority. The Committee emphasizes the seriousness of these allegations and requests the Government to ensure that an independent inquiry is promptly carried out and to inform it of the outcome of such inquiry.*
- (b) Concerning the allegations regarding the Guatemalan Telecommunications Enterprise, the Committee regrets that the Government has not sent its observations on the allegations and urges it to do so without delay.*

CASE NO. 2341

INTERIM REPORT

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

- the Trade Union of Workers of Guatemala (UNSI TRAGUA) and
- the International Confederation of Free Trade Unions (ICFTU)

Allegations: Interference by the labour inspectorate in the internal affairs of the Trade Union of Workers of the Portuaria Quetzal enterprise, and unlawful removal of seven trade union members from their positions on the trade union's executive committee, restructuring (optional resignation plan) of the company for anti-trade union purposes and without consultation, and practices infringing the right to bargain collectively; dismissal of trade union members in violation of the collective agreement; subcontracting for anti-trade union purposes pursued by the Ministry of Education against teachers; mass anti-trade union dismissals in the Crédito Hipotecario Nacional; dismissals in the municipality of Comitancillo (department of San Marcos) in breach of a court reinstatement order, dismissal of a member of the Trade Union of the Supreme Electoral Tribunal; criteria for the representation of employers on the Tripartite Commission for International Affairs in breach of Convention No. 87; introduction of a mechanism preceding submission of complaints to the ILO; suspension of work and pay of workers of the La Esperanza company who established a trade union; violation of union premises and threats and intimidation of trade union members

- 891.** The complaint is contained in communications by the Trade Union of Workers of Guatemala (UNSI TRAGUA) dated 13 and 29 May, 28 July, 9 and 10 August and 25 November 2004 and 10, 11, 12, 13 and 25 January, and 23 May 2005, and by the International Confederation of Free Trade Unions (ICFTU) dated 2 August 2005.
- 892.** The Government sent its observations in communications dated 17 September, 27 October and 4 November 2004, and 17 and 25 January, 11 and 25 April, 20 July and 5 October 2005.

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

A. The complainants' allegations

894. In its communications dated 13 and 29 May, 10 August and 25 November 2004, the Trade Union of Workers of Guatemala (UNSI TRAGUA) alleges that on 6 May 2004, the executive committee of the Trade Union of Workers of the Portuaria Quetzal enterprise convened an extraordinary general assembly for the purpose of discussing the following items on the agenda: (a) reading of the previous minutes; (b) report of the external audit contracted by the trade union; and (c) information on the negotiation process of the new collective agreement on employment conditions. The assembly began normally but, upon completion of consideration of the first item on the agenda a quorum ceased to exist, for which reason the remaining items were presented purely for information purposes. The results of the auditor's report revealed the existence of anomalies in the handling of trade union funds amounting to over 450,000 quetzals; in the light of this information, the members of the executive committee expressed their intention to bring the matter to the attention of the criminal courts in order to ascertain the existence of criminal liability on the part of previous committees. At this time, a group of leaders and members took possession of the podium and stated that Mr. Mariano Gutierrez Lopez, a labour inspector, was present. They then proceeded unlawfully to dismiss the seven members of the executive committee in flagrant violation of the trade union's rules of procedure, and unlawful action was taken to elect persons to replace them. The UNSI TRAGUA adds that the labour inspector, clearly interfering in the internal affairs of the trade union and in breach of the trade union rules for voting and of its rules of procedure, facilitated the unlawful removal of the legally elected members of the executive committee to make way for the election of a new executive committee and initiate procedures for their registration. On 7 May, some 70 members contested the above-described extraordinary general assembly and the taking over of the podium and assumption of control of the assembly by Messrs. Rony Cardona Corzo, Everildo Revolorio Torres, Juan José Morales Moscoso, Eualio Salomón Palencia Jiménez and Mario René Delgado Gómez. They also challenged the unlawful dismissal of the legally elected executive committee, the unlawful election violating the established procedures laid down in the rules of procedure and the regulation governing voting in elections, and interference by the Labour Inspectorate; however, the new trade union leader, Miguel Antonio Madrid, refused to receive the document challenging the removal of the previous committee, alleging that the new committee (unlawfully elected) had decided not to receive the document. In the light of this refusal, the members approached the Labour Inspectorate with a view to requesting that a labour inspector be assigned to record the refusal of the trade union leaders to receive the challenge document; this request was denied by the Labour Inspectorate. On 11 May 2004, the unlawfully dismissed trade union leaders submitted a complaint to the Office of the Public Prosecutor in order to initiate an investigation into the anomalies in the management of trade union funds and to ascertain the possibility of criminal prosecution. On 13 May 2004, 113 workers declared the events of 6 May 2004 to be without effect and complained of interference by the Labour Inspectorate.

895. The UNSI TRAGUA alleges that, at the present time, the representatives of the Portuaria Quetzal enterprise have formed a commission from which workers' representatives are excluded and are in the process of adopting a so-called "voluntary resignation plan" intended to achieve the separation from the company of a large number of workers. This procedure has not been discussed in the Joint Council and the opinion of the trade union has not been solicited. The purpose of the voluntary resignation plan is to reduce the number of workers in the company in order to justify granting a concession for the provision of port services to companies from the private sector; such action in practice

affects all workers in light of the fact that the Organic Law of the company provides that workers own a 5 per cent stake in the company. Another objective of this voluntary resignation plan is to replace the permanent workers (trade union members) by workers on fixed-term contracts or under mechanisms that totally change the employment relationship and remove workers' right to resignation or retirement benefits. In addition, selective dismissals have occurred, in breach of the procedures laid down in the current collective agreement, which has generated uncertainty among the company's employees. Such actions are intended to demonstrate that the authorities are prepared to breach the provisions of the collective agreement. These measures have three clear objectives: to bring financial pressure to bear on workers to accept voluntary resignation by driving them to desperation; to achieve discord by deliberately delaying the conclusion of the new collective agreement on employment conditions and make it impossible to offer a concerted response to such measures; and, lastly, to generate uncertainty and the sensation among workers that they are defenceless. In order to institute this resignation plan, the authorities intend to use the pension fund reserves which will deplete the sums available to pay benefits to workers resigning or retiring from the company in the future.

896. The UNSITRAGUA alleges that on 12 January 2004, the Trade Union of the Workers of Portuaria Quetzal enterprise reacted to the expiry of the period for negotiation of the collective agreement on employment conditions by bringing this fact to the notice of the employer, in written form and with acknowledgement of receipt by the employer for the appropriate purposes. The Ministry of Labour acted on the assumption that notification had been given of the expiry of the collective agreement on employment conditions and instructed that this be recorded accordingly. Subsequently, the Portuaria Quetzal enterprise proposed to the trade union that a different period of validity be introduced for bargaining and that negotiations focus on matters of genuine importance to the trade union. In the light of this proposal, the trade union, in full agreement with the employer, decided to restrict bargaining to those matters of a financial and social nature that needed to be updated, in the interests of forestalling an excessively protracted bargaining process. On 14 October 2004, the outcome of the collective bargaining process was submitted to the Ministry of Labour with a request that the reforms to the Occupation Act be endorsed, and this request was accompanied by the necessary documentation. On 3 November 2004, the trade union was notified of a resolution by the Ministry of Labour, dated 2 November 2004, which declared void the request for endorsement by reason of the fact that notification had not been received of the expiry of the previous collective agreement on employment conditions and that it was impossible to endorse the new agreement, in deference to the stewardship principle laid down in article 103 of the Constitution. On 4 November 2004, an appeal was lodged against this resolution stating that, on the contrary, notification had been given of the expiry of the agreement. On 11 November 2004, the trade union filed a request for re-examination of that judgement, attaching a copy of the denunciation of the collective agreement. On 24 November 2004, the trade union was informed of a resolution rejecting the appeal on the grounds that it had been demonstrated that legal notification of expiry had been given, and that the provisions of Government Agreement No. 221-2004 had not been given effect (ordering rejection *in limine* of the request if requirements are not met).

897. The UNSITRAGUA alleges that, on 28 July 2004, the employee, Edgar Ticas Arévalo, was dismissed for supposedly having failed to report for work on 9 and 14 July 2004. According to the UNSITRAGUA, the provisions of the current collective agreement on employment conditions provides that the employer should have placed this matter before the Joint Council and that no disciplinary measure could be executed in the absence of a ruling by that body. Although the trade union requested that the Joint Council be convened, the Portuaria Quetzal enterprise refused to accede to the request. The UNSITRAGUA adds that the trade union member in question failed to report for work because he was being held in custody by the national civil police in connection with a

personal dispute. However, administrative delays in the administration of justice meant that the relevant proceedings were not completed until 13 July 2004, at which time bail was posted to secure his release and allow him to return to work. The UNSITRAGUA states that the General Employment Regulation provides that such a situation cannot justify dismissal and can give rise only to suspension without pay for a period equivalent to the duration of custody.

898. The UNSITRAGUA alleges that, on 4 January 2005, upon the orders of the general manager of the Portuaria Quetzal enterprise, the employee, Oscar Humberto Dueñas Hernández, a member of the Trade Union of the Workers of Portuaria Quetzal enterprise, was dismissed on grounds of article 78, paragraphs (a), (b), (f) and (i) of the company's General Employment Regulation, despite the fact that it is clear from the description of the charges that the grounds put forward are not listed as justifying dismissal or sanction. The UNSITRAGUA adds that during the hearing to allow the employee to defend himself, the authorities of the Portuaria Quetzal enterprise denied him full disclosure of the contents of the documents detailing the facts underlying the charges against him, which severely hampered his right to defence. The UNSITRAGUA adds that the allegations used to justify dismissal should have been substantiated before a competent tribunal, which did not occur. Despite an express application by the trade union, the Portuaria Quetzal enterprise has failed to bring this case before the Joint Council, as required by the collective agreement.

899. In addition, the UNSITRAGUA submits a complaint, in communications dated 28 July and 9 August 2004, in regard to the formulation by the Ministry of Labour and Social Welfare of a draft regulation for the Tripartite Commission for International Affairs, which is intended to create a mechanism which in practice monitors the international activity of trade unions in submitting complaints and reports of violations of freedom of association; all complaints or reports must be submitted for consideration and possible rejection by the State of Guatemala prior to their further referral; thus, the State effectively assumes the functions corresponding to the Committee on Freedom of Association. The complainant alleges that a high-level commission already exists, composed of various state bodies with a remit to seek solutions in cases of violations of freedom of association reported to the ILO. The Ministry would appear to intend to adopt a regulation that introduces a binding procedure prior to transmission to the ILO of complaints or reports of violations of freedom of association.

900. The UNSITRAGUA alleges in a communication dated 10 January 2005 that, on 30 September 2004, the employee Víctor Manuel Cano Granados, a member of the Trade Union of the Supreme Electoral Tribunal, was dismissed, in the absence of any administrative disciplinary proceeding and in total and open violation of his rights to defence and to due process (the employer was aware that no employee could be dismissed without prior authorization by the tribunal hearing the case). Consequently, the employee applied for reinstatement; current standards require the tribunal to order his reinstatement within 24 hours after receiving the complaint or request, but over three months have passed and the judge has failed to comply.

901. The UNSITRAGUA alleges in its communication dated 11 January 2005 that, with the term for which trade union leaders were elected approaching expiry, the Trade Union of Employees of the Crédito Hipotecario Nacional de Guatemala proceeded to convene and, in keeping with its articles of incorporation, carry out the election of persons to assume trade union posts; the following persons were elected: Mr. Luis Fernando Sirín Aroche, as secretary for employment and disputes and Mr. Yuri de León Polanco, as a member of the Advisory Council on trade union organization. Mr. Freddy Arnoldo Muñoz Morán, chairperson of the board of the Crédito Hipotecario Nacional, and its legal representative, made known his disagreement with the election of these individuals by challenging their election to trade union posts. The General Labour Inspectorate had already declared that

these trade union leaders could not be removed from office when their election was made public on 1 December 2004. Nonetheless, and in retaliation for the trade union's refusal to allow employer interference in the election of their representatives, the chairperson dismissed Mr. Luis Fernando Sirín Aroche and Mr. Yuri de León Polanco and a further 30 employees who were trade union members.

- 902.** The UNSITRAGUA alleges in a communication dated 12 January 2005 that employees of the municipality of Comitancillo, in the department of San Marcos, seeing that the number of employees was insufficient to meet the requirements embodied in the Labour Code to establish a trade union (which provides that a minimum of 20 workers are required), established a coalition of workers and submitted to their employer, the municipality of Comitancillo, San Marcos, a series of petitions and subsequently submitted the corresponding collective dispute to the Court of the First Instance for Labour and Social Welfare in the department of San Marcos. Despite the fact that the Mayor of Comitancillo, San Marcos, was aware of the fact that he could not legally dismiss any employee without the prior authorization of the judge hearing the case, he nonetheless dismissed 18 employees, between 16 January and 16 February, that is, all those who sought to exercise their right to bargain collectively. In reaction to the dismissals, the respective reinstatements were sought, of which eight were granted, only to be dismissed again one week later by the Mayor.
- 903.** The UNSITRAGUA alleges in its communication dated 13 January 2005 that Agreement No. 284-2004, article 7, provides that:

Convocation. One month prior to the date when the new members of the tripartite commission for international labour affairs take their respective posts, the Ministry of Labour and Social Welfare should convene trade union sectors and the most representative industrial, agricultural, commercial and financial bodies, so that candidates may be designated during the following 15-day period. If the sectors involved fail to submit their respective lists within the deadline or if they submit more candidates than required, the Ministry of Labour and Social Welfare will make a selection on the basis of greatest representation.

The UNSITRAGUA is of the view that this provision breaches Convention No. 87 as it provides that employers will be represented by industrial, agricultural, commercial and financial entities, thereby excluding employers' representatives from other areas of the economy.

- 904.** The UNSITRAGUA alleges in its communication dated 25 January 2005 that, employees of the agricultural company La Esperanza y Anexos S.A., established a trade union and initiated collective bargaining within the context of a collective dispute of an economic and social nature and that this was immediately countered by their suspension for an indefinite period. This retaliatory action by the employer was brought before the Tribunal of Labour and Social Welfare of the Department of Escuintla. On 2 August 2004, the court ordered the employer, La Esperanza y Anexos, S.A., to retract these unlawful suspensions and pay the wages and other benefits that had remained unpaid for the duration of the suspension. The UNSITRAGUA adds that the employer appealed and the case is currently before the Fourth Chamber of the Appeal Court for Labour and Social Welfare. The employees have been suspended for over 21 months, for which reason a provisional attachment of assets was requested to ensure compliance, but this application was denied. The attachment was requested a second time and the judge handed down a decision stating that claims for the payment of sums not received by employees in reprisal should be lodged with an ordinary court.
- 905.** The UNSITRAGUA alleges in its communication of 23 May 2005 that the State of Guatemala, through the Ministry of Education, has implemented a strategy intended to generate an atmosphere of labour instability, which will dissuade workers from exercising

their right to freedom of association for fear of losing their jobs and thereby weaken and gradually destroy existing trade unions. The Ministry of Education is seeking to provide a legal underpinning for a new strategy to weaken and destroy trade unions. The provisions of the cooperation agreements offered by the Asociación Movimiento Fe y Alegría and the Ministry of Education seek to disguise the employer status of the Asociación Movimiento Fe y Alegría using a system of subcontracting through so-called parents' associations. The teachers are hired by these associations for a period of ten months and warned that if they join a trade union their contract will not be renewed and they are effectively forbidden to even speak with trade union leaders and other unionized employees. This also means that these employees are deprived of two months' salary per year and of one-sixth of their Christmas bonus and of the annual bonus payable to employees in the private and public sectors, and to their leave entitlement, as well as of employment stability as enjoyed by other employees hired directly by the Asociación Movimiento Fe y Alegría. Meanwhile, these subcontracted employees are being paid a substantially higher salary than those who are trade union members, this being a means used by the employer to discourage new or continued trade union membership.

- 906.** In its communication of 2 August 2005, the International Confederation of Free Trade Unions (ICFTU) alleges that its affiliate, the Confederation of Trade Unions of Guatemala (CTUG) has reported that, during the early morning of 11 May 2005, an attempt was made to break into their trade union premises. Fortunately, the intruders did not enter the offices and confined themselves to breaking down the metal door of the main entrance; this is certainly an act of intimidation in reaction to the repeated complaints by the CTUG against the Government's anti-union policy towards workers.
- 907.** The ICFTU adds that on 9 May 2005, unknown persons entered the headquarters of the National Coordination of Peasant Organisations (NCPO) and removed 15 computers which contained information of great importance to the organization, together with a video camera and two digital cameras; they also examined the files which they then scattered on the floor. In addition, on 10 May, an unsuccessful attempt was made to enter the headquarters of the General Union of Workers of Guatemala (GUWG) through the roof. The NCPO shares its premises with the recently established Indigenous, Peasant, Trade Union and Popular Movement which combines several trade unions and popular organizations; hence, the ICFTU suspects that those responsible for these incidents were not common criminals but were more likely to be members of the national security forces seeking to intimidate trade union members and members of popular organizations.
- 908.** The ICFTU further states that, on 25 and 26 June 2005, the head office of its affiliate, the Trade Union of Education Employees of Guatemala (STEG), was burgled by unknown persons, who removed computers, communication equipment such as fax machines, telephones and other office material and files. They also destroyed all the office furniture and conference tables; they daubed red crosses in three different places, which may be taken as a clear threat directed at the trade union leaders and employees working in the institution. The ICFTU expresses its concern at the fact that an arrest warrant was issued for the Secretary-General of the STEG, Mr. Joviel Acevedo, on account of his participation in protest demonstrations by civil society against adoption of the Free Trade Agreement.
- 909.** The ICFTU further alleges that all members of the executive committee of the Trade Union of Employees of the Crédito Hipotecario Nacional (STCHN) have been subject to threats and intimidation. On 25 July 2005, a funeral wreath was laid at the entrance to the offices of the UNSITRAGUA (to which the STCHN is affiliated) and documents containing threats against the STCHN leaders were found inside the premises; however, the threats in fact target all members of the union (a photocopy of the threats is attached). The names of the threatened leaders are: Edgar Vinicio Ordóñez García, Secretary-General; Luis Fernando Sirín Aroche, secretary for employment and disputes; Efrían

López Quiché, secretary for communications, records and agreements; Danilo Enrique Chea Herrera, secretary for organization and publicity; Elio Santiago Monroy Lopez, secretary for finance; José Douglas Asencio, secretary of sport; Manuel Francisco Arias Virula, secretary for social welfare and Luis Ernesto Morales Gálvez, a member of the Advisory Council.

- 910.** The ICFTU assumes that these threats are related to the labour dispute, which began on 22 March 2002 following the dismissal of 170 employees belonging to the trade union who were obliged by the bank (Crédito Hipotecario Nacional) to tender their “voluntary resignations”. On 21 July 2002, the same happened to another group of employees who were also trade union members. During the course of 2003, several leaders were intimidated in different ways and the trade union submitted complaints of corruption in connection with the merger between the Banco del Ejercito and BANORO. Since then, a policy of pressure and harassment has been directed against employees to encourage their withdrawal from the trade union with the result that the 450 membership in 2002 has declined to 210 at the present time; in addition, the agreements concluded through collective bargaining have not been implemented and consequently the trade union has taken action to prevent the bank from dismissing trade union members; the authorities have threatened trade union leaders with removal of trade union immunity.

B. The Government’s replies

- 911.** In its communications dated 17 September, 27 October and 4 November 2004, the Government states that there were no acts of interference by the Labour Inspectorate in the affairs of the Trade Union of Employees of the Portuaria Quetzal enterprise, and that freedom of association has not been infringed because he made no suggestion at any time during the assembly held by that trade union. All the events that took place in the assembly are recorded in the minutes drafted by that official and appended as evidence. At the request of the secretary of the trade union, the labour inspector participated solely as observer of events during the trade union’s extraordinary general assembly of 6 May 2004. The inspector participated only when his opinion was requested regarding the matter under discussion during the assembly, to the effect that, as the supreme body of the trade union in question, the assembly had to decide as to the future of the members of the executive committee in dispute, and then proceeded to read articles 207, 221 and 222 of the Labour Code; this occurred, as stated in the inspector’s records, after the assembly had discussed the dispute within the executive committee (its members could not agree on decisions to be taken) and considered the different possibilities, including replacement of committee members. The Government states that at no time were the articles of incorporation of the trade union in question violated, and that during the assembly the labour inspector did not remove the immunity of any member of the committee given that he was not empowered to do so; immunity was removed by majority of the plenary assembly, as recorded in the minutes which he drafted as observer of these events; the record states that there was a quorum of two-thirds of members. It is stated that the committee members did not at any time leave the podium, as alleged. The Government adds that the former committee members in question at no time requested the intervention of an inspector from the Dirección V Central to witness the refusal by the newly elected committee members to receive the document challenging the former members’ removal; they simply submitted the document so that the labour inspector could bring it to the attention of the new committee members. Neither did they request the intervention of an inspector to witness the refusal by the new committee member, Miguel Antonio Madrid Hernández, to receive the document. According to the record, on 13 May 2004, 113 employees submitted a document challenging the decisions of the trade union assembly to the General Directorate of Labour; the record states that 450 of the 600 members attended the assembly.

- 912.** The Government states, in regard to endorsement of the collective agreement on employment conditions between the Trade Union of Employees of the Portuaria Quetzal enterprise and the company that, on 14 October 2004, a request was submitted for endorsement of the reforms to the collective agreement on employment conditions, as negotiated and adopted. On 2 November 2004, opinion No. 292-2004 and resolution No. 1820-2004 were issued refusing the request by reason of the fact that this could not occur unless the previous collective agreement was terminated. On 30 November 2004, endorsement of the new collective agreement was again requested. On this occasion, the legal office proceeded to issue the respective opinion after studying the matter and concluding that the agreement in question did not breach current labour provisions in law and recommended that it be endorsed, as occurred.
- 913.** In its communications dated 17 and 25 January, 11 and 25 April and 20 July 2005, the Government states that the alleged mass dismissal of employees of the Crédito Hipotecario Quetzal, including the dismissal of 29 employees belonging to the trade union, does not constitute trade union repression because the persons involved were hired on temporary or fixed-term contracts specifying an expiry date. It is further stated that Mr. Luis Fernando Sirín Aroche is currently working for the Crédito Hipotecario Nacional de Guatemala as secretary for employment and disputes on the trade union's executive committee. Mr. Jaime Yuri de León Polanco no longer works for the Crédito Hipotecario Nacional de Guatemala and investigation of his employment situation reveals that, on 31 December 2004, his employment relationship was lawfully terminated and an official document to that effect was issued.
- 914.** In response to the employer interference alleged by UNSITRAGUA, which states that the Labour Code and articles of incorporation of the organization provide that the right to challenge elections to trade union posts is confined to trade union members, the Government states that such statements reveal blatant manipulation of the legal system governing employment, since the Labour Code, article 1, states: "this Code regulates the rights and duties of employers and workers, in connection with employment, and establishes institutions to settle disputes". The Labour Code does not grant an exclusive right to trade union members, but grants them in fact to the parties in the employment relationship.
- 915.** Moreover, the Government states that the complaint lodged by the UNSITRAGUA in regard to the Portuaria Quetzal enterprise is based on an interpretation of constitutional provisions and employment standards which they consider to be applicable to the case, and subsequently refer to the dismissal of the former employee Mr. Oscar Humberto Dueñas Hernández and the procedure followed to dismiss him.
- 916.** Article 108 of the Constitution provides that relations between employers and workers are governed by the internal regulations of the company, in this case the Portuaria Quetzal enterprise, and not by the Labour Code as claimed by the UNSITRAGUA. It may be noted that the Organic Act of the Portuaria Quetzal enterprise (Legislative Decree No. 100-85, which has an authority equal to the ordinary law passed by the Congress of the Republic), article 19, paragraph (d), provides that the general manager has the power to: "appoint and dismiss any member of staff, with the exception of the deputy manager and the internal auditor". This provision confirms one of the administrative powers of any employer, which is to recruit and dismiss staff.

- 917.** Meanwhile, the Portuaria Quetzal enterprise's general employment regulation (governmental Agreement No. 949-89 of 12 December 1989) embodies all relevant labour standards and article 67, paragraph (d), provides for: "dismissal when, in the view of the general management, the employee's action merits dismissal, corresponding to the grounds laid down in this regulation". Article 78 lists grounds for dismissal, including those applicable to Mr. Dueñas Hernández's case: "(a) when the employee conducts himself in an openly immoral manner during the course of his work or proffers insult, abuse or physical violence ... (b) when the employee engages in any of the above-described acts, against another employee of the company, necessarily with the result that it seriously undermines discipline or interferes with the company's work ... (f) when the employee expressly refuses to abide by the resolutions, standards or provisions of the company's management ... (i) when the employee fails to comply with the obligations and prohibitions by which he is bound ..."
- 918.** On 23 December 2004, a report was received from the Portuaria Quetzal enterprise security officer regarding the incident and the conduct of Mr. Dueñas Hernández, after which the personnel department arranged a two-day hearing to allow him to defend his position, which he was not able to do, leading to the issue of Order No. 001-2005, terminating the employment relationship. It was held against him that when he delivered lunch to his daughter, who worked in another part of the company, he parked his car in such a way as to block the entrance to the company premises for ten minutes, and used insulting and offensive language in response to the guard who instructed him to comply with the internal security procedures; similar incidents had occurred previously.
- 919.** This was not the first case of misconduct on the part of Mr. Dueñas Hernández who had previously been subject to suspension without pay for successive instances of misconduct, to the extent that on 17 September 2001, Mr. Dueñas Hernández signed a document agreeing to: "formally undertake henceforth to display irreproachable conduct, with a view to avoiding any problems in his employment that might affect company officials or co-workers, or damage company property, failing which the Portuaria Quetzal enterprise is free to dispense with his services and he undertakes expressly, in writing, to resign from the position that he currently occupies ..."
- 920.** It may be noted that Mr. Dueñas Hernández was only a member of the trade union, subject to the rights and duties of any worker, and was not a member of the union's executive committee, without entitlement to any special privileges and notably that of immunity from dismissal. A review appeal submitted by the individual in question was processed and duly rejected by the company board after which, in the light of the employee's refusal to accept the compensation and benefits due to him, the case was taken before a labour tribunal.
- 921.** In regard to Mr. Víctor Edgar Ticas Arévalo, the Government states that he was employed in the position of security supervisor, whose main task was to coordinate, supervise and oversee activities within the port complex. Port security is extremely important and complex, involving considerable responsibility given the need to ensure appropriate oversight of goods and services and particularly supervision of workers in order to ensure due confidence in the manner in which supervisory, administrative and port activities are carried out.
- 922.** Unfortunately, Mr. Ticas Arévalo departed from this line of conduct and his partiality to alcohol had caused serious incidents. One such incident occurred when he was driving under the influence of alcohol and collided with another vehicle resulting in the death of one person, leading to criminal prosecution for voluntary manslaughter. Meanwhile, it was reported that Mr. Ticas failed to report for work on 8, 9, 10, 11, 12, 13 and 14 July, without justification; upon his return to work, he was granted a hearing to explain the situation, during which he failed to offer any justification for his absence and confined himself to

expressing his dissatisfaction that he had not been granted leave that he had requested, and it was only later that the company learned that, under the effect of alcohol, he had been involved in an incident in a local restaurant during which he had brandished his revolver in a threatening manner and caused damage to property, and other offences. In keeping with its required procedure, the company made known its readiness to pay compensation and corresponding benefits, which were not accepted by the employee.

- 923.** It should be noted that the UNSITRAGUA's version of the situation is not accurate; it exaggerates some elements and misrepresents others. The UNSITRAGUA states that Mr. Ticas Arévalo's case should have been placed before the Joint Council. This Council meets at the request of the employee involved but, in this case, it was the employee himself who, on 29 July 2004, submitted an appeal against the dismissal agreement which was to be duly considered and settled by the honourable board of the company. It was not until 2 August that the trade union "suggested" that the Joint Council be convened, by which time the appeal was already being processed as requested by the employee in question.
- 924.** The UNSITRAGUA is also inaccurate in stating that negotiation of the new collective agreement on employment conditions has been unduly delayed by the enterprise's management. It should be noted in this regard that the new collective agreement has already been concluded between the trade union and the company. As is true of any collective bargaining, the process must follow a prescribed course during which the agreements reached must be submitted to referendum, as occurred without any untoward delays in the bargaining process.
- 925.** The Government states, furthermore, that the "Fe y Alegria" Movement association has submitted a communication rejecting the complaint, stating that the "Fe y Alegria" Movement does not engage in subcontracting through parent associations; these associations are organized by parents in the context of freedom of association embodied in the Political Constitution of the Republic of Guatemala; their main motivation is their concern about constant absenteeism and problems with bad teachers in schools who cannot be dismissed because they entrench themselves by means of constant collective disputes relating to economic and social matters; this year there had been three collective disputes promoted and organized by the trade union, two of which have already been ruled to be unlawful by the corresponding jurisdictional bodies.
- 926.** The "Fe y Alegria" Movement association states that it has not interfered in any way in organizing parents' associations which are different legal entities and, as such, these associations enjoy the freedom, power and right to hire staff in any capacity that they consider necessary to carry out the functions for which they have been established and under the terms they consider they can afford. The "Fe y Alegria" Movement adds that, just as the association does not interfere in the organization of parents' associations, neither does it intervene in their decisions; thus, decisions to pay higher salaries than schools are taken internally, based on internal provisions of which the "Fe y Alegria" Movement is not aware because they are different legal entities. The financial situation of the "Fe y Alegria" Movement is severely constrained by the fact that it is forced to devote funds to counter the endless unfounded complaints levelled against the movement by the trade union.
- 927.** The Government further states that the municipality of Comitancillo terminated the contracts of the employees to which the complaint related, on the grounds provided for in Decree No. 71-86, article 4, paragraph c.1, the Law on Unionization and Regulation of Strikes by Civil Servants which states that: "when an employee engages in conduct that constitutes a just cause for dismissal, the nominated authority of the State and of its decentralized and autonomous bodies are empowered to cancel appointments and employment contracts, without incurring liability and without prior judicial authorization".

It is therefore clearly apparent that the municipality in question is an autonomous authority of the State and is therefore empowered to terminate the employment contract of an employee who has engaged in conduct that constitutes just cause for dismissal, without having to apply for prior judicial authorization from the judge examining the collective dispute giving rise to the prohibition contained in article 380 of the Labour Code (not applicable to this case), which states that no employment contract may be terminated without the authorization of the judge hearing the case in question. In other words, the provision contained in Decree No. 71-86 exempts the municipality from having to seek authorization to terminate an employment contract when just cause exists to dismiss the employee. Consequently, the municipality of Comitancillo terminated the employment contract of the employees referred to in the complaint by reason of the fact that just cause existed to terminate each of these contracts. This procedure was never used, as the complainants claimed, to infringe freedom of association and the right to bargain collectively. Moreover, it should be noted that the employees dismissed with just cause challenged the termination of their employment contract and sought reinstatement before the Labour and Social Welfare Tribunal which, after duly considering the matter, ruled on 9 and 24 September 2004 in favour of the municipality of Comitancillo and rejected the application for reinstatement lodged by the dismissed employees.

- 928.** The actions of the municipality of Comitancillo have not infringed freedom of association rights or the right to bargain collectively in respect of the dismissed employees in any way. The documents submitted by the Government demonstrate that the judicial authority initially ordered reinstatement by reason of the fact that the persons in question were members of the newly established trade union but had subsequently ascertained that these were (state) employees and thus not covered by the Labour Code; the Appeal Court ruled that no reprisals had been taken by the employer and that just cause existed for dismissal, further stating that the complainants should have used other judicial channels (ordinary court) to ascertain whether just cause existed; the employees' application for reinstatement was rejected. The documentation submitted by the Government reveals that the dismissed employees have lodged a remedy of *amparo*.
- 929.** In its communication dated 25 January 2005 (received September 2005), the Government states in connection with the allegations regarding the La Esperanza agricultural enterprise that, on 8 February 2005, in reprisals Case No. 421-2004, the Fourth Chamber of the Appeal Court for Labour and Social Welfare (Mazatenango) ruled in favour of the appellants and ordered the employer, La Esperanza, to end the illegal suspension of the individual employment contracts, paying back salaries and other benefits, in addition to a fine. Likewise, on 24 August 2005, before the Conciliation Tribunal established in the department of Escuintla, the parties agreed on the reinstatement of all the employees involved in the reprisals incident and on a guarantee of employment stability. An agreement was also concluded regarding payment of back wages.
- 930.** In its communication dated 5 October 2005, the Government recalls that the fast-track procedure when complaints are filed with the ILO results from a tripartite decision made during a direct contacts mission, that is not a compulsory mechanism and that USITRAGUA resorted to it.

C. The Committee's conclusions

- 931.** *The Committee notes that the allegations submitted are as follows: interference by the Labour Inspectorate in the internal affairs of the Trade Union of Employees of the Portuaria Quetzal enterprise, and unlawful removal from trade union positions of seven members of the executive committee, restructuring (voluntary resignation plan) of the company for anti-union purposes without consultation and practices contrary to the right to bargain collectively; dismissal of trade union members in violation of the collective*

agreement; subcontracting for anti-union purposes instigated by the Ministry of Education with regard to teachers (*Fe y Alegria* Movement); mass anti-union dismissals by *Crédito Hipotecario Nacional*; dismissals in the municipality of *Comitancillo* (department of *San Marcos*) in violation of a judicial reinstatement order; dismissal of a member of the Trade Union of the Supreme Electoral Tribunal; the criteria for employers' representation in violation of Convention No. 87; introduction of a mechanism prior to the submission of complaints to the ILO and suspension of work and pay of employees of the company *La Esperanza* who had established a trade union. The Committee also notes the more recent allegations by the ICFTU, dated 2 August 2005, regarding violation of trade union premises and theft of property, threats and intimidation of trade union members, including an arrest warrant against one member, and while emphasizing its concern over the gravity of these allegations, requests the Government to submit its comments on these matters without delay.

932. In regard to the alleged acts of interference by the labour inspector in the affairs of the Trade Union of Employees of the *Portuaria Quetzal* enterprise, by intervening in an extraordinary general assembly on 6 May 2004 when, according to the complainant, seven trade union leaders were unlawfully removed from their posts and others appointed in their place, the Committee notes the Government's statement that such interference did not occur, that freedom of association was not infringed and that the labour inspector participated solely as an observer (at the request of the trade union). According to the Government, the inspector only participated in the assembly when his opinion was requested in regard to the matters under discussion to which he replied that it was up to the assembly to decide the future of the members of the executive committee. The Committee further notes the Government's statement that the inspector's report records that the plenary of the assembly, by majority, removed the former committee members from their positions on the executive committee.
933. In light of the above, the Committee notes the contradiction between the allegations of interference and lack of a quorum in the assembly, and the Government's reply denying interference by the labour inspector in the extraordinary general assembly during which trade union leaders were removed from the executive committee, and highlighting the fact that the trade union requested that the labour inspector be present and that a quorum existed of two-thirds of its members. The Committee notes that, according to the allegations, 113 of the 600 members of the trade union submitted a challenge to the assembly's decisions to the General Directorate of Labour. The Government for its part states that the trade union assembly was attended by 450 of the 600 union members. The Committee requests the Government to keep it informed of any administrative or judicial decision relating to this matter. Lastly, the Committee notes the Government's contention that the trade union leaders removed from the executive committee did not request the intervention of an inspector from the *Dirección V Central*, for the purpose of recording the refusal by the newly instituted leaders to receive the challenge document. According to the Government, the document in question was submitted only so that the Labour Inspectorate could transmit it to the new executive committee, as occurred. The Government adds that the presence of an inspector was not requested to witness the refusal by the new leader, *Miguel Antonio Madrid Hernández*, to accept the challenge document submitted.
934. In regard to the alleged denial by the authorities to recognize the collective agreement concluded between the Trade Union of Employees of *Portuaria Quetzal* enterprise and the *Portuaria Quetzal* enterprise, the Committee notes that, according to the Government's reply, endorsement of the collective agreement was initially withheld because the previous agreement remained in force and had not been withdrawn. Once that matter had been resolved, the new collective agreement was certified.

- 935.** *In regard to the alleged dismissal of Mr. Edgar Ticas Arévalo and Mr. Oscar Humberto Dueñas Hernández by the Portuaria Quetzal enterprise, the Committee notes that the Government declares that the dismissals are not related to the exercise of freedom of association, that the first case of dismissal is due to a voluntary manslaughter while under the influence of alcohol, together with other offences and failure to report for work and, the second, to the repeated incidents at work, the most recent being obstruction of the entrance to premises with his car and insults to the company's security staff. The Committee however draws attention to the fact that the Government has not denied the allegation that the company did not convene the Joint Council as provided in the current collective agreement, and requests the Government to guarantee that this provision will be enforced in the future.*
- 936.** *In regard to the allegation that a draft regulation of the Ministry of Labour (in connection with the Tripartite Commission on International Affairs) provides for the establishment of a mechanism prior to the submission of complaints to the ILO, the Committee notes from the report of the Committee of Experts for 2005 (observations on Conventions Nos. 87 and 98), that this mechanism arose during a direct contacts mission between 17 and 20 May 2004. It is "a rapid action mechanism to consider reports and complaints to be submitted to the ILO that institutes a period of 15 days to endeavour to resolve the problems in question before they are forwarded to the ILO" and is intended to allow the authorities to carry out special prompt action. The Committee also notes that, as stated by the Committee of Experts, this mechanism was approved by the Tripartite Commission for International Affairs. The Committee notes that, according to the Government, that procedure is not compulsory and that UNSITRAGUA has used it. In the view of the Committee, this mechanism is fully compatible with the principles of freedom of association.*
- 937.** *In regard to the alleged practice by the Ministry of Education in promoting subcontracting by the "Fe y Alegria" Movement association through parents' associations with a view to weakening the trade union, making renewal of these subcontracted employees conditional upon their not joining the trade union and by paying them more than other employees, the Committee notes that the Government merely reproduces the statements by the "Fe y Alegria" Movement association to the effect that: (1) parent associations were established by parents without interference by the Ministry or the "Fe y Alegria" Movement association, and the latter does not intervene in the activities and decisions of the parent associations to pay higher wages; (2) the "Fe y Alegria" Movement association does not subcontract staff. The Committee requests the Government to carry out an independent investigation into the allegations of anti-union practices and to keep it informed in this respect.*
- 938.** *Regarding the dismissal of leaders of the trade union operating in Credio Hipotecario Nacional, namely Mr. Luis Fernando Sirín Aroche and Mr. Yuri de León Polanco, the Committee notes the Government's statement that the former remains employed by the Crédito Hipotecario Nacional and that the latter's services were terminated on 31 December 2004 on the basis of an official document to that effect. The Committee however notes that the Government fails to identify the reason why the latter's employment relationship was terminated and requests the Government to keep it informed in this respect. In regard to the alleged dismissal of 30 employees belonging to the trade union, the Government notes that they were working on temporary or fixed-term contracts with a specified expiry date.*

939. *In regard to the alleged dismissal of 18 employees of the municipality of Comitancillo, who declared a collective dispute by reason of the fact that they were denied the right to bargain collectively because they could not meet the legal minimum requirement of 20 workers to form a trade union, the Committee notes that the Government has submitted documentation demonstrating that the judicial authority, pursuant to legal provisions regarding trade union privileges applicable to employees belonging to the trade union, ordered initially that the workers be reinstated but in subsequent proceedings ascertained that, since the individuals in question were state employees, they were not covered by the Labour Code, concluding therefore that there had been no reprisal by the employer and that the employer had in fact invoked just cause. The Appeal Court also noted that the employees should have used an alternative judicial channel (ordinary court) and rejected the application for reinstatement of the dismissed employees. The Committee notes that the documentation submitted by the Government reveals that the dismissed employees have submitted a remedy of amparo and requests the Government to keep it informed of the outcome of the proceedings.*

940. *In regard to the alleged suspension of employment and pay of employees of the agricultural enterprise La Esperanza who established a trade union, the Committee notes with interest that these matters have been settled by judicial means in an agreement concluded between the parties in the context of proceedings before the Conciliation Tribunal.*

941. *The Committee requests the Government, after consultation with the most representative workers' and employers' organizations, to submit its observations without delay regarding the allegations to which it has not responded, as listed hereafter:*

- *Portuaria Quetzal enterprise: restructuring (voluntary resignation plan) of the company for anti-union purposes and without consultation, and practices contrary to the right to bargain collectively;*
- *dismissal of employee Víctor Manuel Cano Granados who is a member of the Trade Union of the Supreme Electoral Tribunal; and*
- *criteria for representation of employers at the Tripartite Commission for International Affairs, infringing Convention No. 87.*

The Committee's recommendations

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

- (a) *Noting the contradiction between the allegations and the Government's response denying interference by the Labour Inspectorate in the extraordinary general assembly of the Trade Union of the Portuaria Quetzal enterprise, during which trade union leaders were removed from their positions, and in the absence of a quorum, the Committee requests the Government to keep it informed of any administrative or judicial decision that is taken in regard to this matter and, in particular, in regard to the contested decisions of the trade union assembly presented by 113 of the 600 members.*

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- (b) *The Committee requests the Government to guarantee in the future that when the Portuaria Quetzal enterprise intends to dismiss employees, the Joint Council be convened as provided for in the collective agreement.*
- (c) *As regards the alleged practice by the Ministry of Education of promoting subcontracting by the “Fe y Alegria” Movement association through parent associations with a view to weakening the trade union, by making renewal of the subcontracted employees’ contracts conditional upon their not joining the trade union, and paying a higher salary than that received by other employees, the Committee requests the Government to carry out an independent investigation into these alleged anti-union practices and to keep it informed in this respect.*
- (d) *The Committee requests the Government to inform it of the specific grounds for terminating the employment relationship of the trade union member Mr. Yuri de León Polanco by the Crédito Hipotecario Nacional.*
- (e) *The Committee requests the Government to inform it of the outcome of the remedy of amparo initiated in connection with the dismissal of 18 employees of the municipality of Comitancillo.*
- (f) *The Committee requests the Government, after consulting the most representative workers’ and employers’ organizations, to forward without delay its observations on the allegations to which it has not responded and which are listed hereafter:*
- *Portuaria Quetzal enterprise: restructuring (voluntary resignation plan) of the company for anti-union purposes and without consultation, and practices contrary to the right to bargain collectively;*
 - *dismissal of employee Víctor Manuel Cano Granados who is a member of the Trade Union of the Supreme Electoral Tribunal; and*
 - *criteria for representation of employers at the Tripartite Commission for International Affairs, infringing Convention No. 87.*
- (g) *The Committee requests the Government to forward its observations without delay on the most recent allegations by the ICFTU contained in its communication dated 2 August 2005 and emphasizes its concern over the gravity of these allegations.*

CASE NO. 2361

INTERIM REPORT

Complaints against the Government of Guatemala presented by

- **the Union of Workers of the City of Chinautla (SITRAMUNICH)**
- **the Trade Union Federation of Public Employees (FENASTEG) and**
- **the Union of Workers of the Directorate General for Migration (STDGM)**

Allegations: The mayor of Chinautla refused to negotiate a collective agreement and dismissed 14 union members and two union leaders; the Government is promoting a new civil service law containing provisions contrary to ratified ILO Conventions on freedom of association; departments in the Ministry of Education are being reorganized with the possible elimination of posts with the aim of destroying the union that operates there; the Directorate General for Migration refused to negotiate the collective agreement and to reinstate union leader Mr. Pablo Cush with payment of lost wages and is taking measures to dismiss union leader Mr. Jaime Reyes Gonda without court authorization; the Directorate General for Migration refused to set up the mixed (joint) committee as set out in the collective agreement; 16 members of the Union of Workers of the “José de Pineda Ibarra” National Centre for Textbooks and Educational Material were dismissed as a result of a reorganization ordered by the Ministry of Education and action is being taken to dismiss all members of the union’s executive committee

- 943.** The complaints are contained in communications from the Union of Workers of the City of Chinautla (SITRAMUNICH) (12 May, 9 June and 29 October 2004), the Trade Union Federation of Public Employees (FENASTEG) (28 and 29 October, 20 and 21 December 2004 and 21 January, 1 and 18 July 2005), the Union of Workers of the Directorate General for Migration (STDGM) (21 January 2005).
- 944.** The Government sent its observations in communications dated 19 January, 16 February, 8 March, 1 and 7 July, 12 September and 7 October 2005.
- 945.** Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 946.** In its communications of 12 May, 9 June and 29 October 2004, the Union of Workers of the City of Chinautla (SITRAMUNICH) alleges that the mayor refused to negotiate a collective agreement with the union and that 14 union members and two union leaders (Mr. Marlon Vinicio Avalos and Ms. Bilda Marley Flores) were dismissed, despite the judicial authority ordering their reinstatement in the context of the ongoing legal proceedings stemming from a collective dispute. In a resolution on 30 August 2004, the Human Rights Prosecutor noted the violation of labour law and the freedom of association of the dismissed workers, and stated that there were reasonable indications of the mayor's responsibility.
- 947.** FENASTEG alleges in its communication of 28 October 2004 that the Government is promoting a new civil service law containing provisions contrary to the ILO Conventions, ratified by Guatemala, on freedom of association: lack of impartiality of the body that handles disputes, limitations on the right to strike, the impossibility for the labour inspectorate to supervise and punish infractions of labour law, the abolishment of the National Civil Service Office and consequently of its union, etc.
- 948.** In its communication of 20 December 2004, FENASTEG alleges that a process to reorganize the departments of the Ministry of Education and possibly to eliminate posts has been approved, in spite of the fact that the Union of Workers in the Guatemalan Departmental Education Directorate (STDDED) has brought a socio-economic dispute before the judicial authority. The reorganization is part of a strategy to destroy the union and also violates the right to collective bargaining; the complainant alleges that discussions on the socio-economic dispute to improve working conditions were imminent.
- 949.** In their communications of 21 January 2005, FENASTEG and the Union of Workers of the Directorate General for Migration (STDGM) allege that the aforementioned Directorate General in the Ministry of the Interior also completely refuses to negotiate the collective agreement on working conditions. It refuses to reinstate union leader Mr. Pablo Cush (who had been suspended) despite the fact that he was absolved in the criminal courts by a ruling on 13 August 2004. It has also begun disciplinary dismissal proceedings against union leader Mr. Jaime Reyes Gonda and attempted to notify him of his dismissal despite not having the court authorization required by the Labour Code. In a communication dated 19 April 2005, the STDGM notes that union leader Pablo Cush has been reinstated to his post but that he has not been paid his lost wages. In addition, the Directorate General for Migration is not willing to set up the mixed (joint) committee for labour disputes as set out in the collective agreement.
- 950.** In communications dated 1 and 18 July 2005, FENASTEG alleges that 16 members of the Union of Workers at the "José de Pineda Ibarra" National Centre for Textbooks and Educational Materials were dismissed because of an illegal reorganization by the Minister of Education, even though there was a socio-economic dispute pending before the judicial authority. All this was done without consultation, and is aimed at destroying the union and the right to collective bargaining. The Government has also brought a case to dismiss all the members of the union's executive committee.

B. The Government's reply

- 951.** In its replies dated 19 January and 16 February 2005, the Government states that the new civil service bill was still at the stage of consultation, discussion and revision with various institutions and union organizations (the Government encloses a copy of minutes of meetings where union organizations were present) and says that it does not contravene the Conventions that have been ratified.

- 952.** In its communications of 8 March and 1 July 2005, the Government states that all the workers at Chinautla Town Hall are at their respective posts, apart from a few who have found better jobs. Ms. Bilda Marley Flores was reinstated following a judicial order but after one day back at work (18 May 2004) she did not return to her post and therefore, after this was formally placed on record, dismissal proceedings were brought before the judicial authority on 28 May 2004, which are still pending. As a result of the socio-economic dispute brought before the judicial authority by the union, a conciliation and arbitration court has been set up whose work is still under way.
- 953.** In its communication of 7 July 2005, the Government states that the judicial authority confirmed the reinstatement of Bilda Marley Flores on 24 May 2005 as a result of an appeal presented by Chinautla Town Hall. In its communications of 12 September and 7 October 2005, the Government states that the allegations relating to the dismissal of 16 members of the Union of Workers of the “José de Pineda Ibarra” National Centre for Textbooks and Educational Material are not receivable because the complainants do not indicate the names of the persons concerned, nor the jurisdiction dealing with these cases.

C. The Committee’s conclusions

- 954.** *The Committee observes that the complainants in this case have made the following allegations: the mayor of Chinautla refused to negotiate a collective agreement and dismissed 14 union members and two union leaders; the Government is promoting a new civil service law containing provisions contrary to ratified ILO Conventions on freedom of association; departments in the Ministry of Education are being reorganized with the possible elimination of posts with the aim of destroying the union that operates there; the Directorate General for Migration refused to negotiate the collective agreement and to reinstate union leader Mr. Pablo Cush with payment of lost wages, and is taking measures to dismiss union leader Mr. Jaime Reyes Gonda without court authorization; the Directorate General for Migration refused to set up the mixed (joint) committee as set out in the collective agreement; 16 members of the Union of Workers of the “José de Pineda Ibarra” National Centre for Textbooks and Educational Material were dismissed as a result of a reorganization ordered by the Ministry of Education and action is taken to dismiss all members of the union’s executive committee.*
- 955.** *Regarding the allegations concerning Chinautla Town Hall (the dismissal of 14 union members and two union leaders), the Committee notes the Government’s statements that all the workers at the Town Hall are at their respective posts (apart from a few who have found better jobs), including union leader Bilda Marley Flores, whose reinstatement was ordered by the judicial authority. The Committee notes that the Government states that as a result of the socio-economic dispute brought before the judicial authority by the union, a conciliation and arbitration court has been set up, and requests the Government to inform it of any decisions that are handed down by that court regarding the 14 dismissed union members (who, according to the Government, are still working at the moment) and union leader Marlon Vinicio Avalos. In addition, noting that the Government has not replied to the allegation that the mayor of Chinautla refused to negotiate the collective agreement, the Committee requests the Government to take measures to promote collective bargaining in Chinautla Town Hall.*
- 956.** *Regarding the allegations of 2004 that the Government is promoting a new civil service law containing provisions contrary to ratified ILO Conventions on freedom of association, the Committee notes the Government’s statement that the new civil service bill is still at the stage of consultation, discussion and revision with various institutions and with union organizations. The Committee requests the Government to ensure that the draft law that emerges from the consultation process is fully compatible with Conventions Nos. 87 and 98 and to send a copy of it when the process is complete, and reminds the Government that*

the ILO is ready to provide assistance to ensure the compatibility of the bill with the aforementioned Conventions.

- 957.** *Lastly, the Committee notes with regret that the Government has not replied to the following allegations: departments in the Ministry of Education are being reorganized with the possible elimination of posts with the aim of destroying the union that operates there; the Directorate General for Migration refused to negotiate the collective agreement and to reinstate union leader Mr. Pablo Cush with payment of lost wages, and is taking measures to dismiss union leader Mr. Jaime Reyes Gonda without court authorization; the Directorate General for Migration refused to set up the mixed (joint) committee as set out in the collective agreement. The Committee requests the Government to reply to these allegations without delay. As regards the allegations concerning the dismissal of 16 members of the Union of Workers of the “José de Pineda Ibarra” National Centre for Textbooks and Educational Material as a result of an illegal reorganization, without consultation, ordered by the Ministry of Education, and the action taken to dismiss all members of the union’s executive committee, the Committee requests the complainant organization (FENASTEG) to transmit the names of the workers concerned, and to indicate the court dealing with this issue.*

The Committee’s recommendations

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

- (a) *Noting the Government’s statement that as a result of the socio-economic dispute before the judicial authority, a conciliation and arbitration court has been set up, the Committee requests the Government to inform it of any decisions that will be handed down by that court regarding the 14 dismissed union members (who, according to the Government, are still working at the moment) and union leader Marlon Vinicio Avalos. In addition, noting that the Government has not replied to the allegation that the mayor of Chinautla refused to negotiate the collective agreement, the Committee requests the Government to take measures to promote collective bargaining in Chinautla Town Hall.*
- (b) *The Committee requests the Government to ensure that the civil service bill that emerges from the consultation process is fully compatible with Conventions Nos. 87 and 98 and to send a copy of the bill when the process is complete, and reminds the Government that the ILO is ready to provide assistance to ensure the compatibility of the bill with the aforementioned Conventions.*
- (c) *Lastly, the Committee notes with regret that the Government has not replied to the following allegations: departments in the Ministry of Education are being reorganized with the possible elimination of posts with the aim of destroying the union that operates there; the Directorate General for Migration refused to negotiate the collective agreement and to reinstate union leader Mr. Pablo Cush with payment of lost wages, and is taking measures to dismiss union leader Mr. Jaime Reyes Gonda without court authorization; the Directorate General for Migration refused to set up the mixed (joint) committee as set out in the collective agreement. The Committee requests the Government to reply to these allegations without*

delay. As regards the allegations concerning the dismissal of 16 members of the Union of Workers of the “José de Pineda Ibarra” National Centre for Textbooks and Educational Material as a result of an illegal reorganization, without consultation, ordered by the Ministry of Education, and the action taken to dismiss all members of the union’s executive committee, the Committee requests the complainant organization (FENASTEG) to transmit the names of the workers concerned, and to indicate the court dealing with this issue.

CASE NO. 2364

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

Complaints against the Government of India presented by

- **the Trade Unions International of Public and Allied Employees (TUIPAE) and**
- **the Tamilnadu Government Officials’ Union (TNGOU)**

supported by

- **the World Federation of Trade Unions (WFTU) and**
- **Public Services International (PSI)**

Allegations: The complainants allege denial of the right to negotiate terms and conditions of services for government employees and teachers and violation of their right to strike. They further allege that the Government withdrew the recognition of almost all government employees’ and teachers’ associations and sealed the Office of the complainant organization

959. The complaint is set out in communications by the Trade Unions International of Public and Allied Employees (TUIPAE) and the Tamilnadu Government Officials’ Union (TNGOU) dated respectively 21 and 29 May 2004. The World Federation of Trade Unions (WFTU) and Public Services International (PSI) associated themselves with the complaint by communications dated 25 May and 17 June 2004, respectively.

960. The Committee has been obliged to postpone its examination of the case on two occasions [see 335th and 336th Reports, paras. 5 and 6 respectively]. At its meeting in May-June 2005 [see 337th Report, para. 10], the Committee issued an urgent appeal to the Government, indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it could present a report on the substance of the case at its next meeting even if the information or observations requested had not been received in due time. No reply from the Government has been received so far.

961. India 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. The complainants' allegations

- 962.** In their communications dated 21 and 29 May 2005, the Trade Unions International of Public and Allied Employees (TUIPAE) and the Tamilnadu Government Officials' Union (TNGOU) submitted that on 2 July 2003, a coalition of government employees' unions in Tamil Nadu called for an indefinite strike to protest the state government's unilateral decision to withdraw pension benefits.
- 963.** Prior to the strike, during the night of 30 June 2003, the Government arrested over 2,400 union leaders and members. Allegedly, no arrest warrants were issued and the police used violent and unnecessary force. The President of the Tamil Nadu Government Officials' Union was among those arrested and was imprisoned for 12 days and was not allowed any outside contacts.
- 964.** The strike took place on 2 July 2003. On 5 July, invoking the Tamil Nadu Essential Services Maintenance Act (TNESMA), the Government issued dismissal notices for government employees and teachers; 170,241 employees and teachers were dismissed through public announcements posted on boards in government offices.
- 965.** On 11 July, the High Court of Tamil Nadu ordered the release on bail of the arrested employees and referred the cases of dismissals to the administrative tribunal. On 24 July, taking into account "the gravity of the situation", the judges of the Supreme Court ordered the reinstatement of all dismissed employees, with an exception of those who had been arrested or those who had received written dismissal notices. In its ruling, the Supreme Court stated, however, that as a condition for the reinstatement, each government employee should tender a written apology and undertake an obligation to abide by Rule 22 of the Tamil Nadu Government Servants Conduct Rules, which prohibited government employees from engaging in strikes or similar action. The court further declared that "government employees had no fundamental, legal, moral or equitable right to go on strike". The remaining 6,072 cases of dismissals were to be heard by the retired judges. The Trade Unions International of Public and Allied Employees provided the following statistics: out of 6,072 dismissed employees, 5,708 appeared for the hearing by the retired judges; on 17 November 2003, 2,350 employees were reinstated following the verdict of the judges without apology letters but with punishments of increment cut or demotion; 2,349 employees were reinstated on 31 December 2003 without apology letters but with punishments; and dismissal of 999 employees was confirmed by the judges.
- 966.** The complainants further submitted that the Government refused to recognize the period of time between the day when the strike was officially called off (7 July 2003) and the actual day when the duty was resumed as working time. In this respect, the complainants submitted that the leaders of the strike steering committee agreed to call off the strike and resume duty on 7 July 2003. A written statement to this effect was submitted to court on 5 July 2003. However, on 11 July, the Government did not allow employees to go back to work by virtually conducting a lockout. The period of absence from 2 July to 24 July was treated in respect of all employees as an extraordinary leave with loss of pay and allowances and from 25 July to the date when the work was actually resumed as leave at the employee's credit. The complainants considered that this period should be treated as working days.
- 967.** In February 2004, as a result of international and national pressure, the remaining dismissed employees were reinstated although they did not receive any back pay. On 18 May 2004, the Chief Minister of Tamil Nadu had announced the withdrawal of all punishments imposed in connection with the strike. All disciplinary proceedings instituted in this connection were also dropped.

968. The complainants stated, however, that the following issues were still pending:

- the TNESMA of 2002 was not amended;
- Rule 22 of the Tamil Nadu Government Servants Conduct Rules was not repealed;
- the Government had withdrawn the recognition of almost all associations of government employees and teachers;
- the office building of the Tamil Nadu Secretariat Association was sealed by the government and was not yet handed back to the Association;
- the letters obtained from 164,169 employees containing an agreed-to obligation not to resort to strike or any trade union action in future were not cancelled;
- all dismissed employees did not receive their pay for the time they were arbitrarily dismissed;
- the demands for which the strike was conducted remained unsettled. The complainants consider that terms and conditions of service for government employees and teachers should be negotiated; and, finally,
- no monetary relief was given to the families of 42 employees who had lost their lives as a result of the distress created by the situation.

B. The Committee's conclusions

969. *The Committee deeply regrets that, despite the time that has elapsed since the complaint was first presented, the Government has not replied to any of the complainants' allegations, although it has been invited on several occasions, including by means of an urgent appeal, to present its comments and observations on the case. The Committee strongly urges the Government to be more cooperative in the future.*

970. *Under these circumstances, and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee finds itself obliged to present a report on the substance of the case without the benefit of the information which it had hoped to receive from the Government.*

971. *The Committee recalls that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for this freedom in law and in fact. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments on their side will recognize the importance of formulating for objective examination detailed replies concerning allegations made against them [see the First Report of the Committee, para. 31].*

972. *The Committee notes that the complainants in this case alleged the violation of the right to collective bargaining and the right to strike of the state employees and teachers. They further alleged that the Government had withdrawn the recognition of almost all government employees' and teachers' associations and sealed the office of the complainant organization, the Tamilnadu Government Officials' Union.*

973. *The Committee notes that, following the Government's unilateral decision to withdraw pension benefits enjoyed by the public servants, the complainant organizations declared an indefinite strike to begin on 2 July 2003. Prior to the strike, the Government arrested*

2,400 trade union members. Several trade union leaders were put into preventive custody. The Tamil Nadu Government then issued an ordinance declaring the services of all government employees and teachers as “essential” under the Tamil Nadu Essential Services Maintenance Act (TNESMA). The strike nevertheless took place. On 5 July, invoking the TNESMA, the Government dismissed 170,241 government employees and teachers. On 11 July, arrested trade unionists were released on bail following an order of the High Court of Tamil Nadu. On 24 July, while considering that “government employees had no fundamental, legal, moral or equitable right to strike”, taking into account “the gravity of the situation”, the Supreme Court ordered the reinstatement of all dismissed employees, with the exception of those previously arrested, in return for written apologies and an undertaking to abide by Rule 22 of the Tamil Nadu Government Servants Conduct Rules, which prohibited government employees from engaging in strike action. Although reinstated, due to the lockout exercised by the employers, these employees did not receive their wages for the period between the end of the strike and the day they were allowed to return to work. The Committee further notes that, by February 2004, the remaining dismissed employees were all reinstated either following an order of the retired judges, to whom these cases were referred, or as a result of international and national pressure. However, the complainants allege that the employees did not receive their wages for the period they were arbitrarily dismissed.

- 974.** Firstly, the Committee is bound to recall that public servants, other than those engaged in the administration of the State, should enjoy collective bargaining rights, and priority should be given to collective bargaining as the means of settling disputes arising in connection with the determination of terms and conditions of employment of public service [see *Digest of decisions and principles of the Freedom of Association Committee*, 4th edition, 1996, para. 793]. The Committee therefore requests the Government to take the necessary measures in order to ensure the application of this principle in Tamil Nadu.
- 975.** The Committee further recalls that public servants should also enjoy the right to strike, provided that the interruption of services does not endanger the life, personal safety or health of the whole or part of the population. The right to strike may however be restricted or prohibited for public servants exercising authority in the name of the State [see *Digest*, *op. cit.*, paras. 532 and 534]. In public service of fundamental importance and 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, a certain minimum service may be requested, but in this case, the trade union organizations should be able to participate, along with employers and the public authorities, in defining the minimum service [see *Digest*, *op. cit.*, paras. 556 and 557]. The Committee notes that by virtue of Rule 22 of the Tamil Nadu Government Servants Conduct Rules and the TNESMA, the right to strike is prohibited for government employees, including teachers. The Committee therefore requests the Government to take the necessary measures to amend the Tamil Nadu Government Servants Conduct Rules and the TNESMA so as bring them in line with the above freedom of association principles and to keep it informed in this respect.
- 976.** As concerns the alleged use of violence and unnecessary force by the police, the Committee recalls that the authorities could resort to calling in the police in a strike situation only if there is a genuine threat to public order. The intervention of the police should be in proportion to the threat to public order [see *Digest*, *op. cit.*, para. 582]. The Committee requests the Government to give the necessary instructions so as to ensure in the future that any police intervention is wholly proportionate to the threat to public order that may have been created by a strike action.
- 977.** As concerns the allegations of arrests of over 2,000 trade union members and leaders and the massive dismissals, while noting that by February 2004, all dismissed employees were

reinstated and that on 18 May 2004, the Chief Minister of Tamil Nadu had announced the withdrawal of all punishments imposed in connection with the strike and that all disciplinary proceedings instituted were dropped, the Committee points out that arrests and dismissals of strikers on a large scale involve a serious risk of abuse and place freedom of association in grave jeopardy. The competent authorities should be given appropriate instructions so as to obviate the dangers to freedom of association that such arrests and dismissals involve [see *Digest*, *op. cit.*, para. 604]. The Committee requests the Government to issue appropriate instructions to the police and the other competent authorities in this respect and to keep it informed on the measures taken.

- 978.** While taking due note of the withdrawal in May 2004 of all punishments in connection with the strike, the Committee notes more specifically from the allegations that the remaining dismissed government employees (some 999) were not reinstated until February 2004 – eight months after the strike – and that these employees received no back pay. The complainants also allege the refusal by the Government to pay wages for the time of lockout it allegedly exercised following the strike. In light of the particularly massive nature of these dismissals and their damaging effect on the overall labour relations climate in respect of government employees in Tamil Nadu, the Committee requests the Government to review the matter of lost wages following the termination of the strike action, in consultation with the trade unions concerned, with a view to compensating the employees concerned for any damages suffered solely for the exercise of legitimate trade union activities. The Committee requests the Government to keep it informed of developments in this respect.
- 979.** The Committee notes that the complainants further alleged the withdrawal of recognition of almost all associations of government employees and teachers. The Committee points out in this respect that these categories of workers, like all other workers, without distinction whatsoever, have the right to form and join organizations of their own choosing to further and defend the interests of their members. The Committee has emphasized that the cancellation of registration of an organization by the registrar of trade unions is tantamount to the suspension or dissolution of that organization by administrative authority and that such measures constitute serious infringements of the principles of freedom of association [see *Digest*, *op. cit.*, paras. 213, 214, 664 and 669]. The Committee therefore urges the Government to take immediately the necessary measures so as to ensure the recognition of all associations of government employees and teachers, whose recognition was withdrawn as a sanction for their participation in strike action and to keep it informed of developments in this respect.
- 980.** The Committee further notes that the complainants alleged that the office building of the Tamil Nadu Secretariat Association was sealed by the Government and had not yet been handed back to the association. The Committee recalls in this respect that the occupation of trade union premises constitutes a serious interference by the authorities in trade union activities and that the occupation or sealing of trade union premises should be subject to independent judicial review before being undertaken by the authorities in view of the significant risk that such measures may paralyse trade union activities [see *Digest*, *op. cit.*, paras. 174 and 183]. The Committee therefore urges the Government immediately to return the office building to the Tamil Nadu Secretariat Association and keep it informed in this respect.
- 981.** With regard to the request for monetary compensation to the families of 42 employees who had allegedly lost their lives as the result of the distress created by the situation, given that no more specific information was provided by the complainants in respect of this allegation, the Committee requests the Government to provide its comments on this issue.

982. Finally, in order to ensure a sound and lasting labour relations environment, the Committee requests the Government to begin thorough consultations on the unsettled issues related to the terms and conditions of employment of government employees and teachers with the trade unions of this sector. The Committee requests the Government to keep it informed in this respect.

The Committee's recommendations

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

- (a) *The Committee deeply regrets that, despite the time that has elapsed since the complaint was first presented, the Government has not replied to any of the complainants' allegations. The Committee strongly urges the Government to be more cooperative in the future.*
- (b) *The Committee recalls that public servants, other than those engaged in the administration of the State, should enjoy collective bargaining rights, and priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of terms and conditions of employment of public service. The Committee therefore requests the Government to take the necessary measures in order to ensure the application of this principle in Tamil Nadu.*
- (c) *The Committee requests the Government to take the necessary measures to amend the Tamil Nadu Government Servants Conduct Rules and the Tamil Nadu Essential Services Maintenance Act so as to ensure that public servants, with the only possible exception of those exercising authority in the name of the State, and teachers may exercise the right to strike.*
- (d) *The Committee requests the Government to give necessary instructions so as to ensure in the future that any police intervention is wholly proportionate to the threat to public order that may have been created by a strike action.*
- (e) *The Committee requests the Government to give appropriate instructions to the police and the other competent authorities so as to obviate the dangers to freedom of association that such massive arrests and dismissals involve.*
- (f) *The Committee requests the Government to review the matter of lost wages following the termination of the strike action, in consultation with the trade unions concerned, with a view to compensating the employees concerned for any damages suffered solely for the exercise of legitimate trade union activities and to keep it informed in this respect.*
- (g) *The Committee urges the Government to take immediately the necessary measures so as to ensure the recognition of all associations of government employees and teachers, whose recognition was withdrawn as a sanction for their participation in the strike and to keep it informed of developments in this respect.*

- (h) *The Committee urges the Government immediately to return the office building to the Tamil Nadu Secretariat Association and keep it informed in this respect.*
- (i) *The Committee request the Government to provide its comments on the complainant's request concerning monetary compensation to the families of the 42 employees who had lost their lives.*
- (j) *In order to ensure a sound and lasting labour relations environment, the Committee requests the Government to begin thorough consultations on the unsettled issues related to the terms and conditions of employment of government employees and teachers with the trade unions in this sector. The Committee requests the Government to keep it informed in this respect.*

CASE NO. 2348

INTERIM REPORT

**Complaint against the Government of Iraq
presented by
— the Union of the Unemployed in Iraq (UII) and
— the Federation of Workers' Councils and Unions in Iraq (FWCUI)**

Allegation: Restrictions on the right to organize

- 984.** The complaint is contained in communications dated 15 May and 12 July 2004 from the Union of the Unemployed in Iraq (UII) and the Federation of Workers' Councils and Unions in Iraq (FWCUI).
- 985.** As a consequence of the lack of a response on the part of the Government at its June 2005 meeting [see 337th Report, para. 10], the Committee launched an urgent appeal and drew 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 may present a report on the substance of this case even if the observations or information from the Government in question have not been received in due time. To date, the Government has not sent its observations.
- 986.** Iraq has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), but has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

A. The complainants' allegations

- 987.** In their communication dated 15 May 2004, the complainants indicated that the Iraqi workers themselves had set up several trade union organizations after the fall of the previous regime, including the Federation of Workers' Councils and Unions in Iraq (FWCUI), of which the Union of the Unemployed in Iraq (UII) is an affiliate. The FWCUI was set up at its founding national conference held on 8 December 2003 in Baghdad and is now grouping 300,000 Iraqi workers. As for the UII, it was formed in May 2003 with the election of an executive council and a general secretary. It has now formed local branches in seven provinces recording so far 150,000 affiliated workers from around the country.

988. The complainants explained that, on 28 January 2004, Decree No. 16, issued by Interim Governing Council President, Adnan Pachachi, granted recognition to one of the existing trade union federations in Iraq, the Iraqi Federation of Workers' Trade Unions (IFTU), by stating that the IFTU and its President, Mr. Rasem Hussein Abdullah, were "the legitimate and legal representatives of the labour movement in Iraq". At various workplaces, such as the Baghdad railway station or Basra Refinery, after the adoption of Decree No. 16, Iraqi workers were told by the management that they should join the legalized union, thus implying that the other unions would be illegal. The complainants further mentioned that by not affiliating to the only recognized union, Iraqi workers can be arrested and put in jail.
989. The complainants considered that the current situation created by the introduction of Decree No. 16 was not consistent with ILO standards on freedom of association and in particular 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). They claimed that, by passing Decree No. 16, which selects the union to be granted recognition, the public authorities had barred the right to affiliate to unions of one's own choosing and had perpetuated the previous system of official selection and recognition of trade unions, in blatant contradiction with the principles enshrined in the Conventions.
990. The complainants explained that hundreds of thousands of workers in Iraq were currently unemployed (70 per cent of the workforce). Through their organizations and duly elected representatives, they claimed their right to formulate demands towards the elaboration of national labour legislation. They shared the view that full freedom of association, guaranteeing the Iraqi workers the right to organize and to bargain collectively, was a prerequisite in this respect.
991. The complaint also referred to the fact that the 1987 law banning the right to strike in all public enterprises had not been repealed, and that Iraqi trade unionists had been threatened by company managers and attacked by the occupying forces for striking.

B. The Committee's conclusions

992. *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 2005 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.*
993. *The Committee recalls that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for this freedom in law and in fact. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments on their side will recognize the importance of formulating, for objective examination, detailed replies concerning allegations made against them.*
994. *The Committee notes that the allegations in this case concern restrictions placed upon the right of workers to form and join the organization of their own choosing and to bargain collectively as a result of Decree No. 16, issued on 28 January 2004, which recognized the*

Iraqi Federation of Workers' Trade Unions (IFTU) as the only legitimate and legal organization in Iraq.

- 995.** *While taking note of the process of reconstruction ongoing in the country and the rebuilding of national institutions, as well as the underlying climate of violence, the Committee insists on the importance it places on the right of workers to form and join organizations of their own choosing in full freedom. While it is generally the advantage of workers and employers to avoid the proliferation of competing organizations, a monopoly situation imposed by law is at variance with the principle of free choice of workers' and employers' organizations [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 288]. Workers should be free to choose the union which, in their opinion, will best promote their occupational interests without interference by the authorities. In this respect, the right to establish and to join organizations "of their own choosing", contained in Convention No. 87, is in no way intended as an expression of support either for the idea of trade union unity or for that of trade union diversity. It is intended to convey, on the one hand, that in many countries there are several organizations among which the workers or the employers may wish to choose freely and, on the other hand, that workers and employers may wish to establish new organizations in a country where no such diversity has been found. This diversity should remain possible in all cases. Therefore, any governmental attitude involving the "imposition" of a situation of monopoly would be contrary to the basic principles of freedom of association and measures taken against workers because they attempt to constitute organizations outside the official trade union organization would be incompatible with the above principle [see **Digest**, op. cit., paras. 291 and 301].*
- 996.** *In view of the foregoing, the right of workers who do not wish to join the IFTU and wish to join another organization in defence of their interests should be protected. The Committee therefore urges the Government to take the necessary measures to amend Decree No. 16 so as to ensure that workers may affiliate with the workers' organization of their own choosing free from interference by the public authorities. It requests the Government to keep it informed of the progress made in this regard.*
- 997.** *As regards the allegation of threats and attacks against Iraqi trade unionists, as a consequence of the ban on the right to strike in all public enterprises, the Committee considers that the allegation is too vague for it to draw any conclusions and therefore requests the complainants to provide further information in this regard. It would however recall the importance it attaches to the principle 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. In this respect, public servants in state-owned commercial or industrial enterprises should have the right to negotiate collective agreements, enjoy suitable protection against acts of anti-union discrimination and enjoy the right to strike, provided that the interruption of services does not endanger the life, personal safety or health of the whole or part of the population [**Digest**, op. cit., paras. 475 and 532]. The Committee requests the government to review its legislation to ensure that this principle is fully respected with regard to workers in public enterprises.*

The Committee's recommendations

- 998.** *In light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee regrets that the Government has not replied to the allegation, despite the fact that it was invited to do so on several occasions, including by means of an urgent appeal, and urges it to reply promptly.*

- (b) *The Committee urges the Government to take the necessary measures to amend Decree No. 16 so as to ensure that workers' organizations may affiliate with the workers' organization of their own choosing free from interference by the public authorities and requests the Government to keep it informed of the progress made in this regard.*
- (c) *As regards the allegation of threats and attacks against Iraqi trade unionists as a consequence of a 1987 law banning the right to strike in public enterprises, the Committee requests the complainants to provide further information in this respect. The Committee also requests the Government to review its legislation in order to ensure that only those workers in public enterprises that may be providing essential services in the strict sense of the term may be prohibited from undertaking strike action.*

CASE NO. 2391

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

**Complaint against the Government of Madagascar
presented by
the General Maritime Union of Madagascar (SygmMa)**

Allegations: The complainant alleges that its two principal leaders have been victims of anti-union discrimination since the union was set up, that they have been blacklisted since January 2003 and have not been able to find work on any vessel since their union action which led to the implementation of a collective agreement for all the employer's vessels. It also alleges that the employer has set up and runs an association which serves as an intermediary between seafarers and the recruiting shipowner which seafarers are obliged to join and which hinders the legitimate activities of SygmMa; that seafarers' freedom of association is governed by the Maritime Code, which does not give them all the guarantees of the Labour Code or the Conventions on freedom of association, particularly in regard to articles of agreement approved by the maritime administration, which stipulate that striking is considered to be serious misconduct, punishable by immediate discharge and legal action

999. The complaint is contained in communications from the General Maritime Union of Madagascar (SygmMa) dated 13 and 18 October 2004.

1000. The Government sent its reply in a communication dated 27 May 2005.

1001. Madagascar has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). It has not ratified the Workers' Representatives Convention, 1971 (No. 135).

A. The complainant's allegations

1002. In its communications of 13 and 18 October 2004, Mr. Lucien Razafindraibe, general secretary of the General Maritime Union of Madagascar (SygmMa), states that this organization represents the seafarers of the Indian Ocean Maritime Services Company (SMOI). Mr. Razafindraibe and the SygmMa assistant general secretary, Mr. Hanitriniony, have suffered anti-union discrimination since January 2003 following wage demands they had made resulting in a collective agreement.

1003. They had worked for SMOI as deck officer and engine officer since 1995; more recently they were employed as second captain and second engineering officer respectively, aboard the *Elven*, managed by SMOI. Following a SygmMa salary dispute which ended in November 2002 when a collective agreement was signed covering all the vessels of the brokerage, fitting-out and transportation company SOCATRA/SMOI (SMOI handles the recruitment of crews for SOCATRA's vessels), Mr. Razafindraibe and Mr. Hanitriniony were blacklisted and have not been able to find work on any vessel since, although SMOI continued to recruit new officers and crewmembers.

1004. SygmMa is complaining about SMOI's action in response to Mr. Razafindraibe and Mr. Hanitriniony's union activities, and demands on their behalf that they be given the right to work on SMOI vessels again, and that they be paid damages for what amounts to their wrongful dismissal from January 2003 until the present day.

1005. The complainant also alleges that SMOI is guilty of interference as it has set up an association known as the Community of SMOI Seafarers (hereafter, the "Community") which resembles a union, and imposes conditions of membership that are very close to indirect coercion, in violation of the Conventions on freedom of association. The main role of the Community is to act as an intermediary between the seafarers and SMOI in its capacity as a recruiting shipowner. The Community was created by SMOI to hinder SygmMa's union activities to protect workers and their legal rights through collective bargaining.

1006. The Community headquarters also happen to be the SMOI headquarters. Its honorary president is an employee of a subsidiary of SMOI, the Coastal Navigation Company of Madagascar (SOCAMAD), and its secretary is the SMOI trainer. These facts alone confirm SMOI's involvement in the setting up of the Community, an association whose real purpose is to protect the interests of the employer. SygmMa requests the Committee to formulate the necessary recommendations to put an end to SMOI's anti-union operations: seafarers are forced to join the Community through fear of dismissal.

1007. The complainant also points out that SMOI and SOCAMAD make seafarers sign individual articles of agreement which stipulate that striking is considered to be a serious misconduct, punishable by legal action and the discharge of the seafarer. SygmMa includes with its complaint a copy of an individual contract indicating the conditions of work and remuneration, which include the following in article 9: "SOCAMAD will not tolerate the seafarer ... encouraging the crew to strike ... If this occurs, the seafarer will be immediately discharged, without prejudice to the legal action that will be taken against him." Article 10 specifies that: "The parties declare that they have understood the general employment conditions for crew on board SOCAMAD vessels, conditions which have been approved and stamped by the Malagasy maritime authorities."

- 1008.** SygmMa emphasizes that seafarers are governed by the Maritime Code in Madagascar, which does not include the fundamental provisions of ILO instruments, and thus leaves the door open to this sort of abuse, condoned by the maritime authority, whose stamp is used to authenticate the signatures of seafarers' articles of agreement.
- 1009.** The complainant requests the Committee to formulate the necessary recommendations to urge the Government, and more specifically the maritime authority, to act more responsibly in the effective application of Conventions Nos. 87 and 98 for all Malagasy workers without exception.

B. The Government's reply

- 1010.** In its communication of 27 May 2005, the Government states that although the right to strike is a constitutional freedom, in maritime matters, the exercise of this right varies depending on whether the crew is on board or on land. In the latter case, section 3.12.10 of Act No. 99-028 of 3 February 2000, amending the Maritime Code, provides for the right to strike once all other remedies for appeal and conciliation of parties (shipowners and seafarers) have been exhausted.
- 1011.** Regarding the situation on board, the International Convention for the Safety of Life at Sea, 1974, ratified by Madagascar in 1976, stipulates the maritime safety rules that are applicable, placing emphasis on the vessel, the cargo and the crew. Sections 7.4(23), (24) and (25) of Act No. 99-028 provide for disciplinary and criminal sanctions enabling the captain of the vessel to adequately discharge his responsibilities to ensure safety at sea. Striking is a legitimate right, but is not permitted on board as it endangers the safety of the passengers, the crew, the vessel and the cargo. In addition, in considering striking to be a serious misconduct, the individual articles of agreement drawn up by SMOI are merely complying with the provisions of the aforementioned international regulations.
- 1012.** The Government adds that the Maritime Code is a collection of technical provisions governing all aspects of the maritime sector. The Maritime Code is a special law. Consequently, the general law rules laid down in the Labour Code or the international labour Conventions ratified by Madagascar apply automatically, without having to be restated in the Maritime Code. Thus, the freedom of association that is provided for in the Labour Code applies to workers in general and to seafarers in particular.
- 1013.** The Government also states that it is for the ILO Committee on Freedom of Association to assess the establishment of a Community of SMOI seafarers allegedly resembling a union.
- 1014.** Regarding employment with SMOI, the seafarer's articles of agreement terminate upon the discharge of the seafarer (section 3.7.01 of Act No. 99-028 of 3 February 2000, amending the Maritime Code) or upon expiry of the term of the articles of agreement (article 3.7.02 of the Maritime Code). Reemployment of seafarers is the prerogative of the shipowner, in this case SMOI.

C. The Committee's conclusions

- 1015.** *This complaint concerns allegations of anti-union discrimination by blacklisting union leaders and by setting up an employer-dominated association, as well as abusive contractual provisions regarding the right to strike.*

Anti-union discrimination

- 1016.** *Regarding acts of anti-union discrimination, the Committee notes that Mr. Razafindraibe and Mr. Hanitriniony, respectively the general secretary and the assistant general secretary of the General Maritime Union of Madagascar (SygmMa), had worked for the Indian Ocean Maritime Services Company (SMOI) since 1995, most recently as second captain and second engineering officer on a vessel operated by SMOI. They allege that, following a salary dispute which ended in November 2002 when a collective agreement was signed covering all the vessels of the brokerage, fitting-out and transportation company (SOCATRA/SMOI), they were blacklisted and have not been able to find work on any vessel since January 2003, although SMOI continued to recruit new officers and crewmembers.*
- 1017.** *The Committee can only note the proximity between the SygmMa dispute, which led to a collective agreement being signed in November 2002, and the fact that Mr. Razafindraibe and Mr. Hanitriniony have not received offers of employment on any vessel since January 2003, even though they had worked for SMOI for eight years, and had recently held positions of increased responsibility, which would indicate that their work was satisfactory, and the company in question continued recruiting new officers and crew members. The Committee recalls that no person should be prejudiced in his employment by reason of his legitimate trade union activities [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 690] and that the practice of blacklisting workers seriously undermines the exercise of trade union rights [see **Digest**, op. cit., para. 711].*
- 1018.** *In its reply, the Government confined itself to stating that the reemployment of seafarers was the prerogative of the shipowner, in this case SMOI. The Committee considers that the Government's responsibility goes further than this simple observation, particularly in this type of employment relationships where, to all intents and purposes, there are no permanent contracts but rather a series of fixed-term contracts depending on their embarkations. The workers are therefore particularly vulnerable to discrimination, including blacklisting, and governments should take stringent measures to combat such practices [see **Digest**, op. cit., para. 709]. The Committee's decision is borne out by its conclusions on the other aspects of the complaint, particularly regarding the establishment of an employer-dominated association (see below).*
- 1019.** *Consequently, the Committee requests the Government: to open an independent inquiry without delay into the discriminatory practices and blacklisting by SMOI, in particular regarding Mr. Razafindraibe and Mr. Hanitriniony since January 2003, and to inform the Committee of the results as soon as they are known; and to give the necessary instructions without delay to the competent services to put an immediate stop to all discrimination in recruitment against these union leaders and any other member or leader of SygmMa. The Committee requests the Government to keep it informed of the measures taken to give effect to its recommendations.*

Employer interference

- 1020.** *Regarding the acts of employer interference, the Committee notes that SMOI has set up an association or Community of SMOI Seafarers (hereafter, the "Community") which resembles a union, whose principal role is to act as an intermediary between seafarers and SMOI in its capacity as recruiting shipowner. The Committee also notes that the headquarters of the Community are in the SMOI headquarters, that its honorary president is an employee of a subsidiary of SMOI, the Coastal Navigation Company of Madagascar (SOCAMAD), and its secretary is the SMOI trainer. Lastly, the Committee notes that, according to the allegations, seafarers are forced to join the Community through fear of*

losing their jobs. On the basis of the facts available, in particular, the fact that SMOI officials also play a key role in the Community, and the obvious overlap between the two structures (e.g. the shared premises), the Committee concludes that the employer played a determining role in the establishment of the Community and currently dominates it. Recalling the fundamental principle of the free choice of organization by workers [see *Digest*, *op. cit.*, para. 274] and the need for organizations to be independent from the employer, the Committee recalls Article 2, paragraph 2, of Convention No. 98 which provides that: “In particular, acts which are designed to promote the establishment of workers’ organizations under the domination of employers or employers’ organizations, or to support workers’ organizations by financial or other means, with the object of placing such organizations under the control of employers or employers’ organizations, shall be deemed to constitute acts of interference within the meaning of this Article.”

- 1021.** *The Government confined itself, in responding to the allegations of interference, to stating that it was for the Committee on Freedom of Association to assess the establishment of such a community; the Committee recalls that Article 3 of the same Convention provides that: “Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.” The Committee thus requests the Government to ensure that the allegations of interference by the employer in the free functioning of SygmMa through the Community are duly investigated by the competent national body, so that corrective measures can be taken against any interference detected. The Committee requests the Government to keep it informed of the measures taken to give effect to its recommendations.*

References to striking in articles of agreement

- 1022.** *Regarding the references to incitement to striking in SMOI’s articles of agreement, the Committee notes that these articles state that incitement to strike warrants “the immediate discharge” of the seafarer, which assumes that he is on board a vessel, or even at sea, at the time. The Government mentions the International Convention for the Safety of Life at Sea, 1974, and points out the difference in the right to strike depending on whether the crew is on board or on land. The Committee recognizes that the safety of persons and of goods during all boatage, anchoring, berthing and towing manoeuvres, and even more at sea, justifies restrictions or even a prohibition on the right to strike. The Committee recalls however that transport generally does not constitute an essential service in the strict sense of the term [see *Digest*, *op. cit.*, para. 545]. Noting that, according to the Government, the Maritime Code allows the right to strike once all other remedies for the parties (shipowners and seafarers) have been exhausted, the Committee requests the Government to indicate whether these provisions allow seafarers and other workers in the maritime sector to exercise the right to strike when the safety of persons and goods is not in danger, for example when the vessel is within the port or alongside.*

The Committee’s recommendations

- 1023.** *In light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee requests the Government: to open an independent inquiry without delay into the discriminatory practices and blacklisting by the Indian Ocean Maritime Services Company (SMOI), in particular regarding Mr. Razafindraibe and Mr. Hanitriniony since January 2003, and to inform it of the results as soon as they are known; and to give the necessary instructions without delay to the competent departments to put an immediate*

stop to all discrimination in recruitment against these union leaders and any other member or leader of SygmMa. The Committee requests the Government to keep it informed of the measures taken to give effect to these recommendations.

- (b) *The Committee requests the Government to ensure that the allegations of interference by the employer in the free functioning of SygmMa through the Community are duly investigated by the competent national body, so that corrective measures can be taken against any interference detected. The Committee requests the Government to keep it informed of the measures taken to give effect to its recommendations.*
- (c) *The Committee requests the Government to indicate whether the legal provisions applicable to seafarers and other workers in the maritime sector allow them to exercise their right to strike when the safety of persons and goods is not in danger.*

CASE NO. 2404

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

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

- **the International Textile, Garment and Leather
Workers' Federation (ITGLWF)**
on behalf of
— **the Moroccan Labour Union (UMT)**

Allegations: The complainant alleges that the Government has not taken the desired measures to protect workers' right to organize and to collective bargaining, or to protect them against acts of anti-union discrimination from a private employer (Somitex SA). The complainant alleges, in particular, the dismissal of 14 union representatives engaged in legitimate union activities, the collective dismissal of 145 workers who had gone on strike to protest against the company's attitude, management's refusal to attend meetings and to bargain collectively, and its stalling tactics during negotiations

- 1024.** The complaint is contained in a communication from the International Textile, Garment and Leather Workers' Federation (ITGLWF) dated 19 January 2005, presented on behalf of the Moroccan Labour Union (UMT).
- 1025.** The Government sent its reply in a communication dated 9 March 2005.
- 1026.** Morocco has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135). It has not

ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

A. The complainant's allegations

- 1027.** In its communication of 19 January 2005, the International Textile, Garment and Leather Workers' Federation (ITGLWF) explains that the Somitex SA company is situated in the industrial zone of Hay Rahma in Salé, Morocco. An election of workers' representatives was held there on 15 September 2003; 12 (six permanent and six substitutes) of the 14 representatives elected were members of the Moroccan Labour Union (UMT), which represented 194 Somitex SA workers.
- 1028.** In December 2003, three months after the election, the union called a general assembly during which the UMT members were to elect the executive committee of the union section, made up of the 12 elected representatives and two other UMT members. Shortly afterwards, Mr. Abdelhay Bessa, the company director, decided to dismiss four workers on the grounds that they were employed on fixed-term contracts. Examination of the dismissed workers' employment contracts shows however that they were in fact employed on contracts without limit of time.
- 1029.** The local union section requested a meeting with the management to discuss the dismissals and other matters regarding working conditions in the company. The wages paid were often below the statutory minimum wage, the working hours were longer than the statutory maximum and verbal and sexual harassment were common practice among managers. Between December 2003 and March 2004, Mr. Bessa systematically refused to negotiate with the union representatives and even refused to attend the meetings called by the local representative of the Labour Ministry. At meetings, the management would send representatives with no powers of negotiation. However, the authorities have not taken any measures to force the company to enter into dialogue.
- 1030.** A meeting was held on 1 March 2004 under the supervision of the local representative of the Labour Ministry. The company representatives at first stated clearly that they refused to negotiate with the union representatives but, after the ministry representative intervened, found an excuse to put off the negotiations until a later date, saying that they would only reopen the debate after receiving a written statement of the workers' concerns, which was done that same day. The union's demands were that all the dismissed workers be reinstated, that the verbal and sexual harassment stop, that the posts and specialities of workers be respected and that interference by managers in the work of the union representatives and discrimination against the latter on account of their union membership stop. It also demanded that the law be respected in regard to the minimum wage, working hours and overtime, occupational health and safety, the right of breastfeeding women to the statutory hour's nursing break per day, periods of unpaid temporary lay-offs, payment for two public holidays (21 and 22 August) and that premises and facilities be made available for union activities.
- 1031.** On 12 March 2004, during a meeting held on company premises, the management simply stated that it rejected all the union's demands. The union informed the local representative of the Ministry about this and asked him to intervene urgently and to order the company to respect the law. During February and March 2004, the union asked the Ministry to intervene 15 times.
- 1032.** Between 15 and 17 March, the company dismissed all the union representatives, members of the UMT and other union members on completely fabricated grounds. The dismissal letters cited a variety of alleged offences, notably taking part in union activities and organizing a union meeting without the permission of the employer. Although national

legislation requires the company to inform the labour authorities before dismissing workers' representatives, in fact it only sent the notices three to four weeks after the workers concerned had been dismissed. The labour inspectorate states that a report condemned the Somitex SA company for this violation of the procedure intended to protect union representatives from acts of anti-union discrimination, but it has refused to publish the report in spite of repeated requests from the local union. It should be noted that the other two non-unionized workers' representatives were not dismissed.

- 1033.** Mr. Abdellah Laksir, Mr. Lahcen Marir, Mr. Khalid Maljoun (elected representatives), Mr. Brahim Boussouga and Ms. Malika Hoummana (substitute representatives) were dismissed on 15 March 2004. Ms. Karima Albaz, Ms. Malmane Aït Wasse (elected representatives), Ms. Drissia Silââ and Mr. Adil Khribchi (substitute representatives) were dismissed on 16 March 2004. Ms. Milouda Alwarhi (elected representative), Ms. Fatna Alwafi, Ms. Alaichi Nazha, Ms. Aicha Almardanichi and Mr. Khaled Almhachi were dismissed on 17 March 2004.
- 1034.** On 17 March 2004, several workers were physically harassed. Some female workers fainted and were sent to hospital. In the next few days, they received letters from the company explaining that they had been sent to hospital following a bout of mass hysteria and that they would only be able to come back to work if they provided a medical certificate from a neurologist stating that they did not suffer from hysteria.
- 1035.** The union again alerted the local representative of the Labour Ministry about the situation at the Somitex SA company and asked him to intervene, telling him that workers would wear an armband in protest at the behaviour of the management. That same day, some workers were dismissed on the grounds that they had organized an illegal action by distributing armbands to workers.
- 1036.** On 20 March 2004, the union again requested the start of negotiations and the intervention of the local representative of the Labour Ministry. After giving the legal notice period, the workers decided to go on strike on 7 April in support of their representatives and in protest against the company's refusal to recognize their right to freedom of association and collective bargaining. On 9 April, the management prevented 145 workers who had taken part in the strike from returning to work and entering company premises. All these events were recorded in detail in a report drawn up by a Labour Ministry bailiff. However, following these lay-offs and collective dismissals, the Government has not taken any measures to force the employer to reinstate the unfairly dismissed workers. This inertia on the part of the authorities has meant the employer has been left free to take any decisions that it sees fit to its own advantage. In fact, the workers were in such a precarious position that they had no other choice but to accept the severance pay offered by the company even though it was an amount far below the legal minimum. In addition, to obtain this money offered by the company, some workers were forced to drop their accusations against the managers who had harassed them. The complainant provides an example of a suit that was withdrawn.
- 1037.** When the complaint was lodged, more than eight months after the events, seven workers (including four union representatives) were still refusing to accept the severance pay offered by the company and had brought legal action so they could be reinstated. Faced with the apathy of the Government in upholding the law, the other workers had had no other choice but to accept the meagre payments offered by Somitex SA. Most of them are currently unemployed and have stated that if they were reinstated, they would be prepared to return the money that they had been forced to accept.
- 1038.** Despite the union's numerous appeals, the Government has so far refused to take any measures at all to force the company to respect national law and the internationally

recognized labour standards. Although a works council was recently set up at the factory since a new law was passed in June 2004, only two elected representatives sit on it, with seven other so-called workers' representatives who were not elected. The law provides that works councils should be made up of one employer representative, two workers' representatives and at least one or two union representatives.

- 1039.** Presently, the union is still demanding the reinstatement of the seven workers who refused the severance pay offered by the company, the reinstatement of all the workers who had no choice but to accept the payment because of the Labour Ministry's inertia, and respect for the workers' right to freedom of association and collective bargaining.
- 1040.** In conclusion, the complainant alleges that the Government has not ensured the respect of the rights guaranteed in Conventions Nos. 87 and 98, and requests that it take measures without delay to force the Somitex SA company to reinstate the dismissed workers and union representatives and to respect their rights to freedom of association and collective bargaining.

B. The Government's reply

- 1041.** In its communication of 9 March 2005, the Government states that the complaint concerns a dispute over payment for overtime within a private company (Somitex SA which, at the time, employed 330 people) in the town of Salé, as stated in a report dated 15 June 2004 by the local office of the Labour Ministry, included with the Government's reply. According to the labour inspector who was in charge of the inquiry, the "indirect" cause of the dispute was the distinction between overtime worked and making up of hours lost because workers had not achieved the required level of production. Regarding the "direct" cause, the report indicates that, at the same time as the dialogue to resolve the overtime dispute, on 15 March 2004, the company decided to move certain (female) workers to other posts within the factory. The general secretary of the local section of the UMT requested explanations as to why the employer took this measure, and the employer believed that he had gone beyond his mandate and his intervention constituted interference in the management of the company and an attempt to incite workers to disobedience. The director of the company therefore dismissed the union leader and all those who sided with him. In total, 194 workers were dismissed.
- 1042.** Officials of the Labour Ministry intervened as soon as they were informed of the conflict and tried to find a solution; several meetings were held in the company, at the local office of the Labour Ministry and in the prefecture, as indicated in the complaint itself, which refers to several meetings called by the authorities. Following direct dialogue between the parties, 186 workers, including the general secretary of the union, reached an amicable settlement and received their severance pay, calculated in the presence of the labour inspectorate. The remaining eight workers decided that they would rather settle the dispute in the competent court.
- 1043.** The labour inspector also wrote three offence reports, dated 15 June 2004, which give details of several violations of the Labour Code: the dismissal of eight persons, in violation of article 67, punishable in accordance with article 78; the dismissal of 12 persons without the agreement of the labour inspector, in violation of article 457 of the Code, punishable in accordance with article 468; the dismissal of 14 members of the union executive committee engaged in union activity, in violation of article 428. These reports have been sent to the competent court for a ruling.
- 1044.** In his report, the inspector states that the issue of sexual harassment had never been raised before the start of the dispute and the meetings between the parties. No complaint has been made on this issue to the labour inspectorate or to the judicial police. The inspector

concludes that the social environment is stable, even if the economic activity of the company has not returned to normal.

- 1045.** The Government concludes that it has respected the rules on freedom of association and assures the Committee that it is sparing no effort to ensure that the exercise of the right to organize is protected, disputes are settled and social dialogue is promoted.

C. The Committee's conclusions

- 1046.** *The Committee notes that the allegations in this complaint concern acts of anti-union discrimination, in particular the dismissal of union representatives engaged in legitimate union activities, and the collective dismissal of workers who had gone on strike to protest the company's attitude. The complainant also alleges that the company management refused to attend and to participate in good faith in collective bargaining meetings, during which they used stalling tactics. The Government states that the dispute had both indirect causes (a dispute about the nature of hours worked: overtime or making up time for production shortfall) and direct causes (the dismissal of union leaders, without the authorization of the labour inspectorate and the unionized workers who showed solidarity with them).*

Collective bargaining

- 1047.** *Regarding collective bargaining, the Committee notes the allegations that, in spite of several interventions by the competent services of the Labour Ministry, the union had great difficulty in engaging the employer in discussions, or even getting the employer to come to the negotiating table. In addition, when they were present, the management representatives did not have any real negotiating power. In this regard, The Committee recalls the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations. It is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 814-815]. This means that any unjustified delay in the holding of negotiations should be avoided [see **Digest**, op. cit., para. 816]. The Committee believes that, when one party shows obvious reticence in negotiations and does not take part in good faith, the competent authorities have a particular responsibility, especially if the Government has ratified Convention No. 98, and should use all available procedures in national law to facilitate the progress of negotiations. While noting that ministry officials intervened several times in this case, the Committee urges the Government to instruct the competent services to intervene more actively in the next round of collective bargaining at the Somitex SA company, so as to ensure the progress of negotiations in good faith, in the light of the abovementioned principles. The Committee requests the Government to keep it informed of the development of the collective bargaining situation in the company.*

Dismissals

- 1048.** *Regarding the dismissals, the Committee notes that, even though there are certain contradictions between the complainant's allegations and the Government's reply, in particular with regard to the number and identities of those concerned, according to the latest documents submitted to the Committee by the complainant, 194 workers (of a total workforce of 330, that is almost two-thirds) were dismissed, 186 of them accepted severance pay and eight chose to take legal action. The Committee also notes that, according to the complainant, most of the 186 workers who accepted the out-of-court*

settlement were in fact forced to do so because they were in a precarious situation and that some of them, in order to obtain their severance pay, had to withdraw their accusations against the managers who had harassed them.

- 1049.** *The Committee also notes that the labour inspectorate wrote three reports of violations of the labour legislation concerning a total of 34 persons: eight persons dismissed in violation of article 67 of the Labour Code; 12 persons dismissed without the agreement of the labour inspectorate, in violation of article 457 of the Code; and 14 members of the union executive committee, in violation of article 428 of the Code.*
- 1050.** *Regarding the dismissed union leaders, the Committee notes that they were engaged in legitimate union activities, i.e. representing the interests of workers and collective bargaining for improved working conditions. The Committee recalls in this regard that adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures 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 the account of the mandate which they hold from their trade unions [see **Digest**, op. cit., para. 724]. These principles are particularly relevant in this case as the local UMT branch has been practically deprived of its leadership as result of dismissals.*
- 1051.** *The Committee also notes that the two non-unionized workers' representatives were not affected by the dismissals, which bears out the suspicion that the dismissals were acts of anti-union discrimination by the employer.*
- 1052.** *Taking account of the fact that Morocco has ratified the Workers' Representatives Convention, 1971 (No. 135), the Committee requests the Government to take the necessary measures without delay to ensure that the union leaders dismissed in violation of national law, according to the labour inspectorate's findings, effectively enjoy all the protections and guarantees provided by that law, including by reinstating them or, if reinstatement is not possible, by ensuring that the union leaders in question receive appropriate compensation taking account of the damage caused and the need to avoid the repetition of such acts in the future. The Committee requests the Government to keep it informed of the measures taken in this regard.*
- 1053.** *As for the other workers, the information presented to the Committee indicates that they were dismissed for showing solidarity with the members of their union executive committee, for going on strike and for wearing armbands expressing their support for their leaders in other words, legitimate union activities. Taking note of the offence reports written by the labour inspector, particularly regarding the dismissals made without prior authorization as stipulated in national law, the Committee recalls that no person should be dismissed or prejudiced in his or her employment by reason of 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]. Consequently, the Committee requests the Government to take the necessary measures so that all the dismissals carried out in violation of national law, according to the findings of the labour inspectorate, are punished in accordance with that law, including cancellation of the dismissals and reinstatement of the workers concerned or, if reinstatement is not possible, by ensuring that the union leaders in question receive appropriate compensation taking account of the damage caused and the need to avoid the repetition of such acts in the future. The Committee requests the Government to keep it informed of the measures taken in this regard.*

- 1054.** *Regarding the specific case of the eight workers who have refused the payments offered by the employer and brought legal action against the employer, the Committee trusts that the competent courts will give a verdict based on the principles of freedom of association expressed above. The Committee requests the Government to inform the Committee of the judgement in the case of these eight workers as soon as it is handed down.*
- 1055.** *The Committee requests the Government to indicate whether the employer concerned by the present complaint has been consulted and, if not, to obtain the employer's view through the relevant employers' organization.*

The Committee's recommendations

- 1056.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee invites the Government to instruct the competent services to intervene more actively in the next round of collective bargaining at the Somitex SA company, so as to ensure the progress of negotiations in good faith, and requests the Government to keep it informed of the development of the collective bargaining situation in the company.*
 - (b) The Committee requests the Government to take the necessary measures without delay to ensure that the union leaders dismissed in violation of national law, according to the labour inspectorate's findings, effectively enjoy all the protections and guarantees provided by that law, including by reinstating them or, if reinstatement is not possible, by ensuring that the union leaders in question receive appropriate compensation taking account of the damage caused and the need to avoid the repetition of such acts in the future. The Committee requests the Government to keep it informed of the measures taken in this regard.*
 - (c) The Committee requests the Government to take the necessary measures so that all the dismissals carried out in violation of national law, according to the findings of the labour inspectorate, are punished in accordance with that law, including cancellation of the dismissals and reinstatement of the workers concerned or, if reinstatement is not possible, by ensuring that the union leaders in question receive appropriate compensation taking account of the damage caused and the need to avoid the repetition of such acts in the future. The Committee requests the Government to keep it informed of the measures taken in this regard.*
 - (d) The Committee requests the Government to inform it of the judgement as soon as it is handed down in the case of the eight workers who refused the payments.*
 - (e) The Committee requests the Government to indicate whether the employer concerned by the present complaint has been consulted and, if not, to obtain the employer's view through the relevant employers' organization.*

CASE NO. 2398

DEFINITIVE REPORT

**Complaint against the Government of Mauritius
presented by
the Mauritius Labour Congress (MLC)**

Allegations: The complainant alleges that the Pay Research Bureau (PRB) which publishes every five years a report recommending salaries and conditions of work of public officers (in the civil service, parastatal bodies and local government), violated Conventions Nos. 87 and 98 by ending in 2003 the traditional practice of allowing trade unions to declare disputes over its recommendations on salaries and other conditions of work, while at the same time, having opted to accept the benefits flowing from these recommendations; this change left the public employees with no choice but to accept the PRB's recommendations, as those who opted not to do so might have to wait for a long time to obtain possible improvements without enjoying the current benefits

1057. The complaint is contained in a communication from the Mauritius Labour Congress (MLC) dated 1 December 2004. The Government sent its observations in a communication dated 26 January 2005.

1058. Mauritius recently ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). It has also ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

1059. In its communication dated 1 December 2004, the complainant stated that since the last revision exercise of the Pay Research Bureau (PRB) published in June 2003 on salaries and conditions of work of public officers in the country, public officers were no longer allowed to declare disputes on this report. The report was, in principle, published every five years and recommended salaries and conditions of work of public officers in all sectors, namely the civil service, parastatal bodies and local government. It had so far been the practice for employees in these sectors to accept the report but generally unions had the possibility to contest recommendations which they considered were not favourable to their members. The practice for unions to declare disputes on specific aspects of the recommendations of the PRB had been an established practice until 2003 when the PRB came out with the following recommendation in paragraph 1.39 of its report:

Past experience has shown that after each major review in the Public Sector, staff associations have declared disputes although opting for the implementation of the recommendations. The recommendations of independent Committees/Commissions to redress

the alleged anomalies have almost always further disturbed established relativities. To address this very sensitive issue, the Bureau is of the view that recommendations that have been accepted for implementation by staff should not be considered as industrial disputes and recommends accordingly.

- 1060.** The complainant added that since the establishment of the PRB the wide majority of unions catering for public officers had the possibility, despite their acceptance of the PRB's reports, to contest specific recommendations on salaries and other conditions of work. Generally, the unions termed the issues with which they disagreed as "anomalies" and it was the Civil Service Arbitration Tribunal which corrected them.
- 1061.** The complainant added that in the absence of a possibility to bring such anomalies before the Civil Service Arbitration Tribunal, the PRB had accepted in its last report that it might have left some errors or omissions and invited unions to make submissions on these issues. The complainant emphasized that this practice had always existed (inviting trade unions to make submissions to the PRB) but had not given satisfaction to unions or even to public officers. In fact, various unions had pointed out that the issues raised by them had not been addressed by the PRB in its latest report on errors and omissions and this had given rise to much discontent. With the absence of the possibility to declare disputes on the PRB report, it appeared that the PRB was now in a position to dictate its terms and that employees of the public sector had no other option but to accept all its recommendations or to stand to lose salary increases or new conditions of service. Though unions accepted that the PRB sometimes corrected some of its own errors and omissions, it was also clear that it could not be accepted as an institution which was judge and party at the same time.
- 1062.** According to the complainant, the fact that public sector unions were unable to declare disputes on the report constituted a major violation of their rights as public sector employees. Prior to the last PRB report, almost all unions had declared disputes on the report. These disputes had been referred to the Civil Service Arbitration Tribunal which, after examining them, made its awards which became binding on all parties including the Government. The absence of this recourse was badly felt today and there was absolute need for redress in this connection.
- 1063.** The fact that the report no longer allowed unions to declare disputes showed that there was compulsion on all officers to accept the PRB recommendations in their entirety. The complainant emphasized that those who opted not to accept the report and make a representation against its recommendations might have to wait for more than five years for their representation to be decided, sometimes without obtaining satisfaction. It was precisely for this reason that almost all officers chose to accept the PRB report but it was clear that they did so because they were left with no other alternative.

B. The Government's reply

- 1064.** In its communication dated 26 January 2005, the Government stated that on 16 January 2003, the Industrial Relations (Amendment) Act 2003 was enacted amending the definition of "industrial dispute" to the effect that employees who accepted the recommendations of the Pay Research Bureau (PRB) could not declare a dispute on remuneration or allowance of any kind made in the report, if they had accepted those conditions by signing an option form. The PRB conducted a salary review exercise every five years and made its recommendations after consultations with the ministries and parastatal bodies, as well as trade unions of the public sector. All the parties were heard and given the opportunity to make proposals. Following the publication of the salary review report, public officers were invited to sign an option form so as to indicate their acceptance of the new salaries and conditions of service. The signing of the option form was voluntary. The Government added that the complainant and others had lodged a case before the Supreme Court for a

judicial review of the relevant amendment to the Industrial Relations Act and the case had been fixed on 3 March 2005 for filing of the plea.

- 1065.** The Government added that in its 2003 report, the PRB observed that past experience had shown that after each major review in the public sector, staff associations had declared disputes although opting for the implementation of its recommendations. The recommendations of independent committees/commissions to redress the alleged anomalies had almost always further disturbed established relativities. In order to address this situation, the Bureau recommended, in paragraph 1.39 of its report, that once the recommendations of the report had been accepted for implementation by staff, they should not be considered as industrial disputes.
- 1066.** Past experience had shown that all disputes had invariably been sent back to the PRB which had dealt with the matter expediently and competently, whereas no settlement had been reached in the Civil Service Arbitration Tribunal, notwithstanding the long delays in dealing with the disputes (at the Tribunal). More specifically, in 1987, following protests after the publication of the report of the PRB, the Government granted an interim increase of Rs.400 to all officers and a salaries commissioner was appointed to carry out a fresh salary review instead of looking at the anomalies. He released a report in 1988. Trade unions again declared disputes which were referred to the Civil Service Arbitration Tribunal. The latter indicated that it had no competence to examine the disputes and mentioned that the practice of declaring disputes after signing an option form to accept the new salaries and allowances had led to organized chaos. In 1989, the Civil Service Arbitration Tribunal referred the disputes back to the PRB. In 1993, the Tribunal was again in the presence of industrial disputes after the salary review report. It simply granted an increase of three increments to all officers drawing up to Rs.20,400 and an allowance of Rs.1,800 to those drawing above Rs.20,400. It referred all the disputes concerning the conditions of service back to the PRB.
- 1067.** In 2003, when the new system came into effect, almost all the officers in the public sector and parastatal bodies opted for the new salaries and conditions of service after the report of the PRB was released. All officers and the trade unions were given a period of three months to make representations and to highlight any anomaly to the PRB, which undertook to issue an Errors and Anomalies Report by early 2004. On receiving the representations from officers or trade unions, the PRB again held consultations with the parties concerned and issued its report in May 2004. There was general satisfaction on the Errors and Anomalies Report. Public officers and trade unions had been informed that in case there were some omissions and anomalies which subsisted, these would be considered by the Ministry of Civil Service Affairs and Administrative Reforms, in consultation with the PRB. Finally, the redefinition of industrial disputes in the amendment of the IRA allowed any public officer who did not accept the salary or remuneration prescribed in the PRB report, to declare an industrial dispute.

C. The Committee's conclusions

- 1068.** *The Committee notes that this case concerns allegations that the Pay Research Bureau (PRB) which publishes every five years a report recommending salaries and conditions of work of public officers (in the civil service, parastatal bodies and local government), violated Conventions Nos. 87 and 98 by ending in 2003 the traditional practice of allowing trade unions to declare disputes over its recommendations on salaries and other conditions of work, while at the same time, having opted to accept the benefits flowing from these recommendations; this change left the public employees with no choice but to accept the PRB's recommendations, as those who opted not to do so might have to wait for a long time to obtain possible improvements without enjoying the current benefits.*

- 1069.** *The Committee notes that, according to the complainant, it has been an established practice for the wide majority of public sector trade unions to contest specific recommendations on salaries and other conditions of work in the PRB reports despite having accepted these reports (this would apparently allow them to accept a salary increase while claiming further improvements). The trade unions would term the issues with which they disagreed as “anomalies”, and have them examined by the Civil Service Arbitration Tribunal. The PRB decided to recommend a change to this practice in paragraph 1.39 of its 2003 report, ending the possibility to accept its recommendations and then declare a dispute with regard to salaries and benefits before the Civil Service Arbitration Tribunal. Although public officers still had the possibility to make representations if they opted not to accept the report, they might have to wait for more than five years for their representation to be decided, sometimes without obtaining satisfaction. Thus, the public officers had no real option but to accept the PRB’s recommendations in their entirety or stand to lose salary increases or new conditions of service. Although the PRB had invited trade unions to make submissions on any errors and omissions in its 2003 report, it had not addressed the issues raised by various unions giving rise to much discontent. According to the complainant, the PRB could not be accepted as an institution which was judge and party at the same time and there was a need to maintain the possibility to bring disputes before a third party like the Civil Service Arbitration Tribunal.*
- 1070.** *The Committee notes that according to the Government, the PRB conducts a salary review every five years and makes its recommendations after consultations with the ministries and parastatal bodies, as well as public sector trade unions. All the parties are heard and given the opportunity to make proposals. Following the publication of the salary review report, public officers are invited to sign an option form voluntarily so as to indicate their acceptance of the new salaries and conditions of service. On 16 January 2003, the Industrial Relations (Amendment) Act, 2003, was enacted amending the definition of “industrial dispute” to the effect that employees who accepted the recommendations of the PRB by signing an option form could no longer declare a dispute on the recommendations over remuneration or allowance of any kind made in the report. The complainant and others had lodged a case before the Supreme Court for a judicial review of the Industrial Relations (Amendment) Act, 2003. The reason for departing from the previous practice was that disputes over the PRB’s recommendations on remuneration and allowances tended to be brought before successive bodies without putting an end to the controversy. In 1988-89, for instance, a dispute had been brought first before the Government, which granted an interim salary increase, then before a salaries commissioner who issued a report and then, before the Civil Service Arbitration Tribunal which referred the dispute back to the PRB. The Civil Service Arbitration Tribunal had indicated on that occasion that the practice of first accepting the PRB report and then declaring disputes over remuneration and allowances had led to organized chaos. In 2003, when the new system came into effect, there were very few disputes over the PRB’s recommendations, and for those that subsisted, the PRB held consultations with the parties concerned, including public sector trade unions, before issuing its Errors and Anomalies Report in May 2004. There was general satisfaction with this report. Any public officer who did not accept the salary or remuneration prescribed in the PRB report, maintained the possibility to declare an industrial dispute.*
- 1071.** *The Committee observes that the PRB is an independent body entrusted with determining the terms and conditions of employment of public officers. The PRB issues its recommendations after having carried out consultations with all parties concerned, including public sector trade unions. In addition, mechanisms have been built into the procedure to enable post-recommendation consultations to identify any errors or omissions. Indeed, in its 2003 report the PRB undertook to hold further consultations with trade unions which would indicate errors and omissions in its report, with a view to*

rectifying certain aspects of its recommendations on salaries and allowances. The changes introduced in 2003 had the effect of restricting the possibility for public sector trade unions to bring a dispute over the PRB's recommendations to the Civil Service Arbitration Tribunal if their members (on behalf of which they submitted the representation) had opted to accept these recommendations.

1072. *The Committee notes that it is not the PRB itself that is at issue in this complaint, but rather the amendment made in 2003 which recommended that it no longer be possible to dispute the recommendations while at the same time accepting and benefiting from them. The Committee also observes that the possibility to bring disputes over the recommendations of the PRB on salaries and allowances before the Civil Service Arbitration Tribunal persists, as long as public officers have opted not to accept the PRB recommendations. In these circumstances, the Committee does not consider that the change in practice introduced in 2003 constitutes a violation of freedom of association principles.*

The Committee's recommendation

1073. *In the light of its foregoing conclusions, the Committee recommends that the Governing Body consider that this case does not call for further examination.*

CASE NO. 2350

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

Complaint against the Government of the Republic of Moldova presented by the National Confederation of Employers of the Republic of Moldova (CNPM)

Allegations: The complainant alleges that, by not allowing membership contributions to employers' organizations to be fiscally deductible costs, the Government violated Conventions Nos. 87 and 98

1074. The complaint is set out in a communication by the National Confederation of Employers of the Republic of Moldova (CNPM) dated 28 May 2004.

1075. The Committee has been obliged to postpone its examination of the case on two occasions [see 335th and 336th Reports, paras. 5 and 6, respectively]. At its meeting in May-June 2005 [see 337th Report, para. 10], the Committee issued an urgent appeal to the Government, indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it could present a report on the substance of the case at its next meeting even if the information or observations requested had not been received in due time. No reply from the Government has been received so far.

1076. The Republic of Moldova 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

- 1077.** In its communication dated 28 May 2004, the National Confederation of Employers of the Republic of Moldova (CNPM) alleged that, by not allowing membership contributions to employers' organizations to be considered as fiscally deductible costs, the Government limited employers' organizations' activities and development.
- 1078.** In particular, the complainant alleged that contrary to Article 1 of the Declaration of Philadelphia, which stated that the representatives of workers and employers, enjoying equal status with those of governments, join with them on free discussions and democratic decisions with a view to promotion of the common welfare, employers' organizations had no equal status with workers' organizations. In fact, contrary to workers' organizations in the Republic of Moldova, which benefited from a legally imposed contribution of up to 0.15 per cent of the paid enterprise wage fund, the membership fee paid by employers to their own organizations was not considered as a cost item. As a result of this situation, only those employers that made profit could afford the payment of the membership contribution and those who were making losses could not. The CNPM considered that this situation was not favourable for a stable development of employers' organizations and was contrary to Articles 3 and 8 of Convention No. 87. They also considered that the fact that employers' organizations could not collect contributions from their members was also contrary to Article 4 of Convention No. 98 as employers did not have enough resources to hire experts needed for collective bargaining and for development of relevant services to members, including training, information sharing, etc. The complainant indicated that, for about two years, the CNPM and the Government had tried, with ILO assistance, to find a satisfactory solution, but the Parliament had refused once again a proposal from the Government to amend the Fiscal Code so as to provide that the membership contributions to employers' organizations were fiscally deductible costs.
- 1079.** The CNPM referred to the following ILO texts: paragraph 24 of the conclusions of the Sixth ILO European Regional Meeting of December 2000, which stated: "In the light of the resolution adopted at the Warsaw Regional Conference (September 1995), governments that have not yet taken the necessary measures are reminded that they should facilitate by all means (including tax deductions) policies that ease expansion of membership in employers' and workers' organizations" and to the resolution aiming at ensuring the independence and facilitating the financing of employers' and workers' organizations" adopted by the Fifth ILO European Regional Conference (Warsaw, September 1995), and especially its paragraph (c), by which the Conference invited the governments of European countries to "consider appropriate measures that would enable their laws, regulations and practice, including tax regulations, to allow enterprises and workers to account for their subscriptions to their respective organizations as cost items".

B. The Committee's conclusions

- 1080.** *The Committee regrets that, despite the time that has elapsed since the complaint was first presented, the Government has not replied to any of the complainant's allegations, although it has been invited on several occasions, including by means of an urgent appeal, to present its comments and observations on the case. The Committee urgently requests the Government to be more cooperative in the future.*
- 1081.** *Under these circumstances, and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee finds itself obliged to present a report on the substance of the case without the benefit of the information which it had hoped to receive from the Government.*

- 1082.** *The Committee recalls that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations of violations of freedom of association is to promote respect for this freedom in law and in fact. The Committee remains confident that, if the procedure protects governments from unreasonable accusations, governments on their side will recognize the importance of formulating for objective examination detailed replies concerning allegations made against them [see the First Report, para. 31].*
- 1083.** *The Committee notes that the complainant in this case alleged that by not allowing membership contributions to employers' organizations to be fiscally deductible costs, the Government has limited activities and development of employers' organizations and therefore violated Conventions Nos. 87 and 98. The Committee further notes that the complainant claimed that employers' and workers' organizations did not have an equal status in this respect as trade unions benefited from a legally imposed contribution of up to 0.15 per cent of the paid enterprise wage fund.*
- 1084.** *It appears to the Committee that there might be inequality between the fiscal treatment of trade union dues and membership dues of employers' organizations. The Committee considers that, particularly in countries with a transition economy, special measures, including tax deductions, should be considered in order to ease the development of employers' and workers' organizations. Noting the resolution aiming at ensuring the independence and facilitating the financing of employers' and workers' organizations adopted by the Fifth ILO European Regional Conference (Warsaw, September 1995) and paragraph 24 of the conclusions of the Sixth ILO European Regional Meeting (Geneva, December 2000), the Committee invites the Government to take the necessary measures so as to review the Fiscal Code in full consultation with the social partners concerned, with the aim of finding a mutually agreeable solution to the issue of fiscal treatment of membership fees paid by employers to their organizations, including considering the introduction of tax regulation that would enable the deductibility of membership fees paid by employers to their organizations should there indeed be discrimination in fiscal treatment found.*

The Committee's recommendations

- 1085.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee regrets that, despite the time that has elapsed since the complaint was first presented, the Government has not replied to any of the complainant's allegations. The Committee strongly urges the Government to be more cooperative in the future.*
- (b) *It appears to the Committee that there might be inequality between the fiscal treatment of trade union dues and membership dues of employers' organizations. The Committee invites the Government to take the necessary measures to review the Fiscal Code in full consultation with the social partners concerned, with the aim of finding a mutually agreeable solution to the issue of fiscal treatment of membership fees paid by employers to their organizations, including considering the introduction of tax regulation that would enable the deductibility of membership fees paid by employers to their organizations should there indeed be discrimination in fiscal treatment found.*

CASE NO. 2264

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

**Complaint against the Government of Nicaragua
presented by
the Agricultural Workers' Association (ATC)**

Allegations: Anti-union dismissals during a collective dispute at the Presitex Corp. S.A. enterprise because of unilateral changes in the methods of production and payment of the workers

- 1086.** At its March 2004 meeting, the Committee presented an interim report on this case [see 333rd Report, paras. 771-787, approved by the Governing Body at its 289th Session (March 2004)].
- 1087.** The Government sent new observations in a communication dated 17 May 2005.
- 1088.** 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. Previous examination of the case

- 1089.** At its March 2004 meeting, after an examination of allegations relating to dismissals of trade union leaders, the Committee made the following interim recommendations [see 333rd Report, para. 787]:
- (a) The Committee requests the Government to send information on: (i) the alleged unilateral decision of the Presitex enterprise to modify the methods of production and the system of wage payments without consulting the union; (ii) the reasons why the enterprise and the Ministry refused to accept the collective audience requested by the workers aimed at obtaining the conclusion of a collective agreement; and (iii) the alleged pressure exercised by diplomatic representatives of a foreign country on the Ministry of Labour. The Committee requests the Government to promote an appropriate procedure for collective bargaining at the enterprise and to ensure that no outside pressure is brought to bear on the collective bargaining process in violation of Convention No. 98.
 - (b) The Committee requests the Government to provide it with a copy of the decision handed down by the judicial authorities on the dismissal of the four members of the trade union executive committee, as well as information on the specific facts that were cause for the dismissal of trade union members Evelin Moreno and Lilian Moreno. The Committee also requests the Government to ensure that they are reinstated in their jobs without loss of pay if it is shown that their dismissals were due to anti-union motives.

B. The Government's reply

- 1090.** In its communication of 17 May 2005, the Government states: (1) that the complainant's allegations concerning the unilateral decision of the Presitex enterprise to modify the methods of production and the system of wage payments without consulting the union have been neither established nor proven; (2) that the parties (employer and workers) made use of their rights and also of the remedies and appeals established by law; and (3) that it refutes the alleged pressure exercised by diplomatic representatives of a foreign country on the Ministry of Labour in respect of the enterprise. The Government adds that it promotes social dialogue, understanding and collective bargaining between the parties, in accordance with the law and with ILO Conventions.
- 1091.** As to the decision of the judicial authority concerning the dismissal of the four members of the trade union executive committee, the Government states that the complainant organization party to the proceedings has not provided it with any information in this respect. Lastly, the Government indicates that the dismissal of members of the Lidia Maradiaga Trade Union, Evelin Moreno and Lilian Moreno, is not related to the exercise of their trade union rights and corresponds rather to acts of labour insubordination.

C. The Committee's conclusions

- 1092.** *The Committee recalls that the allegations pending in this case refer mainly to the dismissal of four members of the executive committee and of two members of the Lidia Maradiaga Trade Union as a result of a collective dispute relating to unilateral changes – without consulting the mentioned trade union – by the Presitex Corp. S.A. enterprise to the methods of production and payment of wages.*
- 1093.** *With regard to the alleged decision by the Presitex Corp. S.A. enterprise to change the methods of production and payment of wages without consulting the trade union, the Committee notes the Government's information that the complainant's allegations have been neither established nor proven. In these conditions, the Committee recalls the importance of consultations between the social partners on matters of common interest.*
- 1094.** *As to the reasons why the Presitex Corp. S.A. enterprise and the Ministry refused to accept the collective audience requested by the workers aimed at concluding a collective agreement, the Committee notes the Government's information that the parties made use of their rights and also the remedies and appeals established by law. In view of that information, the Committee stresses the importance of the parties seeking to reach agreement during the collective bargaining process.*
- 1095.** *Regarding the alleged pressure exercised by diplomatic representatives of a foreign country on the Ministry of Labour in respect of the enterprise, the Committee notes the Government's firm rejection of the existence of such pressure. Taking this information into account, the Committee will not proceed with the examination of these allegations.*
- 1096.** *Concerning the request that the Government promote an appropriate procedure for collective bargaining at the Presitex Corp. S.A., enterprise and ensure that no outside pressure is brought to bear on the collective bargaining process, the Committee notes the Government's information that it promotes social dialogue, understanding and collective bargaining between the parties to avoid social and labour disputes, in the framework of legislation and ILO Conventions. In this regard, the Committee requests the Government to keep it informed of all collective agreements concluded between the Lidia Maradiaga Trade Union and the enterprise.*

- 1097.** *With respect to the judicial decision on the dismissal of the four members of the executive committee of the Lidia Maradiaga Trade Union, a copy of which had been requested by the Committee, the Committee notes the Government's information that the complainant organization party to the proceedings has not provided it with any information in that respect. The Committee requests the complainant organization to provide additional information on these dismissals and requests the Government to send it a copy of the decision as soon as it is handed down.*
- 1098.** *With regard to the dismissal of the members of the Lidia Maradiaga Trade Union, Evelin Moreno and Lilian Moreno, the Committee notes the Government's information that their dismissal is not related to their trade union activities but rather to acts of labour insubordination. The Committee requests the Government to provide information about the acts of labour insubordination supposedly committed by the workers in question that gave rise to their dismissals and to indicate whether they have initiated judicial proceedings in this regard. The Committee requests the Government to obtain observations on this issue from the enterprise concerned through the relevant employers' organization.*

The Committee's recommendations

- 1099.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government to keep it informed of any collective agreements concluded between the Lidia Maradiaga Trade Union and Presitex Corp. S.A. enterprise.*
 - (b) With respect to the judicial decision on the dismissal of the four members of the executive committee of the Lidia Maradiaga Trade Union, a copy of which had been requested by the Committee, the Committee requests the complainant organization to provide additional information on these dismissals and requests the Government to send it a copy of the decision as soon as it is handed down.*
 - (c) The Committee requests the Government to provide information about the acts of labour insubordination supposedly committed by the members of the Lidia Maradiaga Trade Union, Evelin Moreno and Lilian Moreno, that gave rise to their dismissals, and to indicate whether they have initiated judicial proceedings in this regard. The Committee requests the Government to obtain observations on this issue from the enterprise concerned through the relevant employers' organization.*

CASE NO. 2275

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

**Complaint against the Government of Nicaragua
presented by
the National Federation of “Heroes and Martyrs” Trade Unions of the
Textile, Clothing, Leather and Footwear Industry (FNSHM)**

Allegations: The complainant alleges that: (1) the company Hansae Nicaragua S.A. has excluded and continues to exclude the “Idalia Silva” Workers’ Trade Union (STIS) from collective bargaining and concluded a collective agreement with the trade union SDTH, which has close links to the employer, containing clauses that were damaging to workers, shortly after the establishment of STIS; (2) the enterprise, and subsequently four workers and an adviser paid by the enterprise, requested the dissolution of STIS, and proceedings are under way in this respect; (3) death threats were made against two trade unionists

- 1100.** At its meeting in March 2004, the Committee examined this case and presented an interim report to the Governing Body [see 333rd Report, paras. 788-804, approved by the Governing Body at its 289th Session in March 2004].
- 1101.** The Government sent new observations in a communication dated 17 May 2005.
- 1102.** 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. Previous examination of the case

- 1103.** At its meeting in March 2004, the Committee examined allegations that: (1) the company Hansae Nicaragua S.A. had excluded the “Idalia Silva” Workers’ Trade Union (STIS) from collective bargaining and concluded a collective agreement with the trade union SDTH, which has close links to the employer, containing clauses that were damaging to workers, shortly after the establishment of STIS; (2) the enterprise, and subsequently four workers and an adviser paid by the enterprise, had requested the dissolution of STIS, and proceedings were under way in that respect; (3) death threats had been made against two trade unionists. The Committee on that occasion made the following recommendations [see 333rd Report, para. 804]:

- (a) The Committee considered that information was lacking on this case. In particular, the Committee requests the Government to approach the employers' organizations concerned by the questions at issue, with a view to having at its disposal the views of the enterprise concerned.
- (b) The Committee requests the Government to keep it informed of the outcome of the two proceedings under way in which the cancellation of the registration of STIS was requested. Moreover the Committee regrets the delay in the registration of the STIS executive committee due to an initial refusal and requests the Government to refrain from interfering in trade union affairs in the future.
- (c) The Committee condemns the death threats against trade unionists Ms. Marjorie Sequeira and Ms. Johana Rodríguez and requests the Government to take the necessary measures to institute an independent investigation in this respect and, if the allegations are found to be true, to punish the guilty parties and immediately provide adequate protection to the trade unionists in question.
- (d) The Committee requests the Government to ensure that all workplaces and especially the export processing zone remain free from violent acts against trade unionists.
- (e) With regard to allegations that a collective agreement, containing clauses that were damaging to workers, was concluded with a trade union that has close links with the employer, the Committee requests the Government to send a copy of the collective agreement in question so as to be able to pronounce itself in this respect.

B. The Government's reply

1104. In its communication of 17 May 2005, the Government states that the "Idalia Silva" Workers' Trade Union (STIS) is legally registered under Act of Registration 2704, page 315, volume V, of the Register maintained by the Department of Trade Union Associations. The Government states that the union's executive body is active in promoting its rights as an organization, and maintains that the Government does not interfere in the internal affairs of unions.

1105. As regards the death threats against trade unionists, the Government states that, under the laws that apply to all Nicaraguans, it is the responsibility of the national police to investigate this kind of offence, and, in accordance with the law, the police referred the case (case file No. 5447-02) to the local criminal court. The Government adds that the complainant has provided no information on this. The Government also states that at all the country's workplaces, including the export processing zones, the Ministry of Labour promotes a climate conducive to mutual understanding with a view to developing sustained national dialogue and good labour practices – through knowledge of social and labour law – and using the appropriate means provided by tripartism to head off conflicts between different interests and, accordingly, making more frequent use of the available means for resolving labour disputes.

1106. The Government states that it requested information on the complaint from the employer, and that the company Hansae Nicaragua S.A. had given the following information:

- As regards the allegation that the company Hansae Nicaragua S.A. has excluded and continues to exclude STIS from collective bargaining and concluded a collective agreement with the trade union SDTH, which has close links to the employer, containing clauses that were damaging to workers, shortly after the establishment of STIS, the company states that its management on 8 July 2002 signed a collective agreement with the executive body of the company union SDTH. It adds that STIS was duly established and submitted the necessary documents on 5 July 2002 to the Department of Trade Union Associations of the Ministry of Labour, which, in accordance with the Regulations on Trade Union Associations and the Labour Code, must take a decision regarding the registration within ten days. As long as the union

organization lacks a registration certificate from the Department of Trade Union Associations, it has no legal personality, which prevents it from taking part in any activity such as collective bargaining. For this reason, the company states that, at the time talks on the collective agreement were being conducted, STIS still did not have legal personality (the registration certificate of its executive body was extended on 15 July 2002, seven days after the conclusion of the collective agreement with the Trade Union of Workers of Hansae Nicaragua S.A.). The company states that STIS in the end signed up to the collective agreement concluded with the SDTH, as is shown by the record of the Department of Individual and Collective Conciliation of the Ministry of Labour dated 19 August 2003.

- As regards the request to dissolve STIS and the proceedings still pending in relation to this, the company indicates that section 219 of the Labour Code establishes the reasons for which the dissolution of a trade union may be requested and the authorities that are empowered to make such a request. The judicial authorities will give a ruling on the matter, and the company does not interfere in the administration of justice.

1107. Lastly, the Government sends a copy of the new collective agreement concluded between the company Hansae Nicaragua S.A. and the company union SDTH, to which STIS has acceded and which in its view contains no clause detrimental to the interests of the company's workers.

C. The Committee's conclusions

1108. *As regards the questions still pending (presented in 2003), the Committee notes that the complainant had alleged that: (1) the company Hansae Nicaragua S.A. has excluded and continues to exclude the "Idalia Silva" Workers' Trade Union (STIS) from collective bargaining and concluded a collective agreement with the SDTH, which has close links to the employer, containing clauses that were damaging to workers, shortly after the establishment of STIS; (2) the enterprise, and subsequently four workers and an adviser paid by the enterprise, requested the dissolution of STIS, and proceedings are under way in this respect; (3) death threats were made against two trade unionists.*

1109. *As regards the alleged exclusion by the company Hansae Nicaragua S.A. of STIS from collective bargaining and the conclusion with the union SDTH of a collective agreement containing clauses detrimental to the workers shortly after the establishment of STIS, the Committee notes the statements of the company Hansae Nicaragua S.A. to the effect that: (1) it concluded a collective agreement with the SDTH on 8 July 2002, and that on that date STIS still did not have legal personality and was therefore unable to participate in collective bargaining; and (2) STIS in the end signed up to the collective agreement signed with the SDTH. Under these circumstances, and taking into account the fact that according to the Government STIS has been registered, the Committee will not pursue its examination of these allegations.*

1110. *As regards the judicial proceedings (initiated by the company and four workers) to annul the registration of the union STIS, the Committee notes that, according to the Government, STIS is legally registered and its executive body is active. The Committee also notes in this connection the statements of the company Hansae Nicaragua S.A., to the effect that: (1) section 219 of the Labour Code specifies the possible reasons for requesting the dissolution of a trade union, and the authorities that may make such a request; (2) the judicial authority will give a ruling on the case and the company does not interfere in the administration of justice. Under these circumstances, the Committee requests the Government to keep it informed of the outcome of the current judicial proceedings initiated on the basis of a request for the dissolution of STIS, and emphasizes that allowing*

representatives of the company to request the dissolution of a union may give rise to acts of interference by the employer.

- 1111.** *As regards the alleged death threats made against trade unionists Marjorie Sequeira and Johana Rodríguez to force them to leave their union, the Committee in its previous examination of the case had noted the Government's statements to the effect that Marjorie Sequeira made a complaint to the national police, which referred the matter to the judicial authority. The Committee notes that, in the annexes to the complaint, the complainant had included a mediation agreement between the two trade unionists and the two individuals accused of making the death threats, in which the latter undertook to keep away from the trade unionists and not to cause them any problems, and the case was thus closed. The Committee deplored these threats, requested the Government to carry out an investigation and, if the allegations were found to be true, to punish the guilty parties, and to provide protection for the trade unionists in question. In this regard, the Committee notes that, according to the Government, the national police conducted an independent inquiry (case file No. 5447-02) which was handed over to the Third Local Criminal Court. The Committee requests the Government to keep it informed of the measures adopted by the judicial authority following the police inquiry.*
- 1112.** *Lastly, the Committee recalls that, when it examined this case at its meeting in March 2004, it requested the Government to ensure that all workplaces, especially the export processing zone, were kept free of violence against trade unionists. In this regard, the Committee notes the Government's statements to the effect that in all the country's workplaces, including the export processing zones, the Ministry of Labour promotes and seeks to maintain a climate favourable to mutual understanding in order to encourage sustained national dialogue and good national practices.*

The Committee's recommendations

- 1113.** *In view of the preceding conclusions, the Committee invites the Governing Body to adopt the following recommendations:*
- (a) As regards the judicial proceedings initiated on the basis of a request for the dissolution of the trade union "Idalia Silva" Workers' Trade Union (STIS), the Committee once again requests the Government to keep it informed of the outcome of these proceedings, and emphasizes that allowing the representatives of a company to request the dissolution of a union may give rise to acts of interference by the employer.*
 - (b) As regards the alleged death threats against trade unionists Marjorie Sequeira and Johana Rodríguez, the Committee requests the Government to keep it informed of the measures adopted by the judicial authority following the police inquiry.*

CASE NO. 2378

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

**Complaint against the Government of Uganda
presented by
the International Textile, Garment and Leather Workers' Federation (ITGLWF)**

Allegations: The complainant alleges that Apparel Tri-Star Ltd., a private company in the garment industry, refused to recognize the Uganda Textiles, Garments, Leather and Allied Workers' Union (UTGLAWU) and resorted to intimidation tactics, including the dismissal of 293 workers, while the Government failed to enforce its own laws in respect of trade union recognition. The complainant also alleges an intolerable situation of persisting ambiguity with regard to the legal requirements for trade union recognition, and a lack of adequate machinery against anti-union discrimination

- 1114.** The complaint is contained in communications from the International Textile, Garment and Leather Workers' Federation (ITGLWF) dated 25 June and 29 August 2004.
- 1115.** The Government replied in communications dated 6 January and 30 August 2005.
- 1116.** Uganda recently ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). It has also ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainant's allegations

- 1117.** In a communication dated 25 June 2004, the complainant alleged that Apparel Tri-Star Ltd. refused to recognize the Uganda Textiles, Garments, Leather and Allied Workers' Union (UTGLAWU), a registered union. Apparel Tri-Star Ltd. was a Sri Lankan company which had started operating in Uganda in 2003. The Government of Uganda had given more than US\$4 million in investment subsidies for exports under the United States "African Growth and Opportunity Act" and the President had taken a close personal interest in Tri-Star.
- 1118.** The complainant alleged that in July 2003, the UTGLAWU, mobilized 90 per cent of the workforce in order to address the inhuman working conditions at the plant. The UTGLAWU met with management to discuss a proposed recognition and disciplinary code agreement. However, the company refused to sign the draft agreement until the union proved it represented at least 51 per cent of the workforce and provided its membership list. The UTGLAWU refused, fearing that management would harass union members. During the following months, tension escalated at the company, resorting to intimidation tactics, including the dismissal of a number of workers.

- 1119.** The complainant added that in October 2003, the beating of a woman worker for an alleged lack of discipline sparked off a strike, during which workers locked themselves inside the factory dormitory. Workers demanded that the UTGLAWU be recognized in order to be able to negotiate improvements in the appalling working conditions. While the workers were locked in the factory, the company announced it would dismiss the entire workforce and close the factory. The union immediately applied for an injunction to prevent the company from terminating its employees until all their entitlements, including benefits and repatriation costs, had been paid (document attached; in a communication dated 29 August 2004, the complainant attached a copy of the interim injunction order dated 23 October issued by the High Court of Kampala; the order restrained the employer from terminating the services of the employees without paying all their dues, benefits and repatriation costs, until the hearing of the main application for a temporary injunction pending the hearing of the main suit).
- 1120.** The complainant further alleged that the sit in ended when police broke down the dormitory door. In retaliation, the company terminated the services of 293 workers, asking them to pack up their belongings and leave without pay (in a communication dated 29 August 2004, the complainant explained that the company terminated in fact the entire workforce of 1,900 workers and rehired them the next day on the basis of short-term contracts, except for the 293 workers who were not rehired; the workers were coerced into signing the contracts, as they were told that if they left the factory without doing so they would be considered to have ceased their employment – a sample contract was attached indicating an employment duration of three months). According to the complainant, the President was later reported in the press as saying that “he sacked the AGOA girls for their indiscipline and to prevent their action from scaring away investors”.
- 1121.** The complainant further alleged that following pressure from the dismissed workers, the Minister of State for Labour and Industrial Relations, in a letter dated 27 October, called upon the company to settle the matter of the dismissed workers in a peaceful manner and in accordance with the law and to “show cause in writing within 28 days, why the trade union, namely, the Uganda Textiles, Garments, Leather and Allied Workers’ Union, is not being recognised by the Apparel Tri-Star Ltd.” (document attached).
- 1122.** According to the complainant, the Managing Director of Tri-Star Ltd. refused to attend meetings with various ministers, claiming to be an “untouchable figure” and saying he would “talk only to the President”. He even failed to attend a two-day conference convened by the Prime Minister. The Prime Minister’s conference referred the matter to the Cabinet, with a recommendation for two options, either reinstating the workers or paying their severance benefits as per the Employment Act, i.e. a minimum package of UGX490,000 per person. However, the Cabinet confirmed the termination of the workers, with the payment of benefits in some cases as low as UGX15,000 which was not even enough to cover their repatriation costs.
- 1123.** The complainant added that in the meantime, the UTGLAWU requested once again a meeting with management to settle the issues of the recognition of the trade union and the negotiation of the Disciplinary Code. The company responded through its lawyers, saying that the union had not yet proven that it represented 51 per cent of the workforce and that the union had not been granted certification as a bargaining agent. The union submitted its members’ list to the Registrar of Trade Unions and, on 18 December 2003, the Commissioner for Labour, Employment and Industrial Relations wrote to the company asking it to submit by 24 December 2003 the list of the company’s workers eligible to join a union (document attached). By the time of the complaint, the company had failed to supply that list. As a result of the intervention of the Assistant Presidential Advisor on AGOA, a meeting was scheduled to take place on 22 March 2004. However, the company, acting through its lawyers, postponed the meeting again demanding proof that 51 per cent

of its workforce were union members. Needless to say, the union had not been able to secure certification precisely because of the company's refusal to submit its list of employees to the Registrar.

- 1124.** In a communication dated 29 August 2004, the complainant attached a further communication dated 13 May 2004 by the Commissioner of Labour, Employment and Industrial Relations addressed to Apparel Tri-Star Ltd., noting the following:

I had hoped that the issue of recognising the Textile union would be resolved without any industrial dispute, but it appears that you are dragging your feet in an apparent attempt to frustrate the freedom of association of your employees.

This Ministry has tried all means aimed at harmonizing the relationship between you and the employees who are represented by the above-mentioned union but to no avail. The workers' right to freedom of association and their right to join trade unions has been brought to your attention through several correspondences, but you appear not to take these correspondences with the seriousness they deserve.

The purpose of this letter is once again to urge you to cooperate and expedite the process of freedom of association of your employees that is enshrined in the Uganda Constitution, which is the supreme law in this country.

The complainant added that the company's lawyers replied once again that as long as UTGLAWU was not certified as representative, Apparel Tri-Star Ltd. had no obligation to recognize it.

- 1125.** In its communication of 25 June 2004, the complainant made further reference to the complaint of violations of freedom of association which it had submitted in 1998 against the Government of Uganda for failure to compel employers in the textile sector to recognize the UTGLAWU for the purposes of collective bargaining (Case No. 1996). The complainant recalled that the Trade Unions Decree No. 20 of 1976 contained provisions which impeded freedom of association: according to section 8(3) "no trade union shall be registered unless it is composed of not less than one thousand registered members" and according to section 19(1)(e) "every employer shall be bound to recognize a registered trade union to which at least 51 per cent of his employees have freely subscribed their membership and in respect of which the Registrar has issued a certificate under his hand certifying the same to be a negotiating body with which the employer is to deal in all matters affecting the relationship between the employer and those of his employees who fall within the scope of membership of the registered trade union". The complainant added that, at the time, it had referred to a legal interpretation made by the Attorney General on 9 September 1997 in which he had gone as far as to say that the abovementioned provisions were void since they curtailed the rights of freedom of association guaranteed by the Constitution of 1995.

- 1126.** The complainant recalled from the conclusions and recommendations reached in Case No. 1996 that the Committee had requested the Government:

... to take the necessary measures to ensure that sections 8(3) and 19(1)(e) of the Trade Unions Decree of 1976 are amended in line with freedom of association principles enunciated in the preceding paragraphs. Noting the Government's recognition that these provisions are not compatible with the new Ugandan Constitution of 1995 and that steps to address this problem are being taken within the framework of the labour law reform process currently taking place in the country, the Committee requests the Government to keep it informed of any developments in this regard.

- 1127.** With regard to the provisions on recognition for collective bargaining purposes (i.e. the abovementioned section 19(1)(e) of the Trade Unions Decree No. 20 of 1976), the complainant added that, in 1998, the Committee on Freedom of Association found that the

requirement contained in the Trade Unions Decree that a union represent 51 per cent of the workforce in order to secure bargaining rights “does not promote collective bargaining in the sense of Article 4 of Convention No. 98 since there is a risk that collective bargaining may not take place in the eventuality that no trade union represents the absolute majority of the workers concerned”. The complainant emphasized that efforts by the trade union movement and the Federation of Ugandan Employers to review these obsolete laws over the past five years had not yielded any tangible results despite the recommendations reached in Case No. 1996.

- 1128.** The complainant criticized the persisting ambiguity regarding the legality of the provisions on union recognition for the purposes of collective bargaining, since the Government had already admitted that the provisions of the Trade Unions Decree were not in conformity either with the 1995 Constitution or with international labour standards and had indicated that it would endeavour to resolve this problem. This ambiguity had created an intolerable situation, where not even the authorities appeared to be clear about what legal requirements were currently in force. The provisions of the 1976 Decree had ceased to be counted as labour law. This ambiguity with regard to the legal requirements was reflected in the difference in the positions adopted by the Minister of State for Labour and Industrial Relations and the Registrar of Trade Unions in the present case. Indeed, the Minister of State for Labour and Industrial Relations, in his letter dated 27 October 2003, had asked the company to show cause why it had not recognized the union, and had stated that “the current Constitution of Uganda provides for no minimum percentage of willing workers to organise. That means that so long as any number of workers in an industry want to unionize, their will shall not be frustrated by whomsoever”. Meanwhile, however, the Registrar of Trade Unions, in his letter dated 18 December 2003, said that “the union claims that over and above 51 per cent of your eligible workers have voluntarily expressed willingness to join a trade union. It is our duty to verify the stated claim”. Moreover, in a communication dated 29 August 2004, the complainant attached a further letter by the Commissioner of Labour, Employment and Industrial Relations, dated 13 May 2004, urging the company to expedite the process of freedom of association enshrined in the Uganda Constitution, which he invoked as the “supreme law” in the country and a reply by the company’s lawyers once again invoking section 19(1) of the 1976 Trade Unions Decree in order to refuse the union’s request for recognition and collective bargaining.
- 1129.** The complainant further claimed a failure by the Government to enforce its own laws. The existence of legal provisions that undermined freedom of association, as well as the lack of clarity regarding the labour legislation, were aggravated according to the complainant, by the obvious lack of authority or will on the part of the Government to enforce its own laws. In the case under consideration, the union had met the requirements of the controversial section 19(1)(e) of the Trade Unions Decree. But it had been six months since the Trade Union Registrar had requested a list of employees in order to determine whether the union met the requirements. The company had failed to produce the list that was necessary for granting certification and then had repeatedly refused to meet with the union on the grounds that it did not have the necessary certification. The Government had not taken any action, such as fining the employer, in order to compel it to comply with its legal obligations.
- 1130.** The complainant furthermore alleged the abuse of the admissible privileges for most representative unions, contrary to the principles of freedom of association by refusing to even meet with the union, dealing instead through its lawyers.
- 1131.** Moreover, the complainant alleged a failure on the part of the Government to ensure that complaints of anti-union discrimination were examined promptly, impartially, inexpensively and effectively. The existence of appalling working conditions and physical punishment, coupled with the company’s refusal to recognize the union in order to fix

working conditions through collective bargaining or, indeed, to even meet with the union, had inevitably led to the strike that took place in October 2004. The subsequent firing of the 293 striking workers was a case of anti-union discrimination.

- 1132.** In conclusion, the complainant alleged that it was of great concern that, five years after the complaint submitted against the Government of Uganda on the same grounds, the situation had not changed. The deficiencies cited created an insecure environment for workers and discouraged them from trying to organize.
- 1133.** In a communication dated 29 August 2004, the complainant added that their affiliate had indicated that it did not have ready access to the labour legislation of Uganda, given that the Labour Code could only be purchased as a complete set of all Ugandan legislation, available from a single distributor at a cost of approximately US\$1,000.
- 1134.** The complainant requested the Committee to look into the above matters and ensure that the Government took immediate and effective action to uphold the right of freedom of association of workers at Tri-Star and in the rest of the industry.

B. The Government's reply

- 1135.** In a communication dated 6 January 2005 the Government indicated that the Ministry of Labour was taking steps to have the matter resolved, including requesting the management to show cause why it had not recognized the union. A letter had been sent but the reply to it was unsatisfactory. So the matter was now being handled at another level, and technical consultations were still going on with the office of the Export Led Growth Strategy Unit under which Apparel Tri-Star (Uganda) Ltd. operated. The Government added that it would keep the Committee informed on the progress regarding this matter.
- 1136.** In a communication dated 30 August 2005, the Government emphasized its commitment to the respect and promotion of fundamental principles and rights of workers as demonstrated by the ratification of Convention No. 87 on 2 June 2005. The Government added that it had taken the following steps to ensure that workers' trade union rights were respected. First, on the directive of the Prime Minister, the Minister of State for Labour and Industrial Relations held meetings with the employers in textiles and garments sector in March this year. This was followed up by a tour of some of the key industries in the textile and garments sector including Apparel Tri-Star Ltd. The Minister of State for Labour and Industrial Relations discussed with the employers the issue of unionization of workers in the country and sought the employers' perspective on their failure to recognize trade unions. Second, the management of Apparels Tri-Star Ltd. was requested in writing by the Minister of State for Labour and Industrial Relations to show cause why they were not recognizing the trade union and were given 28 days within which to respond. Third, after having received an unsatisfactory reply to the letter the Minister of State for Labour and Industrial Relations ordered Apparel Tri-Star Ltd. to recognize the UTGLAWU in accordance with section 17(2) and (3) respectively, of the Trade Unions Act, 2000, Cap. 228 of the laws of Uganda, on 15 July 2005. Further to these steps, the Minister of State for Labour and Industrial Relations met with the President of Uganda on 22 August 2005 regarding the issue of union recognition and progress on the revision of the labour laws. The President directed that the labour law Bills including the labour unions Bill be tabled in Parliament in the month of September 2005. The Bills were at the time of the communication under active consideration in Parliament. Meanwhile, the relevant trade union had been informed of all these developments and advised to take appropriate necessary action to ensure recognition of the union.

C. The Committee's conclusions

- 1137.** *The Committee observes that this case concerns allegations that Apparel Tri-Star Ltd., a private company in the garment industry, refused to recognize the Uganda Textiles, Garments, Leather and Allied Workers' Union (UTGLAWU) and resorted to intimidation tactics, including the dismissal of 293 workers, while the Government failed to enforce its own laws in respect of trade union recognition. The complainant also alleged an intolerable situation of persisting ambiguity with regard to the legal requirements for trade union recognition, and a lack of adequate machinery against anti-union discrimination.*
- 1138.** *The Committee notes that the complainant alleged that Apparel Tri-Star Ltd. repeatedly refused to meet and negotiate with the UTGLAWU, dealing with it instead through its lawyers on the pretext that the UTGLAWU had not proven its representativeness; at the same time, Apparel Tri-Star Ltd. allegedly prevented the UTGLAWU from proving its representativeness, either by failing to supply the list of workers eligible to join a union, or by resorting to intimidation tactics including dismissals. The complainant alleges that the company abused the admissible privileges for most representative unions (by refusing to meet with the union as long as the latter did not have the necessary certification of representativeness, while preventing it from obtaining such certification). The complainant claims moreover that the Government violated freedom of association principles by failing to enforce its own laws, for instance, through fines against the employer to compel it to comply with its legal obligations. Thus, it appears from the allegations that, although the Minister of State for Labour and Industrial Relations, the Registrar and the Commissioner for Labour had sent several communications to Apparel Tri-Star Ltd. asking it to show cause in writing why it had not recognized the UTGLAWU (letter of 27 October 2003), produce the list of workers eligible to join a trade union (18 December 2003) and expedite the process of freedom of association (letter of 13 May 2004), the company responded by refusing to recognize the union as long as it was not certified, while refraining from the steps which were necessary to allow for the certification to take place; no enforcement measures were allegedly taken in response to this.*
- 1139.** *The Committee notes with interest from the Government's reply that the Minister of State for Labour and Industrial Relations took the following steps to have the matter resolved: (a) held meetings with the employers in the textiles and garments sector in March 2005 and sought their perspective on their failure to recognize trade unions; (b) requested in writing Apparel Tri-Star Ltd. to show cause in writing why they were not recognizing the trade union and gave it 28 days to respond; (c) after an unsatisfactory response, ordered Apparel Tri-Star Ltd. on 15 July 2005 to recognize the UTGLAWU in accordance with section 17(2) and (3) of the Trade Unions Act, 2000.*
- 1140.** *The Committee notes in this respect that section 17(2) and (3) of the Trade Unions Act, 2000, provides for compulsory recognition of a union by an employer. In particular, section 17(2) provides that "[...] whenever an employer refuses to deal with a registered trade union as therein provided, the trade union shall report the facts to the Minister who shall call upon the employer to show cause in writing within twenty-eight days why the trade union is not being so recognized". Section 17(3) provides that "[...] where the Minister is not satisfied with the cause shown by the employer under subsection (2) or the Minister considers that the public interest so requires, the Minister may, by statutory order and after informing the parties concerned, declare that the registered trade union shall deal in respect of all matters relating to the relations of the employer with those of his or her employees who fall within the scope of membership of that trade union".*
- 1141.** *With regard to the Government's statement that the union had been informed of these developments and had been advised to take appropriate necessary action to ensure its*

recognition, the Committee considers that it would appear that the UTGLAWU has already taken the necessary steps in this respect and that the matter is now in the hands of the Government. The Committee emphasizes that recognition by an employer of the main unions represented in the undertaking, or the most representative of these unions, is the very basis for any procedure for collective bargaining on conditions of employment in the undertaking. The competent authorities should, in all cases, have the power to proceed to an objective verification of any claim by a union that it represents the majority of the workers in an undertaking, provided that such a claim appears to be plausible. If the union concerned is found to be the majority union, the authorities should take appropriate conciliatory measures to obtain the employer's recognition of that union for collective bargaining purposes [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 822, 824 and 846].

- 1142.** Noting with interest the steps taken so far by the Government to obtain the recognition of UTGLAWU by Apparel Tri-Star Ltd., in accordance with section 17(2) and (3) of the Trade Unions Act, 2000, the Committee expects that the Government will spare no effort until the recognition has been effectively obtained in line with Conventions Nos. 87 and 98 ratified by Uganda. The Committee requests to be kept informed in this respect.
- 1143.** The Committee further notes from the complainant's allegations that a strike staged in October 2003 by the workers in Apparel Tri-Star Ltd. on claims that the company recognize the union and negotiate improvements in working conditions, ended up with the dismissal of 293 workers without pay (in fact, the company terminated the entire workforce of 1,900 workers and rehired them the next day except for 293 workers). Despite initiatives, including by the Minister of Labour in a letter dated 27 October 2003, to settle the matter in a peaceful manner, the Managing Director of Apparel Tri-Star Ltd. refused to attend meetings with various ministers and even a two-day conference convened by the Prime Minister on this issue, and claimed himself to be an "untouchable figure" invoking political connections. Although the Conference referred the matter to the Cabinet with a recommendation for either reinstatement or payment of severance benefits as per the Employment Act, i.e., a minimum of UGX490,000 per person, the Cabinet granted benefits sometimes as low as UGX15,000 which is not even enough to cover repatriation costs. The complainant thus claims that the Government failed to ensure that complaints of anti-union discrimination were examined promptly, impartially, inexpensively and effectively.
- 1144.** The Committee notes that, in its reply, the Government does not refute that acts of anti-union discrimination might have taken place in the context of the strike claiming recognition of the UTGLAWU. The Committee also notes that the measures taken by the Government in this respect were confined essentially to mediation/conciliation, including a conference convened by the Prime Minister. The Committee therefore notes that, apparently, no impartial and prompt legal procedure was put in motion in order to verify the allegations of anti-union discrimination and apply any legal remedies.
- 1145.** 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 no person should be prejudiced in his or her employment by reason of membership of a trade union, even if that trade union is not recognized by the employer as representing the majority of workers concerned [see **Digest**, op. cit., paras. 693 and 702]. 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. In particular, respect for the principles of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious, inexpensive and fully impartial [see **Digest**, op. cit., paras. 738 and 741].

- 1146.** *The Committee regrets that no prompt and impartial legal procedure appears to have been put in motion as a result of allegations of acts of anti-union discrimination, in particular, as regards the dismissals of 293 workers at Apparel Tri-Star Ltd. in the context of a dispute with the UTGLAWU over trade union recognition. Taking into account the recommendations made by a conference convened by the Prime Minister on this issue, the Committee requests the Government to institute without delay an independent inquiry into the circumstances of the dismissals and if it is found that they were due to anti-union motives, to take all necessary measures for the reinstatement of the 293 dismissed workers in their posts without loss of pay, or if the investigation finds that reinstatement is not possible, to pay them their severance benefits as per the Employment Act. The Committee requests to be kept informed of developments in this respect.*
- 1147.** *As regards the other 1,607 workers who were dismissed by Apparel Tri-Star Ltd. pursuant to the staging of industrial action only to be rehired the following day on the basis of three-month contracts, the Committee requests the Government to institute without delay an independent investigation into the circumstances of this incident and, if it is found that the new contract these workers were forced to sign placed them in a comparatively prejudicial situation in relation to their previous terms and conditions of employment, and that such action was based on anti-union motives, to take all necessary measures of redress, including adequate compensation. The Committee requests to be kept informed of developments in this respect.*
- 1148.** *Finally, the Committee requests the Government to take all necessary measures so as to prevent acts of anti-union discrimination in the future, in particular, to take appropriate legislative measures to ensure that a prompt, inexpensive and impartial mechanism of redress is at the disposal of workers who consider that they have been prejudiced because of their trade union activities.*
- 1149.** *With regard to the legislative aspects of this case, the Committee notes that, according to the complainant, efforts over the past five years by both the trade union movement and the Federation of Ugandan Employers to revise sections 8(3) and 19(1)(e) of the Trade Unions Decree (on minimum membership and exclusive bargaining rights) have not yielded any tangible results despite the Committee's conclusions and recommendations reached in Case No. 1996. The Committee recalls that, in that case, it had requested the Government to take the necessary measures to ensure that sections 8(3) and 19(1)(e) of the Trade Unions Decree were amended in line with freedom of association principles and had noted the Government's recognition that these provisions were not compatible with the new Ugandan Constitution of 1995 and that steps to address this problem were being taken within the framework of the labour law reform process currently under way. The Committee recalls that section 8(3) of the Trade Unions Decree, which sets out a minimum membership requirement of 1,000 registered members for trade union registration, was considered liable to jeopardize the right of workers to establish organizations of their own choosing without prior authorization; this was all the more likely to occur when section 8(3) was read in conjunction with section 19(1)(e) of the Trade Unions Decree which grants exclusive bargaining rights to a union representing 51 per cent of the employees concerned [see 316th Report, paras. 662, 664 and 669(a)]. The Committee had recalled in that case that a minimum membership requirement of 1,000 set out in the law for the granting of exclusive bargaining rights might be liable to deprive workers in small bargaining units or who are dispersed over wide geographical areas of the right to form organizations capable of fully exercising trade union activities contrary to the principle of freedom of association [see *Digest*, op. cit., para. 832]. It had also recalled that where under a system for nominating an exclusive bargaining agent, there is no union covering more than 50 per cent of the workers in a unit, collective bargaining rights should nevertheless be granted to all the unions in this unit, at least on behalf of their own*

members, or they should be allowed to jointly negotiate a collective agreement applicable to the bargaining unit [see 316th Report, para. 663].

- 1150.** *The Committee further notes from the complainant's allegations that the lack of progress in the legislative reform has created an intolerable situation of persisting ambiguity, where not even the authorities appear to be clear about what legal requirements are currently in force in the country. For example, in the case at hand, the Minister of Labour and the Registrar of Trade Unions were led to adopt conflicting positions as to the minimum membership/representativeness requirements for collective bargaining purposes. Whereas the Minister of State for Labour and Industrial Relations, in a letter dated 27 October 2003 to the company, requesting it to show cause for not recognizing the union, emphasized that the current Constitution of Uganda provides for no minimum percentage of willing workers to organize and that "so long as any number of workers in an industry want to unionise, their will shall not be frustrated by whomsoever", the Registrar of Trade Unions insisted, in his letter dated 18 December 2003, on the need to verify the 51 per cent representativeness requirement. By insisting moreover on the representativeness requirement of section 19(1)(e) of the Trade Unions Decree, the company refuted an invitation by the Commissioner for Labour, Industrial Relations and Employment dated 14 May 2005 to expedite the process of freedom of association enshrined in the supreme law of the country.*
- 1151.** *The Committee notes with interest from the Government's reply the recent ratification of Convention No. 87 and that Bills to undertake the necessary labour reform were under active consideration in Parliament. In particular, the Committee notes that pursuant to a meeting between the Minister of State for Labour and Industrial Relations and the President of Uganda of 22 August 2005, the President directed that the labour law Bills be tabled in Parliament in the month of September 2005.*
- 1152.** *Taking note with interest of the steps taken by the Government with a view to amending the legal requirements concerning minimum membership and representativeness (sections 8(3) and 19(1)(e) of the Trade Unions Decree) so as to bring them into conformity with freedom of association principles, the Committee trusts that the legislative reform process will be concluded without further delay and requests the Government to keep it informed of the progress made in this respect.*
- 1153.** *The Committee finally notes with concern that the Government does not reply to the allegations that the text of the labour law is not accessible to workers because it can only be purchased at a prohibitive cost. The Committee recalls that a genuinely free and independent trade union movement can only develop where fundamental human rights are respected [see **Digest**, op. cit., para. 35]. In particular, respect for the rule of law, which is an essential prerequisite for freedom of association, requires that the text of the law be readily accessible to all those who wish to be informed of their rights and obligations. The Committee therefore requests the Government to take all necessary measures without delay to ensure that the text of the labour law is accessible to all workers and to keep it informed in this respect.*

The Committee's recommendations

- 1154.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *Noting with interest the steps taken so far by the Government to obtain the recognition of the Uganda Textiles, Garments, Leather and Allied Workers' Union (UTGLAWU) by Apparel Tri-Star Ltd., in accordance with*

section 17(2) and (3) of the Trade Unions Act, 2000, the Committee expects that the Government will spare no effort until the recognition has been effectively obtained in line with Conventions Nos. 87 and 98 ratified by Uganda.

- (b) The Committee regrets that no prompt and impartial legal procedure appears to have been put in motion as a result of allegations of acts of anti-union discrimination, in particular, dismissals of 293 workers by Apparel Tri-Star Ltd. in the context of a dispute with the UTGLAWU over trade union recognition.*
- (c) Taking into account the recommendations made by a conference convened by the Prime Minister on this issue, the Committee requests the Government to institute without delay an independent inquiry into the circumstances of the dismissals and, if it is found that they were due to anti-union motives, to take all necessary measures for the reinstatement of the 293 dismissed workers in their posts without loss of pay, or if the investigation finds that reinstatement is not possible, to pay them their severance benefits as per the Employment Act.*
- (d) As regards the other 1,607 workers who were dismissed by Apparel Tri-Star Ltd. pursuant to the staging of industrial action only to be rehired the following day on the basis of three-month contracts, the Committee requests the Government to institute without delay an independent investigation into the circumstances of this incident and, if it is found that the new contract these workers were forced to sign placed them in a comparatively prejudicial situation in relation to their previous terms and conditions of employment, and that such action was based on anti-union motives, to take all necessary measures of redress, including adequate compensation. The Committee requests to be kept informed of developments in this respect.*
- (e) The Committee requests the Government to take all necessary measures so as to prevent acts of anti-union discrimination in the future, in particular, to take appropriate legislative measures to ensure that a prompt, inexpensive and impartial mechanism of redress is at the disposal of workers who consider that they have been prejudiced because of their trade union activities.*
- (f) Taking note with interest of the steps taken by the Government with a view to amending the legal requirements concerning minimum membership and representatives (sections 8(3) and 19(1)(e) of the Trade Unions Decree) so as to bring them into conformity with freedom of association principles, the Committee trusts that the legislative reform process will be concluded without further delay and requests the Government to keep it informed of the progress made in this respect.*
- (g) The Committee requests the Government to take all necessary measures without delay to ensure that the text of the labour law is accessible to all workers.*
- (h) The Committee requests the Government to keep it informed of developments on all of the above.*

CASE NO. 2399

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

**Complaint against the Government of Pakistan presented by
the International Confederation of Free Trade Unions (ICFTU)
supported by
Public Services International (PSI)**

Allegations: The complainant alleges systematic refusal to register the Liaquat National Hospital Workers' Union (LNHWU), dismissals and harassment of trade union members

- 1155.** The complaint is set out in a communication by the International Confederation of Free Trade Unions (ICFTU) dated 21 December 2004. In a communication dated 17 January 2005, Public Services International (PSI) associated itself with the complaint. The ICFTU transmitted additional information in a communication dated 13 July 2005.
- 1156.** The Government forwarded its observations in communications dated 20 April, 27 May and 20 September 2005.
- 1157.** Pakistan has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 1158.** In its communication dated 21 December 2004, the International Confederation of Free Trade Unions (ICFTU) alleged systematic refusal to register the ICFTU-affiliated Liaquat National Hospital Workers' Union (LNHWU), dismissals and harassment of trade union members.
- 1159.** As regards the allegation of denial of registration, the ICFTU stated that the Liaquat National Hospital Employees' Union (LNHEU) had been registered in 1974 but, as a result of the amendment of the Industrial Relations Ordinance (IRO) in 2002, its registration was cancelled. The LNHWU applied for registration for the first time in 2001 and for the second time in January 2003. The Director of Labour in Karachi, the competent authority, had been turning down the application for registration on the grounds that the Liaquat National Hospital was a charitable organization. According to the new IRO, organizations which operated on a charitable basis were not entitled to trade union representation. The appeal of the LNHWU against this decision was still pending before the labour courts. The complainant considered that the IRO was highly restrictive and contrary to the provisions of Conventions Nos. 87 and 98 and referred to Case No. 2229 previously examined by the Committee. Furthermore, the complainant contested the qualification of the Liaquat National Hospital as a charitable organization.
- 1160.** The complainant further alleged that, since the establishment of the LNHWU, all of its office bearers had been systematically ousted from employment and its members had been subjected to serious abuses and harassment by the hospital management. About 23 key office bearers of the union were arrested, kept in prison and subsequently fired. The complainant provided a list (dated 5 May 2002) of 18 dismissed workers and eight workers

suspended pending inquiry (see annex). Their cases of reinstatement have been pending in the labour courts since 2001. In total, about 75 employees were forced to resign because of their LNHU membership.

- 1161.** Several of these workers faced moral and physical harassment. For this purpose, the management had installed what the union refers to as a “torture cell” within the hospital (in Lal Kothi block). According to the complainant, the management used armed personnel who, on its instructions, beat and maltreated people who were brought in. That usually occurred after duty hours when workers were reportedly being called to Lal Kothi to be beaten, tortured and forced to sign blank papers, which were afterwards used to obtain their resignation. Several medical certificates were attached to the complaint.
- 1162.** The complainant further alleged that on 18 August 2002, the LNHU General Secretary Mr. Shahid Iqbal Ahmed was abducted from the court premises, where he was present regarding his pending case for reinstatement, by police officers and brought to the New Town Police Station. There, he was beaten and threatened that he would be involved in a murder case.
- 1163.** The complainant further alleged that on several occasions, the LNHU office bearers and members had been denounced on false charges. More particularly, the complainant stated that Mr. Iftikhar Ahmed, a trade union member, was also falsely accused of participating in an illegal strike at the hospital premises on 16 April 2002. The complainant attached an application made by the hospital to the Karachi East Court against this individual along with 41 other persons allegedly participating in the strike. The complainant submitted that Mr. Iftikhar Ahmed did not participate in the events as on that day he was getting married outside Karachi. In fact, he was later acquitted by the Judicial Magistrate, East Karachi, in the criminal case brought against him and eight other persons in connection with the strike on 16 April 2002.
- 1164.** In its communication dated 13 July 2005, the complainant further provided copies of two judgements dated 31 March 2005 by which the LNHU was acquitted of criminal charges brought against it in respect of strike action on 16 April 2002.

B. The Government’s reply

- 1165.** In its communications of 20 April, 27 May and 20 September 2005, the Government described the circumstances of the dismissal of six hospital employees and attached a letter from the Liaquat Hospital administration in this regard. According to the hospital administration, on 16 April 2002, Mr. Muhammad Rafique along with his colleagues gathered in the compound of the hospital to strike in order to pressure the management to withdraw the Show Cause Notice dated 5 April 2002 issued against other staff members for committing acts of misconduct. They raised slogans against the management and threatened them with physical violence and assault; they also threatened to paralyse the functioning of the hospital. The strike lasted till 3 a.m. The strikers cut off the main electricity and, by their actions, put at risk patients of the hospital. Since the organizers of the strike had not replied to the charge sheet sent to them and failed to participate in the inquiry, despite the notices duly serviced to them, an inquiry was conducted *ex parte*. Consequently, on 6 May 2002, a dismissal order was issued. The six dismissed employees filed a case before the First Sindh Labour Court in Karachi, which, by its order of 5 August 2004, had dismissed their petition. The Government transmitted the texts of two decisions: first, in respect of Mr. Muhammad Rafique, and the second, in respect of Mr. Mohammad Shaukat Hussain and Mr. Alleem-ur Rehman, both dismissed for having slept during duty hours (Show Cause Notice of 5 April 2002) and Mr. Shahid Iqbal Ahmed and Mr. Iftikhar Ahmed, dismissed for having instigated other employees to go on strike. According to both decisions, the provisions of the IRO of 1969 “were not applicable to the [Liaquat National]

Hospital [due to the fact that it was a charitable institution] and, consequently, the applications of the applicants [were] not legally maintainable. The court [had] no jurisdiction to try the applications against the Respondent Hospital and the applicants [were] not entitled for any relief". To further justify the dismissal of six workers, the hospital administration referred to the jurisprudence of the Supreme Court of Pakistan, according to which, in a case of a strike in a hospital, the hospital authorities have a right to dismiss striking workers, subject to the provisions of the Punjab Essential Services (Maintenance) Act.

- 1166.** Following their dismissal, the dismissed workers had also approached the Registrar of Trade Unions and claimed to be the officers of a trade union, which they had formed. Following an investigation, the Registrar concluded that the said trade union was illegally established and that these six employees were already dismissed prior to their claim to be office bearers of that union.
- 1167.** The Government further stated that the application for registration of the trade union presented to the Registrar was rejected on 10 March 2004 on the ground that no union can be formed in Liaquat National Hospital. The Government explained that the IRO of 1969 was not applicable to the hospital and therefore no trade union could be established in the hospital. The IRO of 1969 was repealed by the IRO of 2002. In accordance with section 1(4)(e), an establishment or institution maintained for the treatment or care of sick, infirm, destitute and mentally unfit persons running on a commercial basis were covered by the IRO of 2002. In order for a trade union to be registered, the legislation required all its members to be actually employed in the establishment or industry with which the trade union is connected. In the present case, the workers were not employees of the Liaquat National Hospital and therefore could not establish a union. Finally, the hospital administration enclosed in its communication to the Government regarding this case a legal opinion of the Law Department, Sindh, according to which the IRO of 2002 was not applicable to the Liaquat National Hospital, as it has not been proven to be a commercial establishment.

C. The Committee's conclusions

- 1168.** *The Committee notes that the complainant in this case has alleged systematic refusal to register the Liaquat National Hospital Workers' Union (LNHWU), dismissals and harassment of trade union members.*
- 1169.** *As concerns the registration of the LNHWU, the Committee notes from the complainant's and the Government's communications that registration has been denied because the Liaquat National Hospital is a charitable institution and as such is excluded from the scope of the IRO of 2002. While the complainant raises certain arguments against the determination of this hospital as a charitable organization, the Committee does not consider it to be within its mandate to draw any conclusions as to the commercial nature of the hospital. Nevertheless, the Committee would recall that, when examining the scope of the IRO of 2002 in the context of a previous case (Case No. 2229), it emphasized that the guarantee of the right of association should apply to all workers, with only the possible exception of the members of the police and armed forces and noted a number of excessive restrictions in the IRO in this regard, including as regards charitable organizations [see 330th Report, para. 941]. It regrets that the Government has not yet amended the IRO and, referring to its earlier recommendations, once again requests the Government to amend sections 1(4) and 2(XVII) of the IRO in line with Convention Nos. 87 and 98 ratified by Pakistan so as to ensure the right to organize for all workers without distinction, including those working in charitable organizations. It requests the Government to keep it informed of the measures taken or envisaged in this respect. The Committee reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.*

- 1170.** *As concerns the alleged dismissals of trade union members, the Committee notes that, on the one hand, the complainant referred to about 23 dismissed office bearers of the union, on the other, it provided a list of 18 dismissed workers and eight workers suspended pending inquiry and then stated that, in total, about 75 employees had been forced to resign because of their LNHU membership. From the texts of the court decisions attached to the Government's communication, the Committee notes five cases of dismissals. Mr. Mohammad Shaukat Hussain and Mr. Alleem-ur Rehman were both dismissed for having slept during duty hours. A Show Cause Notice was issued in their respect on 5 April 2002. As for Mr. Muhammad Rafique, Mr. Shahid Iqbal Ahmed and Mr. Iftikhar Ahmed, they were dismissed for having instigated other employees to go on strike in order to pressure the management of the hospital to withdraw the Show Cause Notice issued against the abovementioned employees. The Government further stated that the strikers cut off the main electricity and by their actions, put at risk patients of the hospital. The Committee further notes that the complainant submitted that Mr. Iftikhar Ahmed did not participate in the events as on that day he was getting married outside Karachi. From the court cases submitted by the Government, the Committee understands that the applications of these five workers were rejected by the court as the provisions of the IRO of 1969 were not applicable to the Liaquat National Hospital and, consequently, the court had no jurisdiction to try the applications against the hospital and the applicants were not entitled to any relief.*
- 1171.** *While considering that the right to strike may be restricted or prohibited in the hospital sector, which is considered to be an essential service [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 526 and 544], the Committee notes that the circumstances of this case appear not to be limited to the issue of strikes in essential services and indeed the circumstances surrounding the supposed strike and its relation to the dismissals were never examined by the courts. The Committee notes from the judgement provided that the first two persons were dismissed for sleeping during their duty hours. In addition, from the judgements of 31 March 2005 submitted by the complainant, the Committee notes that Mr. Mohammad Shaukat Hussain, Mr. Shahid Iqbal Ahmed and Mr. Iftikhar Ahmed were acquitted of criminal charges brought against them for participation in a strike of 16 April 2002, as the judge concluded that their participation in the strike was not proved. On the other hand, all their appeals to the courts to contest their dismissals were rejected due to a lack of jurisdiction in view of the non-application of the IRO of 1969 to the Liaquat National Hospital. The Committee understands that this situation has not changed with the entry into force of the IRO of 2002, as the new IRO specifically excludes from its scope charitable institutions.*
- 1172.** *The Committee considers that the denial of the right to challenge the fairness of a dismissal and its eventual anti-union nature before a court is inconsistent with Convention No. 98 ratified by Pakistan. Respect for the principles of freedom of association clearly requires that dismissed workers should have access to means of redress to ensure that effective protection against acts of anti-union discrimination is guaranteed. In addition, the Committee has recalled to need to ensure by specific provisions – accompanied by civil remedies and penal sanctions – the protection of workers against acts of anti-union discrimination at the hands of employers [see **Digest**, op. cit., para. 746]. The Committee therefore requests the Government to take the necessary measures, including the amendment of the legislation so as to ensure that workers at the Liaquat National Hospital may challenge their dismissals and suspensions before independent courts or tribunals. Secondly, given that no information was provided by the Government on the other alleged cases of dismissal, and that the court cases in respect of the five dismissed union members were inconclusive given that the court determined that it had no jurisdiction to consider the reasons for these dismissals, the Committee requests the Government rapidly to investigate all 18 cases of dismissal and eight cases of suspension at the hospital referred to by the complainant. If the dismissals and suspensions of the workers resulted from the*

exercise of legitimate trade union activities, the Committee requests the Government to ensure that those workers are reinstated in their posts with back pay and, if reinstatement is not possible, that they are paid adequate compensation so as to constitute sufficiently dissuasive sanctions. The Committee requests the Government to keep it informed of the outcome of these investigations.

- 1173.** *As for the allegations of pressuring, harassment and moral and physical abuse of trade union members, the Committee notes that the Government has provided no observations in this respect. In view of the seriousness of the allegations, the Committee requests the Government to conduct an independent inquiry into the allegations of torture and harassment of trade union members ordered by the management of the Liaquat National Hospital, as well as into the allegations of abduction, beating and threats carried out against the LNHUWU General Secretary, Mr. Shahid Iqbal Ahmed, by the police. If the allegations are confirmed, the Committee requests the Government to punish the guilty parties and take all necessary measures in order to prevent the repetition of similar events. The Committee requests the Government to keep it informed in this respect.*

The Committee's recommendations

- 1174.** *In the light of its forgoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *The Committee again requests the Government to amend sections 1(4) and 2(XVII) of the IRO of 2002 in line with Conventions Nos. 87 and 98 ratified by Pakistan so as to ensure that all workers without distinction whatsoever, including those working in charitable institutions, may freely establish organizations of their own choosing. The Committee reminds the Government that it may avail itself of the technical assistance of the Office, it so desires.*
- (b) *The Committee requests the Government to take the necessary measures, including the amendment of the legislation, so as to ensure that workers at the Liaquat National Hospital may challenge their dismissals and suspensions before independent courts or tribunals. The Committee further requests the Government rapidly to investigate all 18 cases of dismissals and eight cases of suspension at the hospital and, if the dismissals and suspensions of workers resulted from their trade union activities, the Committee requests the Government to ensure that those workers are reinstated in their posts with back pay and, if reinstatement is not possible, that they are paid adequate compensation so as to constitute sufficiently dissuasive sanctions.*
- (c) *As for the allegations of pressuring, harassment and moral and physical abuse of trade union members, in view of the seriousness of the allegations, the Committee requests the Government to conduct an independent inquiry into the allegations of torture and harassment against trade union members ordered by the management of the Liaquat National Hospital, as well as into the allegations of abduction, beating and threats carried out against the LNHUWU General Secretary, Mr. Shahid Iqbal Ahmed, by the police and, if the allegations are confirmed, to punish the guilty parties and take all necessary measures in order to prevent the repetition of similar events.*

(d) The Committee requests the Government to keep it informed of the measures taken or envisaged on the abovementioned matters.

Annex

List of dismissed and suspended employees

(5 May 2002)

Liaquat National Hospital

No.	Name	Son of	Designation
Dismissed/terminated			
1	Muhammad Sadiq	Abdullah Khan	Staff nurse
2	Syed Rafiq	Haji Qazi Khan	Nursing orderly
3	Aleem-Ur-Rehman	Allemullah Khan	Staff nurse
4	Sabir Aziz	Aziz Fazal	Staff nurse
5	Shahid Iqbal Ahmed	S. Kafil Ahmed	Staff nurse
6	Akhter Hussain	Ashfaq Hussain	Staff nurse
7	Shoukat Hussain	Muhammad Hussain	Staff nurse
8	Aftab Alam Bacha	Ghulan Mursaleen	Staff nurse
9	Sher Rehman	Habib-Ur-Rehman	Staff nurse
10	Iftikhar Ahmed	Abdul Razzaq	Staff nurse
11	Shafi-Ullah Durran	Kifayatullah	Staff nurse
12	Mohammad Imran	Mohammad Khan	Staff nurse
13	Zahir Rehman	Sardar Akbar	Ward boy
14	Ajaz Ahmed Berni	Nisar A. Khan	Ward boy
15	Munney Khan	Mohd Chotey Khan	Clerk
16	Mohammad Rafique	Perva	Clerk
17	Liaquat Ali Khan	Sher Bahadur	Pharmacist
18	Shahid Hussain	Kishta Bachs	Staff nurse
Suspended pending inquiry			
19	Iftikhar Noor	Noor Muhammad	Staff nurse
20	Muhammad Naeem	Ghulam Sarwar	Staff nurse
21	Mohammad Rahim	Aziz-Ur-Rehman	Staff nurse
22	Ghousul Hassam	Ahmed Bacha	Staff nurse
23	Syed Farman Ali	Syed Sultan Ali	Staff nurse
24	Serb Ali Kan	Sher Alam Khan	Staff nurse
25	Dilnawaz Khan	Gulnawaz Kahn	Staff nurse
26	Mohammad Tahir	Syed Qamar	Staff nurse

CASE NO. 2342

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

**Complaint against the Government of Panama
presented by
the National Federation of Associations and Organizations
of Public Servants (FENASEP)**

Allegations: The National Federation of Associations and Organizations of Public Servants (FENASEP) alleges the unjustified and illegal dismissal of a member of the Executive Committee of the Association of Public Servants employed by the Ministry of Education and of 25 trade union officials of the Association of Employees of the Ministry of Youth, Women, Children and the Family

- 1175.** This complaint is contained in communications from the National Federation of Associations and Organizations of Public Servants (FENASEP) dated 6 February 2004.
- 1176.** The Government sent its observations in communications dated 27 December 2004 and 20 May 2005.
- 1177.** Panama 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

- 1178.** In its communications of 6 February 2004, the National Federation of Associations and Organizations of Public Servants (FENASEP) alleges the unjustified and illegal dismissal in August 1999 of 25 trade union officials of the Association of Employees of the Ministry of Youth, Women, Children and the Family.
- 1179.** FENASEP also alleges in connection with this the unjustified and illegal dismissal on 20 January 2004 of Mr. Pedro Alain, a member of the Executive Committee of the Association of Public Servants employed by the Ministry of Education.

B. The Government's reply

- 1180.** In its communications of 27 December 2004 and 20 May 2005, the Government expresses its willingness to resolve the issues raised in this case (a situation inherited from the previous administration). To that end a bipartite commission was set up by the Government and FENASEP. As a result of the dialogue and consultations carried out by the commission, most of the dismissed employees of the Ministry of Youth, Women, Children and the Family have been reinstated and will shortly be resuming their posts. The Government states, however, that as regards the wage arrears of the dismissed workers, Panamanian law requires that these be paid only in cases where such rights are specifically recognized under a prior law. In any case, the Government maintains that it is envisaged

that pending issues will be resolved through negotiations in the bipartite commission. The Government emphasizes its concern to resolve these issues as far as it can, and draws attention to the serious economic difficulties facing the country and the meagre budget available to institutions.

C. The Committee's conclusions

- 1181.** *The Committee notes that this case concerns the dismissal in August 1999 of 25 trade union officials of the Association of Employees of the Ministry of Youth, Women, Children and the Family, including the union's President and General Secretary, as well as the dismissal on 20 January 2004 of Mr. Pedro Alain, a member of the Executive Committee of the Association of Public Servants employed by the Ministry of Education. These allegations were made by the National Federation of Associations and Organizations of Public Servants (FENASEP).*
- 1182.** *The Committee notes that according to the Government, a bipartite commission has been set up by the Government and FENASEP with a view to resolving the issues arising in this case, and notes with interest that, as a result of this, it has been possible to reinstate most of the employees of the Ministry of Youth, Women, Children and the Family. The Committee notes also that according to the Government, wage arrears of dismissed workers can be paid only where a specific provision in law requires this. The Committee lastly notes the Government's statements to the effect that it will continue with negotiations on issues still pending within the bipartite commission.*
- 1183.** *The Committee emphasizes the fact that the workers' reinstatement was obtained thanks to a bipartite commission. Nevertheless the Committee observes that the Government has not challenged the claim that the dismissals were unjustified, the Committee requests the Government to take the necessary measures to ensure that all the union officials of the Association of Employees of the Ministry of Youth, Women, Children and the Family are reinstated in their posts, and to keep it informed of developments and of any agreements reached by the bipartite commission.*
- 1184.** *As regards the payment of wage arrears, the Committee notes that according to the Government, current legislation accords this entitlement only to persons who enjoy that right under the terms of a prior law, and that it is envisaged that this issue should be resolved through negotiation. The Committee hopes that this issue will be resolved without delay in the framework of the negotiations that are taking place in the bipartite commission.*
- 1185.** *As regards the alleged dismissal on 20 January 2004 of Mr. Pedro Alain, a member of the Executive Committee of the Association of Public Servants of the Ministry of Education, the Committee regrets that the Government has not sent its own observations, requests the Government promptly to conduct an investigation and, if the dismissal is found to have been anti-union in nature, to reinstate Mr. Alain without delay. The Committee requests the Government to keep it informed of developments in this regard.*

The Committee's recommendations

- 1186.** *In view of the preceding conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *As regards the dismissal in August 1999 of 25 union officials of the Association of Employees of the Ministry of Youth, Women, Children and the Family, the Committee requests the Government to take the necessary*

measures to ensure that all the union officials in question are reinstated in their posts, and to keep it informed of developments and of any agreements reached by the bipartite commission.

- (b) *As regards the payment of wage arrears of the union officials in question, the Committee hopes that this issue will be resolved without delay in the framework of the negotiations that are taking place in the bipartite commission.*
- (c) *As regards the dismissal on 20 January 2004 of Mr. Pedro Alain, a member of the Executive Committee of the Association of Public Servants of the Ministry of Education, the Committee requests the Government promptly to conduct an investigation and, if the dismissal is found to have been anti-union in nature, to reinstate Mr. Alain without delay. The Committee requests the Government to keep it informed of developments in this regard.*

CASE NO. 2248

INTERIM REPORT

**Complaint against the Government of Peru
presented by
the General Confederation of Workers of Peru (CGTP)**

Allegations: The General Confederation of Workers of Peru (CGTP) alleges the dismissal of several members of the Executive Committee of the recently formed trade union of workers at Petrotech Peruana S.A.; harassment of the union leader Víctor Alejandro Valdivia Castilla; withholding of union leave and anti-union transfers of union leaders in contravention of the collective agreement at the Santa Luisa Mining Company S.A.; collective dismissal of workers with the intention of undermining the trade union at Corporación Aceros Arequipa S.A. and their replacement with contract workers unable to join trade unions or engage in collective bargaining, and the anti-union dismissal of the union leader Mr. Ricardo Jorge Quispe Caso from the Southern Peru Copper Corporation

1187. This complaint is contained in communications dated 28 January and 19 August 2003, 25 June, 2 July, 25 August and 21 December 2004, 28 May and 5 September 2005 from the General Confederation of Workers of Peru (CGTP).

1188. The Government sent its observations on 25 November 2003, 19 October 2004 and 7 February, 3 March, 27 April, 26 July, 4 and 8 August 2005.

1189. Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

1190. In its communications dated 28 January and 19 August 2003, 25 June, 2 July, 25 August and 21 December 2004, 28 May and 5 September 2005, the General Confederation of Workers of Peru (CGTP) presents the following allegations:

- (a) On 1 December 2002, workers from Petrotech Peruana S.A. formed the company trade union and proceeded to appoint the Executive Committee. On 2 December a request was lodged before the Regional Labour and Employment Promotion Directorate in Talara for union registration, which was granted on 4 December. According to the complainant, from 4 December, the company sent a series of letters of dismissal to various members of the Executive Committee, in contravention of trade union immunity (*fuero sindical*). Indeed, a notice of dismissal was sent by the company to the General Secretary, Mr. Leónidas Campos Barranzuela, which took effect on 10 December; on 9 December the company requested the annulment of union registration and sent letters of dismissal to further workers; and on 27 December it sent a letter of dismissal to the Deputy General Secretary, Mr. Julio Purizaca Cornejo. According to the complainant, the trade union currently has only 24 members and, without the minimum necessary membership, is now barely viable.
- (b) Incidents of harassment of Mr. Víctor Alejandro Valdivia Castilla, the Press and Propaganda Secretary of the Trade Union of Ancash Regional Government Workers, by the President of the Ancash region, who lodged a complaint of alleged aggravated defamation against Mr. Valdivia Castilla for having made public statements concerning irregularities in the regional administration.
- (c) At the Santa Luisa Mining Company S.A., the withholding of union leave established in the collective agreement for attendance at events organized by the higher level body or federation concerned with a particular branch of activity, as well as the leave granted by the negotiating committee responsible for holding talks on the union's list of requests and the anti-union transfer of trade union leaders from their main productive work to camp cleaning duties. Legal proceedings have been brought by the trade union leaders against this transfer.
- (d) At Corporación Aceras Arequipa S.A., more than 300 members of permanent staff have been dismissed since 1990 and replaced by contract workers who do not enjoy the same benefits, with the aim of cutting back the numbers of workers who are members of the trade union.
- (e) At Embotelladora Latinoamericana S.A., recently acquired by Corporación Lindley S.A., 132 trade union members, including six union leaders, have been collectively dismissed with the aim, according to the complainant, of undermining the trade union.
- (f) At the Southern Peru Copper Corporation, Mr. Ricardo José Quispe Caso, Toquepala area delegate for the Instrumentation, Electricity and Water Systems Section of the Toquepala Mineworkers' Union at the Southern Peru Copper Corporation, was dismissed and the company is trying to expel him from his residence following allegations that he had been involved in an assault on a worker who did not take part in a strike held on 9 September 2004. In addition, the complainant alleges the widespread use of contract personnel with fewer benefits than permanent employees and without the right to form trade unions or engage in collective bargaining.

B. The Government's reply

- 1191.** In its communications dated 25 November 2003, 19 October 2004 and 7 February, 3 March, 27 April, 26 July, 4 and 8 August 2005, the Government sends the following observations.
- 1192.** With regard to the allegation concerning the dismissal of various members of the Executive Committee of the Petrotech Peruana S.A. trade union as a result of the formation of the union, the Government states that Peruvian law recognizes the right of workers to form trade unions in section 1 of article 28 of the Political Constitution. At the same time, this article recognizes workers' right to trade union immunity (*fuero sindical*). Article 4 of the Constitution states that "The State, the employers and representatives of either shall refrain from any actions tending in any way to constrain, restrict or diminish the right of workers to form unions." The Government states that in this case, having been dismissed, the union leaders and trade union members have the right to bring legal proceedings before the courts and demand to be reinstated in accordance with the provisions of subsection a) of article 29 of Supreme Decree No. 003-97-TR, which stipulates that any dismissal is null and void if carried out for reasons of trade union membership or involvement in trade union activities. Under such circumstances, the worker has the right to be reinstated unless he or she opts for compensation, as also stipulated in the Decree, equivalent to one-and-a-half time's normal pay for every complete year of service. In this regard, the Government concludes that, given that the current legal framework establishes the necessary guarantees of protection of collective rights, workers are able to bring their cases before the courts, with the result that Peru has not violated international labour Conventions.
- 1193.** With regard to the allegations concerning the Santa Luisa Mining Company S.A. regarding the refusal to allow union leave and the anti-union transfer of union leaders, the Government states that, in the light of the information obtained by the company, the National Labour Relations Directorate issued Report No. 017-2005-MTPE/OAL-OAI, dated 7 February 2005. According to this report, there is a complete lack of agreement between the company and the trade union on the question of union leave to attend higher level events. The company confirms this information. With regard to the transfer of trade union leaders Oscar Falcón Mora (General Secretary) and Hernández Ñaupari Leyva (Legal Defence Secretary) of the Mining Workers' Union of the Santa Luisa Mining Company of Hunzalá, this is, according to the report, part of a new programme of job rotation applicable to all personnel in order to raise working, safety and health standards at the mine without affecting pay or necessitating relocation to other company premises; the company denies that they are carrying out cleaning duties. The Government states furthermore that the new work rotation regime does not affect the ability to exercise trade union functions and it does not imply, according to the company, any negative effect from an economic or labour conditions point of view. With regard to the legal proceedings brought by the trade union leaders, the Government states that, according to Supreme Court, Case No. 183402-2004-00314 is currently being considered, having already been heard on 8 February 2005. According to the report, two other cases brought by the trade union against the company are also being considered. The Government states that no complaint concerning the allegations of transfer was brought before the Labour Inspector.
- 1194.** With regard to the allegations made concerning Embotelladora Latinoamericana S.A., the Government states that, on 28 May 2004, the company requested the collective termination on structural grounds of the employment contracts of 233 workers in order to move towards a decentralized trading model. The Ministry of Labour and Employment Promotion (MTPE) held a series of independent meetings in order to settle the dispute but failed to reach an agreement with respect to 68 workers. The MTPE, through the Directorate for Dispute Prevention and Resolution, therefore issued Directorial Resolution No. 096-2004-DRTPELC-DPSC, dated 2 September 2004, whereby it ruled against the

company's request for collective layoffs of workers on structural grounds, considering such a measure to be unjustified. This decision was confirmed by the Regional Labour Directorate through Directorial Resolution No. 015-2004-MTPE/DVMT/DRTPELC, dated 24 September 2004, and by the National Labour Relations Directorate on 14 October 2004.

- 1195.** The Government emphasizes that, although the collective redundancy initially covered 233 workers, 133 took retirement and 32 were relocated between 25 May and 12 July 2004, with only 68 surplus personnel members remaining. The Government adds that included among those employees made redundant were three union workers covered by trade union immunity whose posts had been eliminated as a result of decentralization. The posts in question were two service lift operators and one door-to-door salesperson.
- 1196.** With regard to the dismissal of Mr. Ricardo José Quispe Caso, Toquepala area delegate for the Instrumentation, Electricity and Water Systems Section of the Toquepala Mineworkers' Union at the Southern Peru Copper Corporation, as a result of his involvement in an assault on a worker who did not participate in a strike held between 31 August and 9 September 2004, the Government states that, on 31 August, members of the Toquepala Mineworkers' Union began an indefinite strike, declared illegal by the Tacna Administrative Authorities by Directorial Order No. 010-2004-DPSCI-TAC, dated 9 September 2004. The Government adds that the company informed Mr. Quispe Caso by letter of the initiation of investigative procedures against him, in accordance with article 49 of the company's Internal Labour Regulations, as a result of the complaint lodged on 9 September 2004 with the Peruvian National Police in Toquepala by Julio Washington Ticona Nieto following the physical and verbal assault he suffered at the hands of Mr. Quispe Caso, who also caused damage to Southern Peru property. The Government adds that Mr. Quispe Caso duly prepared his defence and that on 11 October 2004, the company proceeded to dismiss him for gross misconduct, acts of violence, insult and offence. On 3 November, Mr Quispe Caso lodged a demand with Labour Tribunal No. 19 of the Superior Court in Lima for the dismissal to be declared null and void, alleging that it stemmed from his trade union activities. This case is currently at the stage of presenting evidence.
- 1197.** Regarding the allegations concerning the widespread use of contract personnel with fewer benefits than permanent employees, and without the right to form trade unions or engage in collective bargaining, the Government states that employment intermediation or subcontracting of the workforce (whereby the company receiving the workforce has no link with the workers) can only be used for short-term, complementary and specialist services. Short-term services involve the supply of staff to meet various intermittent needs connected with the activities of the workplace or to temporarily replace a permanent company employee. Complementary services are those involving the supply of personnel to engage in auxiliary, secondary services unconnected with the main activities of the user enterprise, and specialized services involve any activities that require a high degree of scientific or technical knowledge, or qualifications. As stipulated by the law, employment intermediation or subcontracting is not appropriate for permanent work in the company's main sphere of activity.
- 1198.** The Government adds that, in the case of the subcontracting of services, one company engages another company, the latter using its own resources and organizational structure to provide an integrated service forming part of the production process of the former. According to the Government, the law does not regulate or prohibit outsourcing of services, being restricted to regulating the conditions for legal employment intermediation. The Labour Regulations incorporate the term "outsourcing" as a means of keeping it outside the scope of application of the law. Hence, in accordance with article 4 of the Regulations, external outsourcing does not meet the conditions for employment intermediation if the intention is for a third party to assume responsibility for an integral

part of a company's production process, as is also the case for services provided by contractors and subcontractors, provided that they take sole risk and responsibility for the tasks contracted to them, that they have at their disposal their own financial, technical and material resources, and that their workers are answerable exclusively to them. The Government states that any incidence of outsourcing with the principal aim of supplying personnel fulfils the conditions for disguised employment intermediation, which is considered illegal.

C. The Committee's conclusions

- 1199.** *The Committee observes that this case concerns: (a) the dismissal of several members of the Executive Committee of the Petrotech Peruana S.A. trade union immediately following the formation of the union; (b) harassment of Mr. Víctor Alejandro Valdivia Castilla, leader of the Trade Union of Ancash Regional Government Workers, following accusations made by him of irregularities in the regional administration; (c) the refusal to allow union leave, and transfer of trade union leaders at the Santa Luisa Mining Company; (d) the dismissal of more than 300 members of the permanent workforce of Corporación Aceros Arequipa S.A. and their replacement with contract workers enjoying fewer benefits, with the intention of undermining the trade union; (e) the dismissal of 132 trade union members and the use of contract workers enjoying fewer benefits than the permanent workforce at Embotelladora Lationamericana S.A.; (f) the dismissal of Mr. Ricardo José Quispe Caso, a member of the Toquepala Mineworkers' Union, as a result of his alleged involvement in an assault on another worker and the use of contract workers without the right to form trade unions or engage in collective bargaining.*
- 1200.** *With regard to the allegations concerning the dismissal of several members of the Executive Committee of the Petrotech Peruana S.A. trade union immediately following the formation of the trade union, the Committee notes that, according to the complainant organization, the dismissal of several members of the Executive Committee meant that the union membership was reduced to 24, leaving it barely viable. The Committee notes the Government's statement to the effect that Peruvian legislation guarantees the protection of workers against precisely this type of scenario, with those affected given the opportunity to bring the appropriate legal proceedings, and that for this reason, Peru cannot be considered to have committed any violation of the Conventions on freedom of association. The Committee recalls 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 of decisions and principles of the Freedom of Association Committee**, 4th edition, para. 703]. Thus, the Committee, observing that the Government does not deny that the alleged facts could constitute violation by the company of the right to freedom of association, requests it to take steps to conduct an investigation and, if it is established that the dismissals occurred as a result of the formation of the trade union, immediately to reinstate the dismissed union leaders with payment of any wages owed to them and, if reinstatement is not possible, to pay them adequate compensation taking account of the damage caused and the need to avoid the repetition of such acts in the future. The Committee considers that it would be appropriate that the Government obtain from the company, through the employers' organization concerned, their comments with regard to this point, in particular, whether they were informed that those dismissed were trade union leaders and members.*
- 1201.** *With regard to the allegations concerning the withholding of union leave established in the collective agreement for attendance at events organized by the higher level body or federation concerned with a particular branch of activity, as well as the leave granted by the committee responsible for holding talks on the union's list of claims at the Santa Luisa Mining Company S.A., the Committee takes note of the Government's statement that the National Labour Relations Directorate issued Report No. 017-2005-MTPE/OAJ-OAI,*

dated 7 February 2005, on the basis of the information provided by the company, and that according to the report, there is a complete lack of agreement between the company and the trade union on the question of union leave to attend higher level events; the company confirms this information.

- 1202.** *With regard to the anti-union transfer of the union leaders Falcón Mora and Hernández Ñaupari Leyva from their main productive work to company camp cleaning duties, the Committee notes that, according to the complainant organization, the transferred workers brought legal proceedings against this measure. At the same time, the Committee notes that according to the Government, the report produced by the Ministry of Labour and Employment Promotion shows that the transfer was carried out as a result of a new programme of job rotation applicable to all personnel in order to raise working, safety and health standards at the mine without affecting pay, the exercising of trade union functions or necessitating relocation to other premises, and that, according to the Supreme Court of Justice report, the legal proceedings brought by the union leaders are currently being considered. In addition, the new work rotation regime has not given rise to complaints before the labour inspectorate and, according to the company, it is not sure that the workers are assigned to cleaning duties, nor that this regime negatively affected their economic and labour conditions. The Committee requests the Government to keep it informed of the outcome of these proceedings.*
- 1203.** *With regard to the allegations concerning the collective dismissal of 132 trade union members, including six union leaders, at Embotelladora Lationamericana, recently acquired by Corporación Lindley S.A., with the aim of undermining the trade union, the Committee takes note of the Government's statement to the effect that, on 28 May 2004, the company requested the collective termination of the employment contracts of 233 workers in order to modify its business structure, and that the Ministry of Labour and Employment Promotion (MTPE), through the Directorate for Dispute Prevention and Resolution, issued Directorial Resolution No. 096-2004-DRTPELC-DPSC, dated 2 September 2004, whereby it rejected the company's request for collective layoffs on structural grounds, considering such a measure as unjustified, a decision that was confirmed by the Regional Labour Directorate through Directorial Resolution No. 015-2004-MTPE/DVMT/DRTPELC, dated 24 September 2004, and by the National Labour Relations Directorate on 14 October 2004. The Committee notes that the Government emphasizes that, although the collective redundancy initially covered 233 workers, a total of 133 took retirement and 32 were relocated and continued working for the company between 25 May and 12 July 2004, with only 68 surplus personnel members remaining, three of whom were union workers covered by trade union immunity, whose posts had, according to the Government, been eliminated as a result of decentralization.*
- 1204.** *The Committee observes that discrepancies exist with regard to the number of trade union members affected. The Committee concludes from the allegations and the Government's observations that, of the 233 workers whose collective redundancy was not authorized by the MTPE, 133 opted for voluntary retirement according to the Government, whilst, according to the allegations, there were in fact 132 redundancies, including six trade union members. According to the Government, of the remaining workers, 32 were relocated, with 68, including three trade union leaders, considered surplus to requirements.*
- 1205.** *The Committee requests the Government to provide clarification on the scope of the term "surplus" and on whether, despite the ruling against the request for collective redundancy by the Ministry for Labour and Employment Promotion on the grounds that it was unjustified, the company proceeded to impose redundancies. The Committee also requests clarification on the total number of workers opting for voluntary retirement, the total number of workers affected by collective redundancy, including trade union leaders, and*

in the case of these leaders, clarification as to whether a request for the lifting of trade union immunity was lodged prior to dismissal.

- 1206.** *With regard to the allegations concerning the dismissal of Mr. Ricardo José Quispe Caso, Toquepala area delegate for the Instrumentation, Electricity and Water Systems Section of the Toquepala Mineworkers' Union at the Southern Peru Copper Corporation, on the grounds that he was involved in an assault on a worker who did not take part in a strike held between 31 August and 9 September 2004 (on the basis of a complaint made by the worker in question not the company), the Committee notes that, according to the Government, the legal proceedings brought by Mr. Quispe Caso seeking to have the dismissal declared null and void are currently at the stage of presentation of evidence. The Committee requests the Government to keep it informed of the legal decision that is handed down.*
- 1207.** *With regard to the allegations concerning widespread use of contract personnel with fewer benefits than permanent employees and without the right to form trade unions or engage in collective bargaining, the Committee takes note of the explanation provided by the Government concerning subcontracting of labour and services. The Committee notes that subcontracting of labour is not appropriate for the company's main activity, since this is illegal, and that when it comes to the subcontracting of services, service providers must take responsibility for all questions relating to protection and risk-management of the workers under their supervision. Under those circumstances, the Committee requests the Government to take steps to conduct an investigation in order to establish whether the legislation is being complied with at Southern Peru Copper Corporation, at the same time ensuring that the principles of freedom of association are being fully applied at the company.*
- 1208.** *Concerning the dismissal of more than 300 members of the permanent workforce of Corporación Aceros Arequipa S.A. and their replacement by contract workers enjoying fewer benefits, with the intention of undermining the trade union, the Committee notes the statement of the company to the effect that it would duly respect the percentage of recruitment through employment agencies as provided by legislation and the Government's indication that it will visit the company in its quality as employment agent. The Committee requests the Government to communicate the results of this visit by the authorities and to provide its observations on the alleged dismissal of over 300 workers.*
- 1209.** *The Committee notes with regret that the Government does not supply observations relating to the allegations of harassment of Mr. Víctor Alejandro Valdivia Castilla, the Press and Propaganda Secretary of the Trade Union of Ancash Regional Government Workers by the President of the Ancash region and requests it to send its observations in this respect.*

The Committee's recommendations

- 1210.** *In light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) With regard to the allegations concerning the dismissal of several members of the Executive Committee of the Petrotech Peruana S.A. trade union (including the General Secretary and Deputy General Secretary) immediately following the formation of the trade union, the Committee requests the Government to take steps to conduct an investigation and, if it is established that the dismissals occurred as a result of the formation of the trade union, immediately to reinstate the dismissed union leaders with*

payment of any wages owed to them and, if reinstatement is not possible, to ensure they are paid adequate compensation taking account of the damage caused and the need to avoid the repetition of such acts in the future. The Committee considers that it would be appropriate for the Government to obtain, from the company through the employers' organization concerned, their comments with regard to this point, in particular, whether they were informed that those dismissed were trade union leaders and members.

- (b) With regard to the anti-union transfer of trade union leaders from their main productive work to camp cleaning duties at the Santa Luisa Mining Company S.A., the Committee requests the Government to keep it informed of the legal proceedings that have been initiated.*
- (c) With regard to the allegations concerning the collective dismissal of 132 trade union members, including six union leaders, at Embotelladora Lationamericana S.A., the Committee requests the Government to provide clarification on the scope of the term "surplus" and on whether, despite the ruling by the Ministry of Labour and Employment Promotion against the company's request for collective layoffs of workers on structural grounds which was considered unjustified, the company proceeded to impose redundancies. The Committee also requests clarification on the total number of workers opting for voluntary retirement, the total number of workers affected by collective redundancy, including trade union leaders, and in the case of these leaders, clarification as to whether a request for the lifting of trade union immunity was lodged prior to dismissal.*
- (d) With regard to the allegations concerning the dismissal of Mr. Ricardo José Quispe Caso, Toquepala area delegate for the Instrumentation, Electricity and Water Systems Section of the Toquepala Mineworkers' Union at the Southern Peru Copper Corporation, on the grounds that he was involved in an assault on a worker who did not take part in a strike held between 31 August and 9 September 2004 (on the basis of a complaint made by the worker in question and not the company), the Committee requests the Government to keep it informed of any legal decision handed down.*
- (e) With regard to the allegations concerning the widespread use of contract personnel enjoying fewer benefits than permanent employees and without the right to form trade unions or engage in collective bargaining at Southern Peru Copper Corporation, the Committee requests the Government to take steps to conduct an investigation in order to establish whether the legislation is being complied with at Southern Peru Copper Corporation, at the same time ensuring that the principles of freedom of association are being fully applied at the company.*
- (f) With regard to the dismissal of more than 300 members of the permanent workforce of Corporación Aceros Arequipa S.A. and their replacement with contract workers enjoying fewer benefits, with the intention of undermining the trade union, the Committee requests the Government to communicate the result of the visit by the authorities of the employment agency and to provide its observations on the dismissal of more than 300 workers.*

- (g) *The Committee requests the Government to provide its observations without delay concerning the allegation of harassment of Mr. Víctor Alejandro Valdivia Castilla, the Press and Propaganda Secretary of the Trade Union of Ancash Regional Government Workers, by the President of the Ancash region.*

CASE NO. 2375

DEFINITIVE REPORT

Complaint against the Government of Peru presented by

- **the International Organisation of Employers (IOE)**
- **the National Confederation of Private Employers' Institutions (CONFIEP) and**
- **the Peruvian Chamber of Construction (CAPECO)**

Allegations: The complainant organizations allege that the construction sector was obliged by legislation to negotiate according to branch of activity, thereby preventing the parties from being able freely to determine the level of negotiation in violation of Convention No. 98

- 1211.** The complaint is contained in a communication dated 30 July 2004 from the International Organisation of Employers (IOE), submitted on behalf of the National Confederation of Private Employers' Institutions (CONFIEP) and the Peruvian Chamber of Construction (CAPECO).
- 1212.** In view of the failure of the Government to send its observations, despite the time which had elapsed since the submission of the complaint, the Committee made an urgent appeal at its May-June 2005 meeting [see 337th Report, para. 10, approved by the Governing Body at its 293rd Session (June 2005)], indicating that, in accordance with the procedural rules in force, it would present a report on the substance of the case at its next meeting if the Government's observations had not been received by that date. Since then, no reply has been received from the Government.
- 1213.** Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 1214.** In its communication of 30 July 2004, the International Organisation of Employers (IOE), the National Confederation of Private Employers' Institutions (CONFIEP) and the Peruvian Chamber of Construction (CAPECO) submitted a complaint alleging violation of the principles of freedom of association and the right to collective bargaining provided for in Convention No. 98, ratified by Peru on 13 March 1964. They allege that the Government issued legislation that obliged the civil construction sector to negotiate according to branch of activity, subsequently affecting the fundamental right to determine, freely and voluntarily, the level of negotiation between employers and workers, in opposition to that recommended by the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations.

- 1215.** As a result of the above, the complainant organizations ask the Committee on Freedom of Association to request that the Government modifies the legislation to bring it into line with the provisions of Convention No. 98 of the ILO, so that the parties involved in a collective bargaining procedure, be they employers or workers, are freely able to choose the level at which they wish to carry out said collective bargaining.
- 1216.** The complainant organizations indicate that Article 4 of Convention No. 98 comprises two basic elements: that it is the measures taken by the public authorities to encourage collective bargaining, and the voluntary character of the recourse to collective bargaining, which lead to the independence of the parties involved in the collective bargaining. In conclusion, the right of freedom or independence to set the level of collective bargaining is a fundamental freedom that the ILO, in its various declarations, has always supported.
- 1217.** Nevertheless, current legislation in Peru has established, specifically in article 46 of Act No. 27912, which entered into force on 9 January 2003, that “should there be an existing level of collective bargaining in a specific branch of activity, this shall remain in force”, a regulation that completely violates the meaning and scope of Article 4 of Convention No. 98, because it has been a legal authority that has mandatorily set pre-existing levels of collective bargaining in the construction sector and not the parties who have set the level of collective bargaining in which they should progress freely and voluntarily. The complainant organizations indicate that, on 12 December 2001, the Ministry of Labour, in violation of the regulations then in force, issued Sub-Executive Order No. 037-2001, in which, contrary to what happened in 1997, 1998, 1999 and 2000, it maintains that the return of the trade union petition for collective bargaining (at the industry level) carried out by the Peruvian Chamber of Construction (CAPECO) is invalid and orders the parties to bargain according to branch of activity.
- 1218.** In the light of this situation, according to the complainant organizations, the Peruvian Chamber of Construction (CAPECO) submitted a complaint based on violation of constitutional rights to the Constitutional Court, which, in the legal reasons for its decision of 26 March 2003 (attached), it laid down that:

... in order to prevent collective bargaining from becoming inoperable, it is reasonable and justified that the State intervene, establishing measures that favour effective collective bargaining. Therefore, they shall remove from our regulations those measures that are incompatible with an effective promotion of collective bargaining in the civil construction sector and, should this be the case, issue regulations that, without disregarding that the level of bargaining should be fixed by mutual accord, establish as the level of bargaining that of the branch of activity when this cannot be reached by said accord.

The complainants believe that this is contrary to the principle of free and voluntary collective bargaining laid down in Article 4 of Convention No. 98.

- 1219.** According to the complainant organizations, the new legal situation created is the result of a mistaken policy of supposed restitution of labour rights infringed by previous governments, when, in reality, it has shown that the various mechanisms established to impose a level of collective bargaining that has never occurred, have been unsuccessful. In effect, as shown in the collective agreements mainly resolved by the labour administrative authority, collective bargaining in the construction industry sector has never had a favourable reception by the parties involved in these processes. It should be noted that the rights and freedoms – fundamentally understood – cannot be abolished or subject to conditions that prevent them being exercised fully, as these are universal rights and freedoms that are inherent to all people independent of their socio-economic situation. Moreover, the current situation implies discrimination against the construction sector with regard to other economic branches.

B. The Committee's conclusions

- 1220.** *The Committee regrets that the Government has not sent its observations, all the more so given that, following two postponements of the case, it issued an urgent appeal to the Government at its May-June 2005 meeting requesting that it transmit its observations as a matter of urgency and warning it that, in accordance with the procedural rules in force, it would present a report on the substance of the case at its next meeting, even though the Government's observations had not been received. In view of the failure of the Government to reply, the Committee finds itself obliged to submit a report to the Governing Body.*
- 1221.** *The Committee reminds the Government that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations relating to violations of freedom of association is to promote respect for employers' and workers' organizations in law and in fact. While this procedure protects governments against unreasonable accusations, governments on their side should recognize the importance for the protection of their own good name of formulating for objective examination detailed factual replies to such detailed factual charges as may be put forward [see 1st Report, para. 31].*
- 1222.** *The Committee notes that, in the present case, the complainant organizations allege that article 46 of Act No. 27912, which entered into force on 9 January 2003, is contrary to the principle of free and voluntary collective bargaining laid down in Article 4 of Convention No. 98 and involves obligation by legislation of the level of collective bargaining according to branch of activity in the construction sector, a situation that, moreover, discriminates against the construction sector with regard to other economic branches. The Committee notes that the complainant organizations take exception to a decision by the Constitutional Court, dated 26 March 2003 (attached), relating to the above, in which the Court stated that the administrative decision of the administrative labour authority (Sub-Executive Act No. 037-2001 of 12 December 2001), resolving that the Peruvian Chamber of Construction and the Federation of Civil Construction Workers of Peru "shall carry out collective bargaining at the level of the branch of activity" did not infringe the rights of the Chamber of Construction.*
- 1223.** *The Committee notes that the relevant legal provisions relating to the present case are as follows: Decree-Act No. 25593 relating to collective labour relations, of 26 June 1992, lays down in article 45 that "If there is no previously existing collective agreement at any level of those indicated in the previous article, the parties shall decide, by common accord, the level at which they shall enter into the first agreement. Failing accord, collective bargaining shall take place at the enterprise level." "Should there be an agreement existing at any level, to enter into another at a different level, with substitutory or complementary character, the agreement of the parties is a prerequisite and this may not be established through administrative act or arbitrator's ruling. [...]." Article 46 of Act No. 27912, which entered into force on 9 January 2003, provides that "should there be an existing level of collective bargaining in a specific branch of activity, this shall remain in force".*
- 1224.** *The Committee also notes the legal reasons contained in the decision of 26 March 2003, where the obligation to promote collective bargaining by the State invoking article 28 of the Constitution, and Article 4 of Convention No. 98 of the ILO is highlighted:*

(...) labour organization for workers in the civil construction sector is very different from other sectors, highlighting: (a) contingency, as the labour relation is not permanent and lasts for the period of the labour for which the workers have been contracted or for the duration of the work; and (b) relative location, as there is no fixed and permanent place where construction work is carried out.

As a result, during his labour activity, the civil construction worker provides services for a number of different employers, rendering the possibility that he/she can rely on a trade union organization at the enterprise level unclear, and therefore practically non-viable that he/she can bargain several times a year. As a result of this, given the particular situation of the civil construction sector and in order to prevent collective bargaining from becoming inoperable, it is reasonable and justified that the State intervene, establishing measures that favour effective bargaining. Therefore, they shall remove from our regulations those measures that are incompatible with an effective promotion of collective bargaining in the civil construction sector, and, should that be the case, issue regulations that, without disregarding that the level of bargaining should be fixed by mutual accord, establish as the level of bargaining that of the branch of activity when this cannot be reached by said accord.

For this reason, the different reasoning that the State uses in this case does not constitute, in itself, any influence on the right to equality, or the right to collective bargaining, as it is based on reasonable and objective criteria. (...)

- 1225.** *The Committee recalls 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 edition, 1996, para. 781].*
- 1226.** *The Committee recalls that, with regard to the level of collective bargaining, the Collective Bargaining Recommendation, 1981 (No. 163), provides, in Paragraph 4(1), that "measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels". The Committee also recalls that, on previous occasions, it has considered that "according to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98 the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority [see **Digest**, op. cit., para. 851]. The Committee has considered that the best procedure for safeguarding the independence of the parties involved in collective bargaining is to allow them to decide, by mutual agreement, the level at which bargaining should take place. Nevertheless, it appears that, in many countries, this question is determined by a body that is independent of the parties themselves. The Committee considers that in such cases the body concerned should be truly independent [see **Digest**, op. cit., para. 855]. For its part, the Committee of Experts has stated the following:*

The principle of voluntary negotiation of collective agreements, and thus the autonomy of the bargaining partners, is the second essential element of Article 4 of Convention No. 98. The existing machinery and procedures should be designed to facilitate bargaining between the two sides of industry, leaving them free to reach their own settlement. However, several difficulties arise in this respect, and an increasing number of countries restrict this freedom to various extents. The problems most frequently encountered concern unilateral decision as to the level of bargaining; the exclusion of certain matters from the scope of bargaining; making collective agreements subject to prior approval by the administrative or budgetary authorities; observance of criteria pre-established by the law, in particular as regards wages; and the unilateral imposition of working conditions.

As was pointed out in Chapter VII, the right to bargain collectively should also be granted to federations and confederations; any restriction or prohibition in this respect hinders the development of industrial relations and, in particular, prevents organizations with insufficient means from receiving assistance from higher level organizations, which are in principle better equipped in terms of staff, funds and experience to succeed in such bargaining. On the other hand, legislation which makes it compulsory for collective bargaining to take place at a higher level (sector, branch of activity, etc.) also raises problems of compatibility with the Convention. The choice should normally be made by the partners themselves, since they are in the best position to decide the most appropriate bargaining level, including, if they so wish, by adopting a mixed system of framework agreements supplemented by local or enterprise-level agreements [see General Survey of the Reports on 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), 1994, paras. 248 and 249].

1227. *In these circumstances, the Committee requests the Government to take the necessary steps to change article 45 of Decree-Act No. 22593 and article 46 of Act No. 27912 to bring them into conformity with the international labour standards and the principles indicated, so that the level of collective bargaining is determined freely by the parties concerned. With regard to the issue of the level of collective bargaining when the parties are not in agreement, the Committee notes the arguments of the decision of the Constitutional Court of 26 March 2003, favouring in such cases collective bargaining at the level of the branch of activity in the construction sector. The Committee notes the Government's interest in promoting collective bargaining in accordance with the national Constitution and with Article 4 of Convention No. 98. However, the Committee believes that, when there is no agreement between the parties as to the level of negotiation, rather than a general decision by the judicial authorities favouring negotiation at the level of the branch of activity, it would be more in keeping with the letter and the spirit of Convention No. 98 and Recommendation No. 163 to have a system established by common accord of the parties in which in each new collective bargaining they may assert their interests and points of view in a specific way. The Committee requests the Government to invite the most representative workers' and employers' organizations to establish a mechanism to resolve conflicts relating to the level at which collective bargaining should take place.*

The Committee's recommendations

1228. *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 amend article 45 of Decree-Act No. 22593 and article 46 of Act No. 27912 to bring them into conformity with international labour standards and the principles of the ILO with regard to the level of collective bargaining.*
- (b) The Committee requests the Government to invite the most representative workers' and employers' organizations to establish a mechanism to resolve conflicts relating to the level at which collective bargaining should take place.*

CASE NO. 2386

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

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

- **the General Confederation of Workers of Peru (CGTP) and**
- **the Federation of Peruvian Light and Power Workers (FTLFP)**

Allegations: Refusal by the electricity enterprises Edelnor S.A.A. and Cam-Peru S.R.L. and by the labour authority to recognize the representativeness of the Unified Trade Union of Electricity Workers of Lima and Callao (SUTREL) for collective bargaining purposes; failure to deduct trade union dues by both enterprises; payment of a bonus by both enterprises to workers withdrawing from SUTREL; and threats by Edelnor S.A.A. to restrict the activity of the trade union section of SUTREL, with regard to distribution of the trade union newspaper, and to cancel the permanent trade union leave of SUTREL delegates

1229. The complaint was presented by the General Confederation of Workers of Peru (CGTP) in a communication dated 23 September 2004, on behalf of its affiliate, the Unified Trade Union of Electricity Workers of Lima and Callao (SUTREL). In a communication dated 29 March 2005, the Federation of Peruvian Light and Power Workers (FTLFP) also presented a complaint on behalf of SUTREL concerning the issues raised in the complaint from the CGTP.

1230. The Government sent partial information in a communication dated 27 July 2005.

1231. Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

1232. In communications dated 23 September 2004 and 29 March 2005, the General Confederation of Workers of Peru (CGTP) and the Federation of Peruvian Light and Power Workers (FTLFP), respectively, present allegations concerning the electricity enterprises Edelnor S.A.A. and Cam-Peru S.R.L., and state that these enterprises do not recognize SUTREL's representativeness for collective bargaining purposes.

Case of the Edelnor S.A.A. enterprise

1233. The CGTP states that the bargaining committee of the trade union section of SUTREL has been concluding collective agreements with the Edelnor S.A.A. enterprise since 1994. The

last agreement covered the period from 1 January 2000 to 31 December 2001. On 29 November 2001, it presented a list of demands, which the enterprise did not accept for the following reasons:

- the enterprise has concluded a collective agreement for four years with the absolute majority of the workers in the enterprise, which applies to all workers, including those belonging to trade unions that are not representative;
- the trade union branch concerned does not have the right to bargain collectively since it does not represent the majority of workers employed in the enterprise as its members and there cannot be two collective agreements in the same bargaining unit.

1234. Faced with this situation, in December 2001 the complainant appealed to the Ministry of Labour to order the Edelnor S.A.A. enterprise to accept the list of demands, arguing that the enterprise's conduct infringed the right to organize and bargain collectively, given that the enterprise intended to impose a contract that it had drawn up itself, disregarding the existence of a trade union and representation, even if that trade union was a minority one for the time being. The complainant affirms that there is no "collective agreement" signed by the majority of workers in the Edelnor S.A.A. enterprise, since there are only individual agreements that the enterprise has compelled the workers to sign individually.

1235. According to the trade union, the labour authority condoned the enterprise's conduct, since it denied that a minority branch trade union could negotiate at enterprise level.

1236. The CGTP adds that the enterprise is encouraging SUTREL members to withdraw from the trade union, by offering them a bonus of 3,500 new soles if they sign a so-called "collective agreement" put forward by the enterprise. Lastly, it alleges that the enterprise does not deduct trade union dues, threatens workers with reprisals or sanctions for distributing the trade union newspaper and threatens to cancel the permanent trade union leave of SUTREL delegates.

The case of the Cam-Peru S.R.L. enterprise

1237. On behalf of their affiliate, SUTREL, the two complainants state that the Edelnor S.A.A. enterprise decided to establish a subsidiary as of May 2000 which would be responsible for marketing, storing and distribution of materials and checking and maintenance of electrical supplies, which would be called *Compañía Americana de Multiservicios (Cam-Peru S.R.L.)*, to which it transferred Edelnor S.A.A. employees working in these areas. When the staff were transferred, the enterprises involved undertook to respect the workers' acquired rights. In this context, the SUTREL members who were transferred decided to establish a trade union section in the Cam-Peru S.R.L. enterprise, after complying with all the legal formalities.

1238. The complainants allege that the Cam-Peru S.R.L. enterprise has not recognized SUTREL's representativeness and right to bargain collectively on the following grounds:

- SUTREL is a branch trade union of the electricity sector, to which Cam-Peru S.R.L. does not belong, as it is a service enterprise;
- the enterprise has concluded a collective agreement with a qualified majority of workers employed in the enterprise and therefore is by no means obliged to negotiate with a minority group of workers.

1239. According to the complainants, the labour authority condoned the enterprise's conduct. The FTLFP alleges that, despite the fact that SUTREL had obtained judicial recognition of

its trade union status and representativeness by decision of the 18th Labour Court of Lima, dated 18 August 2004, the labour authority maintained its restrictive approach by again declaring that the enterprise was justified in objecting on grounds that it did not belong to the same sector.

- 1240.** Lastly, the CGTP alleges that the Cam-Peru S.R.L. enterprise has been encouraging SUTREL members to withdraw from the trade union by offering a bonus of 3,500 new soles. It alleges that the enterprise has not deducted trade union dues since July 2001 despite the fact that, according to the FTLFP, a court order had been issued requiring trade union dues to be deducted in the Cam-Peru S.R.L. enterprise.

B. The Government's reply

- 1241.** In a communication dated 27 July 2005, the Government states that with regard to the allegations relative to the Edelnor S.A.A. enterprise, the latter affirms that various organizations exist within it, grouping together a minority of the workers, given that most of the workers have opted not to join any trade union. It also indicates that it has concluded a collective agreement with the absolute majority of the workers in the enterprise who have opted not to join any trade union and expressed their will to endorse the agreement being the majority in the enterprise, and, therefore, a representative group of the workers in Edelnor. The enterprise adds that while collective bargaining was under way as a result of the list of claims presented by SUTREL, Report No. 85462-01-DRTPSL/DPSC-SDNC, the labour administration authority decided that Edelnor should negotiate with the complainant trade union. However, while the process in question was still pending, an arbitral award was issued in favour of the collective agreement in force; a legal appeal is currently pending. The enterprise indicates that there has been no discrimination since although various trade union organizations exist, they are all minority ones, and this does not prevent the majority group of non-unionized workers from negotiating collectively.

- 1242.** With regard to the allegations relative to the Cam-Peru S.R.L. enterprise, the latter affirms that its refusal to go ahead with the list of claims repeatedly presented by the complainant trade union is based on the fact that a trade union which operates at the sectoral level can only represent workers in one single activity and not workers in two different activities as the trade union tried to do, willing to undertake the representation of trade unions in two different sectors, namely, the electricity sector (enterprises generating, transmitting and distributing electricity) and the services sector to which enterprises like Cam-Peru S.R.L. belong. The enterprise indicates that it has no objection to the establishment of a trade union by its own workers for the defence of their rights and interests, but there was no reason whatsoever or legal ground on the basis of which a union, in a sector of activity in which the enterprise does not belong, might represent workers from another sector. The enterprise indicates, finally, that the main activity of Cam-Peru S.R.L. is the commercialization and sale of materials and it does not carry out any act of production, transmission or distribution of electric energy, reason for which its workers could not be considered or characterized as workers in the sector. For this reason, they could not be represented by the complainant trade union and could not claim to constitute a trade union branch within the enterprise, much less negotiate collectively with regard to workers who cannot be affiliated to this trade union.

- 1243.** The Government indicates that the denunciation made by SUTREL, regarding both the Edelnor S.A.A. enterprise and the Cam-Peru S.R.L. enterprise, involves a controversy which is currently subject to legal proceedings lodged by the parties which consider that their rights have been affected. These proceedings are still pending a final decision.

1244. The Government indicates that, in the case of the Edelnor S.A.A. enterprise, the collective bargaining based on the list of claims presented on 29 November 2001 by the Edelnor trade union branch of the sectoral union named the Unified Trade Union of Electricity Workers of Lima and Callao was resolved through an arbitral award dated 19 June 2003. This situation allows the Government to deduce that there have been no acts of anti-union discrimination aimed at weakening or breaking up the trade union as alleged by the complainants. In the case of the Cam-Peru S.R.L. enterprise, the labour administration authority found that the appeal lodged by the employer was well-founded and consequently declared inadmissible the collective bargaining claimed by the Negotiating Commission of the trade union branch of workers in Cam-Peru S.R.L. This pronouncement has led the affected trade union to initiate legal action for protection of constitutional rights, which has been declared inadmissible by the court of first instance. This decision had been appealed and is currently pending before the court of second instance.
1245. Finally, the Government states that, after the parties had recourse to the judiciary in order to decide upon the lawfulness of the acts in question, it was up to that organ to resolve the matter in a fully independent manner. The Government would keep the Committee informed of the outcome in due time. It is impossible to see from the information obtained in this case, any elements showing the commission of violations by the abovementioned entities.

C. The Committee's conclusions

1246. *The Committee observes that the allegations in this case mainly refer to: (1) refusal by the electricity enterprises Edelnor S.A.A. and Cam-Peru S.R.L., and by the labour administration authority, to recognize SUTREL's representativeness for collective bargaining purposes; (2) failure to deduct trade union dues by both enterprises; (3) payment of a bonus by both enterprises to workers who withdraw from membership of SUTREL; (4) threats by Edelnor S.A.A. to restrict the activity of SUTREL trade union section as regards the distribution of the trade union newspaper; and (5) threats by Edelnor S.A.A. to cancel the permanent trade union leave of SUTREL delegates.*
1247. *With regard to the alleged refusal of the Edelnor S.A.A. enterprise to engage in collective bargaining with the SUTREL trade union (according to the complainants the enterprise considers that it does not have an obligation to negotiate with a minority trade union and has moreover concluded a collective agreement with the majority of the workers), the Committee notes that the Government states that the enterprise informed it that: (1) various trade union organizations exist in the enterprise grouping together a minority of the workers, given that most of the workers have opted not to join any trade union; (2) a collective agreement was concluded with the absolute majority of the workers who expressed their will to endorse the agreement as the majority in the enterprise; (3) in the course of collective bargaining based on the list of claims presented by SUTREL, the administrative authority decided that the enterprise should negotiate with SUTREL, but later on an arbitral award was issued in favour of the collective agreement negotiated with the workers; (4) the arbitral award in question had been challenged before the courts.*
1248. *The Committee recalls that protection of the right to collective bargaining implies that, when no trade union represents the absolute majority of the workers, minority organizations may jointly negotiate a collective agreement applicable to the enterprise or the bargaining unit, or at least conclude a collective agreement on behalf of their members [see *Digest of decisions and principles of the Freedom of Association Committee*, 4th edition, 1996, para. 831].*

1249. *In addition, the Committee stresses the role of workers' organizations as one of the parties in collective bargaining and considers that direct negotiation between the undertaking and its employees, bypassing representative organizations where these exist, might in certain cases be detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted [see **Digest**, op. cit., para. 786].*
1250. *The Committee requests the Government to guarantee the application of these principles and to promote collective bargaining with SUTREL in Edelnor S.A.A. In addition, the Committee requests the Government to keep it informed of the result of the appeal lodged against the arbitral award which confirmed the validity of the collective agreement concluded with the non-unionized workers in the enterprise.*
1251. *With regard to the alleged refusal of the Cam-Peru S.R.L. enterprise to engage in collective bargaining with the SUTREL trade union (according to the complainant, the Edelnor S.A.A. enterprise decided in 2002 to set up a subsidiary – Cam-Peru S.R.L. – in charge of the marketing, storage, distribution of materials and control and maintenance of the electrical supplies; at the time of this transfer, the enterprises agreed to respect the rights that the workers had acquired), the Committee notes that the Government indicates that the enterprise informed it that: (1) its refusal to go ahead with the list of claims, repeatedly presented by the complainant trade union, is based on the fact that a trade union which operates at the sectoral level can only represent workers in one single activity and not workers in two different activities as SUTREL tried to do, willing to undertake the representation of trade unions in two different sectors, namely, the electricity sector and the services sector to which enterprises like Cam-Peru S.R.L. belong; (2) it has no objection to the establishment of a trade union by its own workers for the defence of their rights and interests, but there was no reason whatsoever or legal ground on the basis of which a union in a sector of activity in which the enterprise does not belong, might represent workers from another sector. The Committee also notes that according to the Government the labour administration authority found that the employer's refusal was well-founded and consequently declared the collective bargaining inadmissible; the trade union initiated legal action for protection of constitutional rights, which is currently pending before the court of second instance.*
1252. *In this respect, the Committee considers that if the workers of the Cam-Peru enterprise are affiliated to the SUTREL trade union (sectoral trade union), this trade union should be able to negotiate on their behalf (even more so if one takes into account that the Cam-Peru enterprise is a subsidiary of the Edelnor S.A. enterprise from which the workers originally came, and in which SUTREL has members). Under these conditions, the Committee request the Government, if it is found that the workers of the Cam-Peru enterprise are affiliated to SUTREL and this is the most representative trade union, to take measures in order to promote collective bargaining between this trade union and the Cam-Peru enterprise. Moreover, the Committee requests the Government to keep it informed of the outcome of the proceedings for protection of constitutional rights initiated by SUTREL against the decision of the administrative authority which found that the enterprise's refusal to engage in collective bargaining was well-founded.*
1253. *Concerning the failure to deduct trade union dues by Edelnor S.A.A. and Cam-Peru S.R.L. enterprises, the Committee notes with regret that the Government has not communicated its observations and observes that the FTLFP points out that a court decision handed down by the 18th Labour Court of Lima on 18 August 2004 ordered the deduction of trade union dues of SUTREL members by Cam-Peru S.R.L. As it has pointed out on previous occasions, the Committee recalls that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided [see **Digest**, op. cit., para. 435]. Under these conditions, the Committee requests the*

Government to ensure that the Cam-Peru S.R.L. enterprise deducts trade union dues as ordered by the judicial authority, and guarantees the application of the abovementioned principle. As regards failure to deduct trade union dues by the Edelnor S.A.A. enterprise, the Committee requests the Government to take measures to ensure that the abovementioned principle is respected and to forward a copy of any court decision handed down in this regard. The Committee requests the Government to keep it informed of developments in both enterprises.

- 1254.** *As regards the allegation that both Edelnor S.A.A. and Cam-Peru S.R.L. enterprises have offered a bonus of 3,500 new soles to encourage SUTREL members to withdraw from the trade union, the Committee regrets that the Government has not sent its observations and recalls that paragraph 1 and paragraph 2(a) of Article 1 of Convention No. 98, ratified by Peru, clearly provide that workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. The Committee urges the Government to carry out an inquiry in this regard and, if the complainants' allegations are confirmed, to take the necessary measures to remedy the anti-union practices observed and their consequences. The Committee requests the Government to keep it informed of the results of this inquiry.*
- 1255.** *As regards the alleged threats by Edelnor S.A.A. to restrict the activity of the SUTREL trade union branch in regard to the distribution of its newspaper, the Committee notes with regret that the Government has not sent its observations and reminds it of the resolution concerning trade union rights and their relation to civil liberties adopted by the International Labour Conference in 1970, which defined freedom of opinion and expression, among others, as essential for the normal exercise of trade union rights. Under these conditions, the Committee requests the Government to investigate the matter and, if necessary, to ensure that these rights are guaranteed.*
- 1256.** *As regards the alleged threats by Edelnor S.A.A. to cancel the permanent trade union leave of SUTREL delegates, the Committee notes with regret that the Government has not sent its observations and reminds it that permission to take such leave should not be unreasonably withheld (see Paragraph 10 of the Workers' Representatives Recommendation, 1971 (No. 143)) and that this matter is regulated by Peruvian legislation. The Committee requests the Government to ensure compliance with legislation on this subject and keep it informed in this regard.*

The Committee's recommendations

- 1257.** *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 promote collective bargaining with SUTREL in the Edelnor S.A.A. enterprise and to keep it informed of the result of the appeal lodged against the arbitral award which confirmed the validity of the collective agreement concluded with the non-unionized workers in the enterprise.*

- (b) *The Committee requests the Government, if it is found that the workers of the Cam-Peru S.R.L. enterprise are affiliated to SUTREL and this is the most representative trade union, to take measures in order to promote collective bargaining between this trade union and the Cam-Peru S.R.L. enterprise. Moreover, the Committee requests the Government to keep it informed of the outcome of the proceedings for protection of constitutional rights initiated by SUTREL against the decision of the administrative authority which found that the enterprise's refusal to engage in collective bargaining was well founded.*
- (c) *The Committee requests the Government to ensure that the Cam-Peru S.R.L. enterprise deducts trade union dues as ordered by the judicial authority. As regards the failure to deduct trade union dues by the Edelnor S.A.A. enterprise, the Committee requests the Government to send it a copy of any judicial decision handed down in this regard, and to guarantee respect for the principle that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided. The Committee requests the Government to keep it informed of developments in both enterprises.*
- (d) *The Committee urges the Government to carry out an inquiry concerning the payment of a bonus to workers for withdrawing from membership of SUTREL and, if the complainants' allegations are confirmed, to take the necessary measures to remedy the anti-union practices observed and their consequences. The Committee requests the Government to keep it informed of the results of this inquiry.*
- (e) *As regards the alleged threats by Edelnor S.A.A. to restrict the activity of the SUTREL trade union branch in regard to the distribution of its newspaper, the Committee reminds the Government of the resolution concerning trade union rights and their relation to civil liberties adopted by the International Labour Conference in 1970, which defined freedom of opinion and of expression, among others, as essential for the normal exercise of trade union rights. The Committee requests the Government to investigate the matter and, if necessary, to ensure that these rights are guaranteed.*
- (f) *Lastly, recalling that trade union leave should not be unreasonably withheld and that this matter is regulated by Peruvian legislation, the Committee requests the Government to ensure compliance with the legislation on this subject and to keep it informed of developments.*

CASE NO. 2329

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

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

- **the Petroleum, Chemical and Rubber Industry Workers' Union of Turkey (LASTIK-IS) and**
- **the Confederation of Progressive Trade Unions of Turkey (DISK)**

Allegations: The complainants allege that the Government violated freedom of association principles by suspending for the third time in four years a strike in the tyre industry on the grounds that the strike would be a threat to national security

- 1258.** The complaint is contained in a communication from the Petroleum, Chemical and Rubber Industry Workers' Union of Turkey (LASTIK-IS) dated 22 March 2004 and a communication by the Confederation of Progressive Trade Unions of Turkey (DISK), dated 22 March 2004.
- 1259.** The Government replied in communications dated 6 January and 25 July 2005.
- 1260.** Turkey 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

- 1261.** In a communication dated 22 March 2004, the Petroleum, Chemical and Rubber Industry Workers' Union of Turkey (LASTIK-IS) stated that its activities had been centred in the tyre industry, dominated by large multinational companies like Goodyear, Bridgestone and Pirelli. Since December 2004, on behalf of some 4,000 workers, LASTIK-IS had been negotiating with these three companies for a new agreement covering the years 2004-05. During the meetings, it observed that the employers had neither good will nor intention to reach an agreement, always trying to coerce LASTIK-IS to agree to their unacceptable demands after having taken a guarantee from the Government that it would use its authority to ban an eventual strike. Under these circumstances, considering that these demands could not be accepted, the Executive Committee of LASTIK-IS, which had made every effort to solve the dispute, decided to go on strike at the three multinationals beginning at the Pirelli plant on 22 March 2004. However, the Government once again used its right to "suspend", which meant in fact to ban, the strike at the three companies by a Decree published in the Official Journal dated 21 March 2004. The Decree, signed by the President, the Prime Minister, the Labour Minister and other members of the Council of Ministers, claimed that the strike in the tyre industry was going to be a threat to national security. LASTIK-IS attached a copy of the Official Journal of 21 March 2004 and a translation of Decree No. 2004/6998, which reads as follows:

... it is hereby decided that the strike decisions taken by the Petroleum, Chemical and Rubber Industry Workers' Union of Turkey (Lastik-Is) at the workplaces of Türk Pirelli Lastikleri A.S., Goodyear Lastikleri T.A.S. and Brisa Bridgestone Sabancı Lastik Sanayii ve Ticaret

A.S., and the lock-out decisions taken by the afore-mentioned companies, will be suspended for sixty days as of the date of 16/3/2004, as these are considered to violate national security, according to section 33 of Act No. 2822 of 5/5/1983.

1262. LASTIK-IS added that, according to section 33 of the Collective Agreement, Strike and Lockout Act, any strike could be suspended for a 60-day period if it was deemed to endanger “public health” or “national security”. But “suspension” of a strike under this provision usually meant in practice an indefinite “ban” as section 34 of the same law empowered the Ministry of Labour and Social Security to impose compulsory arbitration at the end of the 60-day suspension, unless the parties had either come to an agreement or voluntarily sought arbitration. LASTIK-IS added that this was not the first time that a strike at the tyre industry had been banned. Other strikes had already been banned on 5 May 2000 and 12 May 2002. With the Decree of 21 March 2004, tyre workers could not exercise their right to strike guaranteed by Convention No. 87, ratified by the Government. LASTIK-IS was of the opinion that social dialogue and democratic industrial relations were very important tools in establishing social order and solving social problems. In this framework they expected from the Government to respect the fundamental human rights which included basic trade union rights, the right to association and collective bargaining on the basis of ratified ILO Conventions.

1263. In a communication dated 22 March 2004, the Confederation of Progressive Trade Unions of Turkey (DISK), to which LASTIK-IS is affiliated, repeated the allegations sent by LASTIK-IS, recalling that the Government had already banned strikes by LASTIK-IS on two occasions in the past and had done the same in the glass industry. DISK also indicated that LASTIK-IS would appeal to the Council of State to cancel the Decree. The executive committees of DISK and their affiliate LASTIK-IS were also prepared to make official complaints to the European Commission, as the Decree was a clear violation of ILO Conventions and European legislation.

B. The Government’s reply

1264. In a communication dated 6 January 2005, the Government indicated that, as mentioned in previous responses on the same issue (i.e. Case No. 2303), the required studies carried out by a Committee of Academics, established in agreement with the social partners, in order to amend the Collective Labour Agreement, Strike and Lockout Act No. 2822 and the Trade Unions Act No. 2821 were still under way so as to bring the legislation in line with the *acquis communautaire* of the European Union and ILO standards, and update it to reflect recent developments in the country.

1265. The Government added that a copy of the Draft Bill amending Act No. 2822 had been sent to the ILO in April 2004 and had been previously attached to the Government’s reply relative to Case No. 2303. As already indicated on those occasions, new provisions which had been introduced to the first paragraph of section 33 of the Collective Labour Agreement, Strike and Lockout Act No. 2822 regarding the suspension of a strike, stipulated that “the Council of Ministers may issue a suspension order upon receiving the opinion of the Council of State on this question”.

1266. The Government added that this provision was in fact cited in other international texts related to this subject. In articles 30 and 31 of the European Social Charter concerning “Derogations in Time of War or Public Emergency” and “Restrictions”, some principles and rights could be restricted in the public interest, or on grounds of national security, public health or public morals in line with the prescriptions of the law.

1267. The Government added that the communications of Petroleum, Chemical and Rubber Industry Workers’ Union of Turkey (LASTIK-IS) and the Confederation of Progressive

Trade Unions of Turkey (DISK) had been duly examined by the Ministry of Labour and Social Security. Upon the suspension of the strike by the Council of Ministers Decree, Professor Dr. Fevzi Sahlanan was once again designated by the Minister of Labour and Social Security as the Official Mediator for the resolution of the dispute. With the efforts and the supervision of the Minister of Labour and Social Security, the parties were convened before the Official Mediator on 12 May 2004 to carry on the consultations concerning the collective labour agreement. On 13 May 2004 a consensus was reached between the parties, as a consequence of which the collective labour agreement covering the period of 1 January 2004 to 31 December 2005 had already been concluded.

- 1268.** In a communication dated 25 July 2005, the Government provided an historical account of the dispute. According to the Government, LASTIK-IS had applied, on 8 September 2003, for a determination of its competence to conclude a collective labour agreement at the workplaces of Turk Pirelli A.S., Goodyear Lastikleri T.A.S. and Brisa Bridgestone Sabanci Lastik Sanayii ve Ticaret A.S. Upon determining that the trade union had the legally required majority, the General Directorate of Labour sent to the parties letters on the issue of competence and, as there was no objection against these letters within the legal time limit, a certificate of competence was given to the union in pursuance of section 16 of Act No. 2822. When the collective bargaining ended in dispute, the Regional Labour Directorate of Kocaeli appointed official mediators in the three workplaces. As an agreement could not be reached at that point, the trade union announced its decision to strike on 8 March 2004. Because this decision was considered as being prejudicial to national security, the Council of Ministers issued a Decree on 16 March 2004 to suspend the strikes for 60 days (published in the Official Gazette on 21 March 2004). Another official mediator was appointed in pursuance of section 34 of Act No. 2822. As a result of the mediation efforts of the Minister of Labour and Social Security assisted by the Official Mediator, the representatives of LASTIK-IS and the employers met on 12 May 2004 at the Ministry of Labour and Social Security. After the negotiations, the parties concluded collective labour agreements on 13 May 2004 for the period of 1 January 2004 to 31 December 2005.
- 1269.** The Government added that LASTIK-IS lodged an appeal before the 10th Chamber of the Council of State against the Decree of the Council of Ministers suspending the strike. The Council of State decided to suspend the execution of the Decree. An appeal lodged against this decision was rejected on 23 September 2004 by the Plenary of the Administrative Court Chambers of the Council of State. The Government appended copies of the collective agreements concluded between the parties and of the decision of the Council of State dated 23 September 2004 (Case No. 2004/387).

C. The Committee's conclusions

- 1270.** *The Committee observes that this case concerns allegations that the Government violated freedom of association principles by suspending for the third time in four years a strike in the tyre industry on the grounds that the strike would be a threat to national security.*
- 1271.** *In particular, the Committee notes from the complainants' allegations that, by issuing Decree No. 2004/6998 of 21 March 2004, the Council of Ministers made use, for the third time in four years, of its authority under section 33 of the Collective Agreement, Strike and Lockout Act No. 2822, to suspend, which meant in fact to ban, a strike in the tyre industry on the grounds that the strike would be a threat to national security. According to the complainants, the Executive Committee of the Petroleum, Chemical and Rubber Industry Workers' Union of Turkey (LASTIK-IS) had decided to go on strike as of 22 March 2004 in opposition to unacceptable demands by the employers. The latter are large multinational companies (Goodyear, Bridgestone, Pirelli) and had allegedly received guarantees from the Government that an eventual strike would be banned. According to the complainants,*

similar decrees banning strikes have been issued in other industries in the recent past. The Committee further notes that section 33 of the Collective Agreement, Strike and Lockout Act No. 2822 enables the Government to suspend any strike for 60 days if it is deemed to endanger “public health” or “national security”. However, “suspension” of a strike, according to the complainants, usually means in practice an indefinite ban, as section 34 of the same law empowers the Ministry of Labour and Social Security to impose compulsory arbitration at the end of the 60-day suspension, unless the parties have either come to an agreement or voluntarily sought arbitration.

- 1272.** *The Committee observes that the Council of Ministers’ Decree No. 2004/6998 does not indicate the grounds on which a strike in the tyre industry was considered as prejudicial to national security. Moreover, the Government does not provide any reply to the allegations that it has repeatedly banned strikes in the tyre industry on grounds of national security. The Committee further notes from the Government’s reply that LASTIK-IS lodged an appeal before the 10th Chamber of the Council of State which decided to suspend the execution of the Decree. An appeal made against this decision was rejected on 23 September 2004 by the Plenary of the Administrative Court Chambers of the Council of State. However, in the meantime, as a result of the mediation efforts of the Minister of Labour and Social Security and the Official Mediator designated for the resolution of the dispute, the parties reached a consensus to conclude a collective agreement one day after they were convened to consultations (between 12 and 13 May 2004). Consequently, a collective agreement covering the period of 1 January 2004 to 31 December 2005 has already been concluded.*
- 1273.** *The Committee notes with regret that this is not the first case concerning Turkey which relates to allegations that the Council of Ministers decided to suspend a strike on grounds of national security, without any apparent relationship between the industries in question (tyre, glass, municipality services and state-run undertakings) and national security. The Committee recalls the conclusions and recommendations reached in Case No. 2303, according to which section 33 of Act No. 2822 was not in itself contrary to freedom of association principles, as long as it was implemented in good faith and in accordance with the ordinary meaning of the terms “national security” and “public health”; however, the repeated application of this section so as to prevent strikes in sectors such as glass and rubber, municipality services and state-run enterprises, which did not appear to have any direct connection to national security or public health, might amount to a systematic violation of the right to strike [see 335th Report, para. 1376].*
- 1274.** *The Committee emphasizes that, in general, a decision to suspend a strike for a reasonable period so as to allow the parties to seek a negotiated solution through mediation or conciliation efforts, does not in itself constitute a violation of freedom of association principles. The Committee recalls however, that sections 21-23, 27, 28, 35 and 37 of Act No. 2822 require as a prerequisite for calling a lawful strike, a long waiting period of nearly three months from the start of negotiations, including an imposed period of compulsory arbitration of up to three weeks (section 23). The Committee further notes from the Government’s report that, in the present case, mediation had already taken place by official mediators appointed by the Regional Labour Directorate of Kocaeli before LASTIK-IS announced its decision to strike, as provided in the law. Thus, when the Government decided to suspend the strike for an additional 60 days and appointed another official mediator, even though mediation had already taken place, this decision constituted an extension of what can already be seen as an elaborate procedure provided in the law. The Committee further notes that the complainants make reference to section 34 of Act No. 2822 which provides that “if, on the expiry of the time limit fixed for the suspension, the parties have not been able to reach an agreed settlement or have not agreed to resort to private arbitration, the Minister of Labour and Social Security shall refer the dispute to the High Court of Arbitration for settlement”, and emphasizes that a “suspension” under*

sections 33-34 ultimately constitutes a banning of the strike, as they expect the Government to make use of its authority under section 34 to refer the dispute to compulsory arbitration.

- 1275.** *The Committee recalls that compulsory arbitration to end a collective labour dispute and a strike is acceptable in cases of acute national crisis and also if it is at the request of both parties involved in a dispute, or if the strike in question may be restricted, even banned, i.e. in the case of disputes in the public service involving public servants exercising authority in the name of the State or in essential services in the strict sense of the term, namely those services whose interruption would endanger the life, personal safety or health of the whole or part of the population [Digest of decisions and principles of the Freedom of Association Committee, 4th edition, 1996, paras. 515 and 517]. The Committee emphasizes that automobile manufacturing does not constitute an essential service in the strict sense of the term [Digest, op. cit., para. 545] and considers that tyre manufacturing is part of the automobile industry and that workers in this industry should enjoy the right to strike without undue impediments. In general, to determine situations in which a strike could be prohibited, the criteria which has to be established is the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population [Digest, op. cit., para. 540].*
- 1276.** *The Committee also considers that the imposition of a compulsory arbitration procedure beyond the abovementioned permissible restrictions raises problems in relation to the application of Convention No. 98, as it is contrary to the free and voluntary nature of collective bargaining. Provisions which establish that, failing agreement between the parties, the points at issue in collective bargaining must be settled by the arbitration of the authority are not in conformity with the principle of voluntary negotiation contained in Article 4 of Convention No. 98 [Digest, op. cit., para. 862].*
- 1277.** *Noting that a collective agreement has already been concluded for the period 2004-05 in the tyre industry as a result of the Official Mediator's intervention, the Committee expresses regret at the Government's systematic practice of ending collective disputes and precluding strikes on grounds of national security in sectors such as the tyre industry, which has no apparent link to national security and does not constitute an essential service in the strict sense of the term. The Committee requests the Government to refrain from this practice in the future and to ensure that strikes are not precluded in this manner, with the possible exception of essential services in the strict sense of the term, disputes in the public service involving public servants exercising authority in the name of the State or in an acute national crisis.*
- 1278.** *The Committee further notes that the Government refers in its reply to the ongoing work of a Committee of Academics established in agreement with the social partners in order to amend the Labour Agreement, Strike and Lockout Act No. 2822 and the Trade Unions Act No. 2821. The Committee notes that, as a result of the work carried out by the Committee of Academics, new provisions have been introduced in section 33 of Act No. 2822, stipulating that the Council of Ministers may issue an order to suspend a strike only upon receiving the opinion of the Council of State on this question.*
- 1279.** *The Committee recalls once again the conclusions and recommendations reached in Case No. 2303 on this issue. In particular, the Committee recalls that, in that case, a decision by the Council of State, which had rendered unenforceable a Council of Ministers' Decree suspending a strike in the glass industry, had been overruled by a further Decree of the Council of Ministers suspending the strike once again; the Committee considered that, as the proposed amendments seemed to envisage a consultative role for the Council of State, they did not seem to constitute an improvement in relation to the current legislation on this point, and might even lead to a weakening of the role of the Council of State which, as seen*

above, currently has the power to review the decisions of the Council of Ministers and render them unenforceable. Consequently, the Committee recommended that responsibility for suspending a strike on the grounds of national security should not lie with the Government, but with an independent body which has the confidence of all parties concerned [see 335th Report, paras. 1376-1377].

- 1280.** *The Committee notes that, in the present case, the Council of State once again ruled in favour of suspending the enforcement of Decree No. 2004/6998 pursuant to an appeal lodged by LASTIK-IS, and that the Plenary of the Administrative Court Chambers of the Council of State confirmed this decision on 23 September 2005. Nevertheless, and given the necessary delay before rendering such decisions, these rulings did not have any practical effect, as the parties had reached an agreement in the meantime. The Committee therefore observes from the information which is available to it that, when the judicial review of the Council of State diverged from the Government's evaluation, the Government nonetheless resorted to an appeal, the resulting delay of which prevented any real effect of the judicial review in practice. In Case No. 2303 the Government had merely issued another contrary decision. Thus, although the Government's practice of ending collective disputes and strikes on grounds of national security is subject to judicial review, its effectiveness might be mitigated.*
- 1281.** *The Committee finally notes the Government's comments on the conformity of section 33 of Act No. 2822 with certain international instruments, which allow for certain rights to be restricted in the public interest, or on grounds of national security, public health or public morals. While the Committee considers, as it has indicated above, that the right to strike may be restricted or even prohibited for reasons directly linked to national security, the Committee must observe in this case and Case No. 2303, that the Government has apparently acted under the authority of this section without any indication as to the specific security or health concerns involved. The need to provide specific reasons justifying a Government's decision may be even more present in cases such as this one, where the judicial authorities have not confirmed the Government's evaluation of the situation.*
- 1282.** *In the particular circumstances of this case, the Committee therefore once again requests the Government to take all necessary measures with a view to modifying section 33 of Act No. 2822, so that responsibility for suspending a strike on the grounds of national security does not lie with the Government, but with an independent body which has the confidence of all parties concerned. The Committee requests the Government to keep it informed of developments in this respect.*

The Committee's recommendations

- 1283.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *Noting that a collective agreement has already been concluded for the period 2004-05 in the tyre industry as a result of the Official Mediator's intervention, the Committee expresses regret at the Government's systematic practice of ending collective disputes and precluding strikes on grounds of national security in sectors such as the tyre industry, which has no apparent link to national security and does not constitute an essential service in the strict sense of the term. The Committee requests the Government to refrain from this practice in the future and to ensure that strikes are not precluded in this manner, with the possible exception of essential services in the strict*

sense of the term, disputes in the public service involving public servants exercising authority in the name of the State or in an acute national crisis.

- (b) *The Committee once again requests the Government to take all necessary measures with a view to modifying section 33 of Act No. 2822 so that responsibility for suspending a strike on the grounds of national security does not lie with the Government, but with an independent body which has the confidence of all parties concerned. The Committee requests the Government to keep it informed of developments in this respect.*

CASE NO. 2366

INTERIM REPORT

Complaints against the Government of Turkey presented by

**— the Confederation of Public Employees' Trade Unions (KESK) and
— Education International**

Allegations: The complainant alleges that the Attorney-General of Ankara filed a lawsuit requesting the courts to order the dissolution of the Trade Union of Public Servants in the Education Branch (Egitim Sen), because its statutes provided as one of the trade union's purposes the defence of "the right of all citizens to education in their mother tongue and the development of their culture", which was contrary, according to the Attorney-General, to constitutional and legislative provisions prohibiting the teaching of any language other than Turkish as mother tongue, and Article 3 of the national Constitution which provides that the Turkish State, along with its nation and territory, constitutes an indivisible entity

- 1284.** The complaint is contained in a communication from the Confederation of Public Employees' Trade Unions (KESK) dated 9 July 2004. In a communication dated 1 September 2005, Education International associated itself with this case and provided additional information.
- 1285.** The Government replied in communications dated 30 September 2004, and 6 January, 29 March, 15 April and 25 July 2005.
- 1286.** Turkey has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainants' allegations

- 1287.** In a communication dated 9 July 2004, KESK states that on 10 June 2004, the Attorney-General of Ankara filed a lawsuit against the Trade Union of Public Servants in the Education Branch (Egitim Sen), which is a KESK affiliate, to dissolve the union in accordance with Articles 3 and 42 of the national Constitution and sections 20 and 37 of the Public Employees' Trade Unions Act No. 4688. The reason for the lawsuit was that one of the articles of Egitim Sen's statutes (section 2(b)) provided that "Egitim Sen has as its purpose the defence of democratic, secular, scientific and free education and the right of all citizens to education in their mother tongue and the development of their culture in accordance with their fundamental human rights and freedoms".
- 1288.** According to KESK, Article 3 of the national Constitution provides that: "The Turkish State constitutes, along with its territory and nation, an indivisible entity." Article 42 of the national Constitution provides that: "No language other than Turkish shall be taught to the Turkish citizens as a mother tongue or serve in order to give courses in any training or educational establishment. Foreign languages to be taught in training and educational establishments and the rules to be followed by schools providing training and education in a foreign language shall be determined by law. The provisions of international treaties are reserved." Moreover, section 20 of Act No. 4688 provides that: "The administration and organs of trade unions and their confederations established according to this law shall not act contrary to the characteristics of the Republic and democratic principles." Section 37 of the same Act provides that: "The trade unions and their confederations that act contrary to the characteristics of the Republic and the democratic principles entrenched in the Constitution will be closed down at the request of the Attorney-General of the city in which they have their central office." Finally, section 6 of Act No. 4688 provides that, in the event of a determination that the law is violated or the conditions prescribed in the law have not been complied with, the responsible governorship will demand the trade union concerned to rectify the omissions within one month; otherwise, it will apply to the competent labour court to ban the trade union's activities. The court in such a case will give 60 days to the trade union to rectify the omissions. If the statutes and documents are not changed in accordance with the law at the end of 60 days, the court will decide to dissolve the trade union.
- 1289.** According to KESK, it was obvious from the above that to bring a lawsuit against a trade union or a confederation to dissolve a trade union might only be possible when the union had acted contrary to the Republic and the democratic principles cited in the Constitution. However, the reason indicated by the Attorney-General for requesting the dissolution was simply that Egitim Sen had not changed an article in its statutes. For this reason, the lawsuit was not in conformity with section 37 of Act No. 4688. The procedure indicated in section 6 of Act No. 4688 should apply instead.
- 1290.** KESK added that section 2(b) of the statutes of Egitim Sen defended the right to education in one's mother tongue and the development of one's culture in a very democratic spirit which was in conformity with the Republic's laws. The Governorship of Ankara had already requested the Attorney-General to take the necessary measures for the trade union's dissolution on 29 March 2002, but the Attorney-General had found no ground for legal action. The Ministry of Labour and Social Security had reported that the statutes were compatible with the law and the Constitution. In addition, since that date, many laws and regulations had been changed in Turkey and by virtue of section 11 of Act No. 4771, published in the *Official Gazette* on 9 August 2002, the possibility for Turkish citizens to learn different spoken languages and dialects had been rendered lawful. The United Nations International Covenant on Economic, Social and Cultural Rights had been ratified by the National Assembly and Article 90 of the national Constitution had been amended so that, in the event of a contradiction between ratified international Conventions and national law, the international Conventions would prevail. Finally, by virtue of regulations issued

on 15 December 2003 concerning the possibilities for Turkish citizens to learn different languages and dialects which used to be spoken in daily life, it had been made possible to learn and develop different languages. Egitim Sen's statutes were therefore clearly compatible with the law.

- 1291.** KESK concluded that, although there remained no legal obstacle to defending the right to education in one's mother tongue in Turkey, bringing an unfounded lawsuit against Egitim Sen and its leadership was a violation of freedom of association principles, Article 3 of Convention No. 87 and Article 5(2) of Convention No. 151.
- 1292.** In a communication dated 1 September 2005, Education International indicated that, on 25 May, the Turkish Supreme Court had ordered that Egitim Sen should be dissolved. On 3 July, during an Egitim Sen extraordinary congress, it was decided to remove from the union's statutes the article which motivated the Supreme Court's verdict. Thus Egitim Sen believed that there was no longer any legal ground to close down the union and the court case should be closed. However, the threat that Egitim Sen might be dissolved persisted as the Industrial Court had to issue a decision based on the final ruling of the Supreme Court by the end of August 2005.

B. The Government's reply

- 1293.** In a communication dated 30 September 2004 the Government indicated that in Turkey the rights of public employees to organize and bargain collectively were regulated by the provisions of the Public Employees' Trade Unions Act No. 4688 of 25 June 2001, which reflected the principles set forth in Conventions Nos. 87, 98 and 151. KESK's allegations on behalf of its affiliate, the Trade Union of Public Servants in the Education Branch (Egitim Sen), concerned legal procedures established by Act No. 4688 for violations of the Act's provisions. These violations were to be determined at the time of establishment of trade unions by the competent governorships in accordance with section 6 of the Act.
- 1294.** The Government further indicated that the lawsuit filed on 10 June 2004 for the dissolution of Egitim Sen (File No. 2004/833), was dismissed after a hearing dated 15 September 2004 by the Second Industrial Court of Ankara (Decision No. 2004/752).
- 1295.** In a communication dated 6 January 2005, the Government added that the decision of the Second Industrial Court of Ankara rejecting the lawsuit was appealed before the 9th Chamber of the Supreme Court of Appeal which quashed the initial ruling in a decision of 3 November 2004 (No. 2004/24792).
- 1296.** In its communications dated 29 March and 15 April 2005, the Government transmitted the above decisions of the Second Industrial Court of Ankara and the 9th Chamber of the Supreme Court of Appeal. The Government added that, during the re-hearing of the case on 21 February 2005, the Second Industrial Court of Ankara confirmed its initial decision to reject the request for dissolution. When this decision confirming the initial judgement was issued, the file would be sent to the General Assembly of the Legal Chamber of the Supreme Court of Appeal for a final verdict.
- 1297.** In a communication dated 25 July 2005, the Government indicated that, on 25 May 2005, the General Assembly of the Legal Chamber of the Supreme Court of Appeals quashed, once again, the second decision of the Second Industrial Court of Ankara on the grounds stated previously by the 9th Chamber of the Supreme Court of Appeals. This final ruling had been taken unanimously but with differing reasons which had not been published yet. The Government added that Egitim Sen sent a communication to the Ministry of Labour and Social Security on 6 July 2005 submitting its statutes of which paragraph (b) of article 2 entitled "union objectives" had been amended so as to delete the term "education in mother tongue". The Government appended the amended version of the statutes.

C. The Committee's conclusions

- 1298.** *The Committee observes that this case concerns allegations that the Attorney-General of Ankara filed a lawsuit on 10 June 2004 under section 37 of the Public Employees' Trade Unions Act No. 4688 (which provides that "every union or confederation that carries out activities against the characteristics of the State set out in the Constitution or democratic principles shall be ordered to go into liquidation by the local labour court at the request of the public prosecutor"), requesting the courts to order the dissolution of the Trade Union of Public Servants in the Education Branch (Egitim Sen), because its statutes provided as one of the trade union's purposes the defence of "the right of all citizens to education in their mother tongue and the development of their culture", which was contrary, according to the Attorney-General, to constitutional and legislative provisions prohibiting the teaching of any language other than Turkish as mother tongue, and Article 3 of the national Constitution which provides that the Turkish State, along with its nation and territory, constitutes an indivisible entity.*
- 1299.** *The Committee notes from the text of the court decisions transmitted by the Government, that the court of first instance (Second Industrial Court of Ankara) rejected the request to order the dissolution of Egitim Sen on the ground that the disputed provision in its statutes did not constitute a risk for the unity of the nation and the territory of the Republic and that this provision was not contrary to articles 10 and 11 of the European Convention on Human Rights concerning, respectively, the right to freedom of expression, to hold opinions and to receive and impart information and ideas without interference by public authority; and the right to freedom of peaceful assembly and to freedom of association, including the right to form and join trade unions for the protection of one's interests.*
- 1300.** *The Committee further notes that the 9th Chamber of the Supreme Court of Appeals decided to quash the decision of the court of first instance, finding that the expression at issue ran against necessary precautions aimed at avoiding any expression against the State's unity and was contrary to articles 3 and 42(6) of the Constitution, as well as section 20 of Act No. 4688; thus, the Supreme Court found that Egitim Sen should be dissolved in conformity with section 37 of Act No. 4688. The Supreme Court of Appeals based its decision on the following grounds: (i) section 3(f) of Act No. 4688 defined a trade union as an institution vested with legal personality and having as an aim the defence and development of the social, economic and professional rights and interests of civil servants; the purposes of Egitim Sen exceeded those mentioned in section 3(f) of Act No. 4688 to the extent that they included "the right of all citizens to education in their mother tongue and the development of their culture"; a trade union should have as its unique purpose the defence of the common social and economic interests of its members and the insistence with which Egitim Sen had refused to modify its statutes was reason for suspicion and proved that this trade union exercised activities falling outside the normal purposes of a trade union; (ii) this provision in the statute of Egitim Sen was contrary to article 42 of the national Constitution and section 2 of Acts Nos. 2925 and 4771 (as amended), all of which provided that no language other than Turkish could be taught to Turkish citizens as a mother tongue or serve to give courses in training and educational establishments, as well as article 3 of the national Constitution which provided that "the Turkish State constitutes, along with its territory and nation, an indivisible entity"; these constitutional and legislative provisions constituted according to the Supreme Court of Appeals, necessary precautions in a democratic society for the defence of national security, public safety and order; they aimed at avoiding any expression against the State's unity. On 21 February 2005, the Second Industrial Court of Ankara upon remand confirmed its earlier decision rejecting the request for dissolution. Finally, on 25 May 2005, upon appeal for the second time, the General Assembly of the Legal Chamber of the Supreme Court of Appeals confirmed its previous decision and quashed, once again, the decision of the court of first instance, on the grounds previously stated by the 9th Chamber of the Supreme Court of Appeals.*

- 1301.** *The Committee further notes from the information provided by the Government that, in a communication dated 6 July 2005, Egitim Sen informed the Ministry of Labour and Social Security that its statutes had been amended so as to delete the term “education in mother tongue”.*
- 1302.** *Observing that Egitim Sen complied with the final decision of the Supreme Court, the Committee also notes the complaint’s allegation that the statutes of Egitim Sen, including the reference to education in one’s mother tongue, were clearly compatible with the law and the request to order its dissolution was unfounded and contrary to section 37 of Act No. 4688 for the following reasons: (i) Egitim Sen had not actually acted against the principles of the Republic but had simply refused to amend a section of its statutes (thus, any proceedings against this trade union should be based on section 6 rather than 37 of Act No. 4688); (ii) by referring to the intention to defend citizens’ rights to education in their mother tongue and the development of their culture, section 2(b) of the statutes of Egitim Sen did not violate any law but, on the contrary, exemplified a purely democratic spirit which was in conformity with the laws of the Republic – reason for which a previous request by the Ankara Governorship to order the dissolution of this trade union had been rejected by the Attorney-General in 2002; (iii) moreover, since that date, many laws and regulations had been changed in Turkey and, by virtue of section 11 of Act No. 4771 of 2002, Turkish citizens now had the possibility to lawfully learn different spoken languages and dialects. In particular, by virtue of the regulations issued on 15 December 2003 concerning possibilities for Turkish citizens to learn different languages and dialects which used to be spoken in daily life, it had been made possible to learn and develop different languages.*
- 1303.** *The Committee emphasizes that measures of dissolution of a trade union, given in particular the serious consequences involved for the occupational representation of workers, should be applied with the greatest caution and only where serious acts have been duly proven. The Committee takes note of Egitim Sen’s concern that it might be dissolved, even though it had taken steps to delete the article of its statutes that was at issue, and trusts that this will not be the case. It requests the Government to inform it of the current status of Egitim Sen.*
- 1304.** *The Committee also requests the Government to provide additional information regarding the contradictions between the Egitim Sen statutes and the national Constitution and any impact that the final court decision might have on freedom of association.*

The Committee’s recommendations

- 1305.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee takes note of Egitim Sen’s concern that it might still be dissolved, even though it had taken steps to delete the article of its statutes that was at issue, and trusts that this will not be the case. It requests the Government to inform it of the current status of Egitim Sen.*
- (b) *The Committee also requests the Government to provide additional information regarding the contradictions between the Egitim Sen statutes and the national Constitution and any impact that the final court decision might have on freedom of association.*

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

1306. 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.

1307. In this regard, the Governing Body adopted the following recommendations:

7. 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 (March 2005), 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.

1308. 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.

- 1309.** At its meeting in March 2005, the Committee was not able to examine the complaint presented under article 26 of the ILO Constitution or formulate recommendations to the Governing Body, given that all the Employer members of the Committee who were present at that meeting had signed the complaint in question. Under these circumstances, the Committee considered that it was 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 [see 336th Report, para. 918].
- 1310.** At its meeting in March 2005, the Governing Body decided that the complaint made under article 26 of the Constitution should be submitted to the Committee on Freedom of Association after the renewal of the Committee in June with a view to examination at its November 2005 session [see Appendix III, document GB.292/PV, Minutes of the 292nd Session of the Governing Body, paras. 155-175].
- 1311.** At its meeting in June 2004, the Committee on Freedom of Association examined Case No. 2254, presented by the International Organisation of Employers (IOE) and the Venezuelan Federation of Chambers of Commerce and Manufacturers' Associations (FEDECAMARAS), and formulated interim conclusions. This case concerns essentially the same questions as those raised in the complaint made by virtue of article 26. At its meeting in May-June 2005, the Committee once again examined this case in the light of the Government's observations and reached interim conclusions [see Appendix IV, 337th Report, paras. 1500-1603]. The Government sent partial observations in a communication dated 26 October 2005, received in the Office on 28 October 2005 (Appendix V).
- 1312.** *Taking into consideration the necessity to obtain an objective assessment of the actual situation, in particular, as concerns employers' organizations and their rights, and to obtain as much information as possible on all the questions at issue, the Committee recommends to the Governing Body to send a direct contacts mission to the country before deciding on 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) Mr. 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 fallen⁶ 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 recommendations¹⁰ 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.

authorities¹¹ 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.

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.

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).

(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.

IV. Petition

The Government of the Bolivarian Republic of Venezuela requests that the complaint be declared irreceivable and closed.

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 .

Appendix III

Complaint concerning non-observance by the Bolivarian Republic of 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

The Employer spokesperson noted the problem arising from the fact that many of the Employer delegates who had submitted the complaint were present at the meeting of the Committee on Freedom of Association (CFA) designated to examine it. He requested clarification from the Legal Adviser as to whether this situation was legal or ethical, as did the Worker spokesperson.

The Legal Adviser stated that his reply to the secretariat of the CFA, which had requested information in this connection, had been negative: it was not possible to be complainant and judge at the same time.

The Employer spokesperson asked whether, in the absence of a written rule, the Employers could select an ad hoc group of their members who had not signed the complaint.

The Worker spokesperson suggested that since the matter had been referred to the CFA, it was for the Committee simply to disqualify it.

The Legal Adviser referred to the rules governing the composition of the CFA. It was made up of three regular members and three deputy members. The purpose of the deputy members was to replace the regular members in cases of conflict of interest – where a regular member's country was implicated in a complaint, for example. As to whether the Governing Body could designate an ad hoc membership of the Committee to examine a particular question, given that the membership was decided for the duration of the Governing Body's mandate, this appeared difficult. Other procedures could be initiated.

The classic solution to the problem would be to follow article 26 procedure, under which the Governing Body would decide on the complaint after considering it against the Government's reply, either by appointing a commission of inquiry, or by closing the procedure.

A further solution, which might be wiser, would be to wait until June, when the Governing Body was due for renewal; a CFA could then be appointed that would be able to examine this complaint. Yet further solutions could be found if needed.

The Employer spokesperson said that his group could not accept closure of the procedure. The question was therefore to *choose* between a commission of inquiry and waiting for a new CFA in June.

The Worker spokesperson agreed to examination of the case by the new CFA in November 2005.

A Government representative of El Salvador, speaking on behalf of the governments of the Group of Latin American and Caribbean States (GRULAC), noted that the case had been referred to the CFA by the 291st Session of the Governing Body. He further noted that the Committee had not been able to examine the complaint and make recommendations, given that all Employer members present on the Committee had signed the complaint. GRULAC observed that the Government of the Bolivarian Republic of Venezuela had responded rapidly to the complaint, and had provided information which proved that its validity was questionable. Moreover, the arguments put forward in the complaint were closely related to Case No. 2254, without bringing any new element into play. In the latter case, the CFA had only produced an interim report. Given that the matter had been sufficiently discussed, the Governing Body should declare that the complaint did not merit examination by a commission of inquiry, and close the procedure.

GRULAC also believed that the criteria for receipt and receivability of complaints made under article 26 should *be* reviewed, to prevent automatic consideration and duplication of procedures.

The Committee on Legal Issues should present a document on criteria for receivability to the 293rd Session of the Governing Body. Furthermore, the legal consultations that the ILO had been called on to carry out by its Members should take place in an appropriate manner, and not in the hurried way in which document GB.291/17 had been examined by the last session of the Governing Body. GRULAC therefore approved the letter sent from the ILO to the Government of the Bolivarian Republic of Venezuela, which stated that the Office took great care to maintain clear rules, in order to ensure adequate legal security.

The Employer spokesperson said that GRULAC was opening a discussion on the substance of the question. This was proper to a supervisory body, not to the Governing Body, which simply had to chose between the three proposed options.

A Government representative of the Bolivarian Republic of Venezuela recalled that the previous session of the Governing Body had decided to refer this case to the CFA and had invited the *Government* of the Bolivarian Republic of Venezuela to supply additional information. This the Government had rapidly done. He welcomed the recognition by the three experts and Employer representatives on the CFA that they were unable to consider the case. In recognizing this, the CFA concurred with the arguments for non-receivability put forward by the Government during the discussion of the case in November. Moreover, as GRULAC had stated, another procedure was under way in the same field, causing inefficient duplication. The representative noted with approval the Legal Advisor's opinion that experts could not be complainant and judge at the same time. This careful and considered opinion appeared to have cancelled the delay incurred in respect of a previous inquiry made by the Government of the Bolivarian Republic of Venezuela.

The report submitted by the Government to the Director-General gave details of measures taken to guarantee the rights of freedom of association and collective bargaining. There was at present in the country an intense process of debate, dialogue and interaction between the social actors, including social actors who had not, by their own choice, previously been included in the debate. The president of FEDECAMARAS, the employers' organization at the origin of this complaint, had last week recognized the Government's will to promote dialogue, and had agreed to work willingly with the government authorities. These meetings of the social actors had been examining and revising the Government's policies in respect of labour and of social security. It was therefore no longer necessary to retain this question on the agenda of the Governing Body. The procedure should be declared closed because it no longer corresponded to the reality in the Bolivarian Republic of Venezuela, but referred to facts already outdated.

A Government representative of Uruguay supported the GRULAC statement, and requested that the procedure be closed.

A Government representative of China believed that the reply given by the Government of the Bolivarian Republic of Venezuela was complete and clear, and that the Government had taken appropriate measures. Moreover, the complaint was almost identical to that in Case No. 2254, which had been examined carefully by the Governing Body. The Governing Body should continue to work closely with the Government to reach a solution.

A Government representative of India noted that the Government of the Bolivarian Republic of Venezuela was collaborating well with the Office. This process should not be disrupted, and the complaint should not be referred to a commission of inquiry.

A Government representative of the Libyan Arab Jamahiriya said the efforts undertaken by the Government of the Bolivarian Republic of Venezuela should be encouraged, and the present procedure closed.

A Government representative of the Russian Federation did not support referring the case to a commission of inquiry.

The Chairperson noted that the Governing Body contained a small minority supporting referral to a commission of inquiry, a small minority for closing the procedure, and a large degree of agreement in support of referral to the new committee that would be established in June 2005.

Governing Body decision

The Governing Body decided that the complaint concerning non-observance by the Bolivarian Republic of 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 should be referred to the Committee on Freedom of Association, after the renewal of the Committee in June, for examination at its November 2005 session.

Appendix IV

CASE NO. 2254

INTERIM REPORT

Complaint against the Government of Venezuela presented by

- the International Organisation of Employers (IOE) and
- the Venezuelan Federation of Chambers of Commerce and Manufacturers' Associations (FEDECAMARAS)

Allegations: The complainant organizations have presented the following allegations: the marginalization and exclusion of employers' associations in the decision-making process, excluding them from social dialogue, tripartism and the holding of consultations in general (particularly in relation to the very important legislation that directly affects employers), thereby not complying with the very recommendations of the Committee on Freedom of Association; action and interference by the Government to encourage the development of and to promote a new employers' organization in the agricultural and livestock sector to the detriment of FEDENAGA, the most representative organization in the sector; the arrest of Carlos Fernández on 19 February 2003 in retaliation for his activities as president of FEDECAMARAS, without a legal warrant and without the guarantees of due process; according to the complainant organizations he was badly treated and insulted by violent groups headed by a government deputy; the physical, economic and moral harassment, including threats and attacks, of the Venezuelan employers and their officials by the authorities or people close to the Government (various cases are listed); the operations of violent paramilitary groups with governmental support, with actions against the facilities of an employers'

organization and against protest actions by FEDECAMARAS; the creation of an atmosphere hostile to employers in order to allow the authorities (and on occasion to encourage them) to dispossess and occupy farms in full production, in violation of the Constitution and legislation and without following legal procedures; the complainant organizations refer to 180 cases of illegal invasions of productive land and indicate that most of these cases have not been resolved by the relevant authorities; the application of an exchange control system decided unilaterally by the authorities, discriminating against companies belonging to FEDECAMARAS in administrative authorization for the purchase of foreign currencies, in retaliation for participation by this employers' confederation in national civic work stoppages

1500. The Committee examined this case at its June 2004 meeting and submitted an interim report to the Governing Body [see 334th Report, paras. 877-1089, approved by the Governing Body at its 290th Session (June 2004)].
1501. Subsequently, the Government sent new observations in its communications of 22 and 25 February 2005.
1502. 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. Previous examination of the case

1503. At its May-June 2004 meeting, the Committee on Freedom of Association made the following recommendations [see 334th Report, paras. 1053-1089, approved by the Governing Body at its 290th Session (June 2004)]:
- (a) In a general way, the Committee wishes to underline the seriousness of the allegations and it regrets that, in spite of the fact that the complaints were presented in March 2003, the Government's reply, dated 9 March 2004, does not give specific replies to a large number of the allegations.
 - (b) Taking into account the nature of the allegations presented and the Government's reply, the Committee expresses generally its serious concern about the poor situation of the rights of employers' organizations, their representatives and their members. The Committee draws the Government's attention to the fact that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations; the Committee also underlines that freedom of association can only be exercised in conditions in which fundamental human rights, and in particular those relating to human life and personal safety, due process and the protection of premises and property belonging to workers' and employers' organizations, are fully respected and guaranteed. The Committee urges the Government to fully guarantee these principles in the future.
 - (c) The Committee regrets that the Government has not convened the National Tripartite Commission for a number of years and that it usually does not carry out bipartite or tripartite consultations with FEDECAMARAS regarding policy-making or legislation that has a fundamental effect on its interests in labour, social or economic matters, thereby violating the basic rights of this employers' confederation; the Committee urges the Government to stop marginalizing and excluding FEDECAMARAS from social dialogue and, in future, to fully

apply the ILO Constitution and the principles therein on consultation and tripartism. The Committee also urges the Government, without delay, to convene periodically the National Tripartite Commission and to examine in this context, together with the social partners, laws and orders adopted without tripartite consultation.

- (d) In the current critical situation facing the country and noting that there has for years existed a permanent conflict between the Government, on the one hand, and FEDECAMARAS and the CTV, on the other, the Committee offers the Government the services of the ILO to provide the State and society with its experience so that the authorities and the social partners may regain trust and, in a climate of mutual respect, establish a system of labour relations based on the principles of the ILO Constitution and of its fundamental Conventions, as well as the full recognition, in all its consequences, of the most representative confederations and all organizations and significant trends in the labour world.
- (e) The Committee urges the Government to reinstate FEDENAGA to the Agricultural and Livestock Council and to stop favouring CONFAGAN to the detriment of FEDENAGA.
- (f) The Committee considers that the arrest of Carlos Fernández, President of FEDECAMARAS, as well as being discriminatory, aimed to neutralize or act as retaliation against this employers' official for his activities in defence of employers' interests and, therefore, it urges the Government to take all possible steps to annul immediately the judicial proceedings against Carlos Fernández and to ensure that he may return to Venezuela without delay and without risk of reprisal; the Committee requests the Government to keep it informed in this respect. The Committee deeply deplores the arrest of this employers' official and emphasizes that the arrest of employers' officials for reasons linked to actions relating to legitimate demands is a serious restriction of their rights and a violation of freedom of association, and requests the Government to respect this principle; the Committee also requests the Government to take steps to carry out an investigation into how the police carried out the arrest of Carlos Fernández, his being imprisoned and held incommunicado for a day and the type of cell in which he was imprisoned, and to keep it informed in this respect.
- (g) With regard to the allegations relating to the application of the new system of exchange control in 2001 (suspension of free buying and selling of currencies) unilaterally established by the authorities, discriminating against companies belonging to FEDECAMARAS in the administrative authorization for the purchase of foreign currencies (in retaliation for its participation in the national civic work stoppages); having taken account of the alleged discrimination and serious difficulties expressed by the complainant organizations because of the negative impact in many industries of this system, the Committee requests the Government to examine with FEDECAMARAS, without delay, the possibility of modifying the current system and that it guarantee, meanwhile, in case of complaints, the application of this system without discrimination of any sort, through impartial bodies. The Committee requests the Government to keep it informed in this respect.
- (h) The Committee urges the Government to take the necessary measures without delay:
 - (i) to ensure that the authorities do not try to intimidate, pressure or threaten employers and their organizations for their activities with regard to legitimate demands, in particular in the communications and in the agro-industrial sectors;
 - (ii) to carry out, without delay, an investigation with regard to: (1) the acts of vandalism at the premises of the Lasa Chamber of Commerce by Bolivarian groups supporting the regime (12 December 2002); (2) the looting of the office of Julio Brazón, president of CONSECOMERCIO (18 February 2003); (3) the threats of violence on 29 October 2002 by alleged members of the government political party against Adip Anka, president of the Bejuma Chamber of Commerce;
 - (iii) to carry out an investigation, without delay, into the allegations relating to 180 cases (up to April 2003) that have not been resolved by the authorities of illegal invasion of lands in the states of Anzoátegui, Apure, Barinas, Bolívar, Carabobo, Cojidas, Falcón, Guárico, Lora, Mérida, Miranda, Monagas, Portuguesa, Sucre, Taclira, Trujillo, Yanacuy and Zulia, and requests that, in the case of expropriations, it fully respect the legislation laid down and the relevant procedures; and
 - (iv) to urgently carry out an independent investigation (by people in whom the workers' and employers' confederations have confidence) into the violent paramilitary groups mentioned in the allegations (Coordinadora Simón Bolívar, Tupamaros movements and Círculos Bolivarianos Armados, Quinta República, Juventud Revolucionaria del MVR, Frente Institucional Militar and Fuerza Bolivariana) with a view to dismantling and

disarming them, and that it ensure that there are no clashes or confrontations between these groups and protestors in demonstrations, and to keep it informed in this respect.

B. The Government's new observations

1504. In its communication of 22 February 2005, the Government states, in relation to the Committee's recommendation on social dialogue, that the Government takes note of the recommendation of the honourable Committee in subparagraph (c) of paragraph 1089. On this point, and taking into consideration the background of destabilization and attacks on democratic institutions, the Government undertook a series of initiatives to consult about and validate measures and actions designed to protect the interests and rights of the majority sectors of the country who are victims of poverty and structural exclusion, due in large measure to the negative impact on these majority sections generated by unilateral neo-liberal and anti-nationalist policies about which there was no consultation. Noteworthy among these measures and actions were a set of legal instruments, whose drafting and approval by the National Executive had been previously authorized by the National Assembly (enabling act), which were submitted to processes of consultation and dialogue with the social actors. Although the positions adopted were not those of the business sector, there is no question of this consultation process not taking place. Perhaps the misunderstanding arose due to the traditional way in which the dialogue and consultation occurred, in which the Government surrendered its role of protector of the interests of the majorities, allowing a progressive trimming of the economic, social and cultural rights of the population.
1505. The Government indicates that the most striking disagreements with these legal provisions were those relating to demands concerning the privatization of oil and hydrocarbons; land and rural development; fishing and coasts and the Public Administration Act, the latter giving rise to a complaint to the Committee, Case No. 2202, subsequently withdrawn by the complainant trade unions when the observations submitted were remedied. The remainder of the 47 authorized to be drafted and approved by the National Executive entered into force smoothly and did not give rise to major comments.
1506. According to the Government, the criticisms that surfaced around this legislation gave rise to actions against democratic institutions, involving key representatives of the social actors, even to the point of a *coup d'état* and sabotage of the country's main economic activities, with paralysis of essential public services and causing an acute national crisis in the country.
1507. The Government adds, however, that the complaint which gave rise to this case fails to mention the process of dialogue conducted by the authorities prior to approval of the legislative measures and even after their approval consultations took place, without prejudice to recourse to other mechanisms and remedies set out in the national legal system.
1508. In the latter regard, the Government points to the controversial Land and Rural Development Act which was challenged in the Constitutional Division of the Supreme Court of Justice, and which led to several decisions, annulling several of the most controversial articles or provisions. Particular mention should be made of the decisions of the Constitutional Division of 20 November and 11 December 2002, on the application of the National Federation of Stockbreeders (FEDENAGA), whose president is Mr. José Luis Betancourt, which declared null articles 89 and 90 of the Decree with rank of law, the Land and Agrarian Development Act, while at the same time providing an interpretation of articles 25, 40 and 43 of the Act.
1509. Likewise, the Government states that, following an intensive process of consultation and debate in the National Assembly, the text originally approved by the National Executive on the Public Administration Act was revised. Indeed, the new version was approved by the National Assembly on 11 July 2002, extending rights of freedom of association and collective bargaining. Amendments resulting from the consultations were even introduced into the original text, which allowed the Latin-American Workers' Confederation (CLAT) to withdraw the complaint it had submitted to the Committee, recognizing the fruits of the dialogue that had taken place. Thus there is little basis for disputing the form in which the texts were approved by the National Executive as omitting the power to amend them at a later stage in the National Assembly, and also in the Supreme Court of Justice.

1510. The Government states that, despite the public actions of Mr. Carlos Fernández in the April 2002 *coup d'état*, the President of the Republic, in a gesture of humility and magnanimity, invited him a few days later to participate in the forums for dialogue which he was initiating with the country's various social sectors. Despite the fact that Mr. Fernández withdrew from the forums for dialogue within a few days, in the specific case of the labour sector, these forums for dialogue continued with grassroots employers' and workers' organizations, leading to important sectoral agreements at grassroots level (in key sectors such as motor vehicles and spare parts, chemicals and pharmaceuticals, tourism, small and medium-sized enterprises, transport, textiles and clothing, among others). Therefore the Committee's statement concerning the supposed deliberate "marginalization" and "exclusion" of FEDECAMARAS by the Government is perhaps inexact and insufficient, when paradoxically within a few days of a *coup d'état* led by the president of FEDECAMARAS, the vice-president of FEDECAMARAS was asked to form part of the national social forums for dialogue. In the light of this, it seems more appropriate to state that it was a case of self-exclusion and self-marginalization.
1511. The Government indicates that in order to overcome the political crisis caused by the *coup d'état* led by the president of FEDECAMARAS, Mr. Carmona, the Government in November 2002 launched a process of national dialogue with the opposition. This process of dialogue was facilitated by the Organization of American States (OAS), the Carter Center and the United Nations Development Programme (UNDP). The opposition side included a representative of FEDECAMARAS. This dialogue process took place despite the fact that within a few days Mr. Fernández, acting as president of FEDECAMARAS, allied himself publicly with an act of military rebellion led by the generals in the Plaza Altamira de Caracas. In addition, within a few days, Mr. Fernández led the work stoppage for over two months to bring about the removal of the President of the Republic. These elements will put into perspective the soundness of the Committee's recommendation on the supposed marginalization and exclusion of FEDECAMARAS from the dialogue. As both the Committee and other ILO monitoring bodies have been informed repeatedly, the process of dialogue facilitated by the OAS, the Carter Center and the UNDP culminated in the signing of an agreement on 29 May 2003, which ultimately led to the calling of the popular referendum on 15 August 2004.
1512. According to the Government, the consultations on minimum wages since 2002 have been conducted through written requests sent to the various social actors at national, regional and local level. The measures adopted by the Government in this field, particularly in 2004, permitted a recovery in workers' wages against a background of economic growth, and declining rates of unemployment, informality and inflation.
1513. The Government indicates that the consultations on other work-related measures, such as labour immobility, agreements of the Andean Community of Nations, action plan on child labour, ratification of Conventions, Workers' Food Act, etc. have in most cases been conducted through correspondence or letters. This government action aimed at all the social actors has intensified since August 2004.
1514. According to the Government, the consultations on the reform of the Organic Labour Act were conducted directly with representatives of the various social actors, both in the National Assembly and the Ministry of Labour.
1515. The Government adds that, following the regional and municipal elections, the Executive Vice-President of the Republic held meetings with representatives of FEDECAMARAS, at both national and regional level, and with representatives of the affiliated chambers (CONINDUSTRIA, CONSECOMERCIO, among others). This effort by the Government is intended to restore social dialogue with leading social actors, without prejudice to maintaining the impetus of regional and sectoral meetings such as those held since 2002.
1516. The Government indicates that on 14 January 2005, in an event which had not occurred since 2001, the president of FEDECAMARAS attended the session where the President of the Republic reported to the nation on the management of the previous year.
1517. For the Government, as well as an immediate commitment of the National Executive, this effort to meet also directly involved the presidency of the National Assembly, where the national committee

of FEDECAMARAS was recently received. This aspect is of particular importance because the President of the National Assembly comes from the Caracas Metro Workers' Union which committed itself to promoting a common agenda for labour legislation, in particular reform of the Organic Labour Act.

1518. As regards social dialogue in a direct and participate democracy, the Government indicates that, in paragraph 1066, the Committee rightly “recalls that the 1944 Declaration of Philadelphia that forms part of the ILO Constitution reaffirms among the fundamental principles on which the ILO is based, the following: the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare”.
1519. The Government indicates that the Committee’s observation in the previous paragraph is also shared by the Government, which highlights that in no other period of the country’s history has there been an inclusive policy of consultation and decision-making involving all elements of Venezuelan society, both organized and otherwise. In the specific case of employers’ organizations, the terms “inclusive” and “grassroots” as part of this dialogue should be highlighted, due to the fact that in the past broad swathes of employers’ and workers’ sectors were left out of the discussions and decisions which affected or regulated their relations with the Venezuelan State, and as established in the Declaration of Philadelphia “the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare”.
1520. In this regard, what the Government has done is to enlarge the basis of the customary consultations or dialogue which took place during the so-called “representative” democracy which existed in the Republic until 1999, dominated by the exclusiveness and privilege of the employers’ representation, before giving way to plurality instead of exclusion, allowing, for example, the Federation of Artisans, Micro, Small and Medium-Sized Industrialists of Venezuela (FEDEINDUSTRIA), founded over 30 years ago, to participate in forums for dialogue or consultations, something which was not usual until the present Government came into power.
1521. The Government adds that it is important to stress than, in terms of bipartite and tripartite dialogue and consultation since 1999, what was done was simply to comply with the ILO Constitution and the provisions of the Conventions duly ratified by the Republic, highlighting in this process the importance of including participatory, proactive and inclusive democracy, i.e. that the country’s important decisions are the subject of wide consultation with all members of the different productive sectors, in this case old and new employers’ organizations.
1522. Consequently, what has been seen is that the conduct of FEDECAMARAS from 2001 up to November 2004 was directed – inexplicably – at marginalizing and excluding itself, by changing from a social actor to a political one, causing economic losses to a large number of its members, promoting disregard for legality, and evading its social obligations and responsibilities. Such acts are not only contrary to the spirit of social dialogue in a democratic framework, but contrary to the social state under the rule of law and justice with which Venezuelan men and women are blessed under the Constitution.
1523. According to the Government, the process of establishing mechanisms of consultation and participation is what has made economic recovery possible, generating new fair and decent work, progressively surmounting social exclusion and enhancing the quality of life of the population, correcting in ample measure the various situations noted by the complainants and the Government before the Committee in March 2003 and March 2004.
1524. As regards the statements concerning the responsibility of FEDECAMARAS, like the Committee, the Government also regrets the discrediting of FEDECAMARAS and its officials (paragraph 1057 of the Conclusions). However, it should be stressed that, at the time of the events at the end of 2001, throughout 2002 and early 2003, there were few protests by other employers affiliated to the employers’ organization expressing their disagreement or differences with the leadership indicated in advance (prior to the actions of Mr. Carmona and Mr. Fernández).

1525. In this case, the Government is referring to employers affiliated to FEDECAMARAS who at that point in time and in the then political situation, did not express their disagreement with the well-known public actions of their leaders. In any case, as was already made clear, the Government points out that, since then, matters have been evolving in a positive way, particularly since the holding of the presidential referendum of 15 August and the regional and municipal elections of 31 October 2004. The new political events have enabled the re-establishment of forums for meeting and dialogue, turning the page on the rifts that occurred between 2001 and 2003. Thus, many of the unconstitutional and illegal actions perpetrated against Venezuela's institutions and people are now in the hands of the respective law enforcement agencies and the courts (Office of the Attorney-General and the Judicial Power), where those under investigation enjoy due guarantees in the framework of due process.
1526. In its communication of 25 February 2005, concerning the *coup d'état* of April 2002, the Government draws to the Committee's attention that, in its conclusions (paragraph 1055), it should take into account, based on the observations submitted by the Government, that "the Committee observes that in response to the complaint as a whole and to an incidental claim by the complainants (that the national civic work stoppage on 9, 10 and 11 April 2002 led to the national crisis that resulted in the resignation of the President of the Republic which was publicly confirmed by the country's highest military official, but that only lasted a few days as it was later cancelled by the President himself) ...".
1527. The Government points out that, in highlighting the facts, the Committee contradicts itself, since it states in paragraph 1056 "... that this complaint does not relate to Pedro Carmona, that the allegations relate to situations both preceding and following the events of 12 and 13 April 2002 (above all the national civic work stoppages of December 2002 to January 2003), that its mandate is limited to examining the allegations of violations of the rights of workers' and employers' organizations, their representatives and affiliates, and that it is not the competent international forum to deal with questions of an exclusively political nature".
1528. The Government indicates that the Committee itself supports the Government's argument through an "incidental claim by the complainants" [IOE – FEDECAMARAS], in other words, the complainants themselves assume the involvement of the employers' organizations and their then leaders in the observations made by the Government in March 2004 which the Committee summarizes in paragraph 1056.
1529. For the Government, the participation, inter-dependency and relationship that existed between both members of the FEDECAMARAS leadership (whose president was Mr. Carmona and vice-president Mr. Fernández) in the events of April 2002 is clear. The actions by both led to a *coup d'état*. These actions are evidenced in documents and newspaper articles provided by the Government to the Committee in its observations of March 2004.
1530. The Government refers to the Committee's summary in paragraph 924 (the Government's reply), which it quotes: "Carlos Fernández succeeded Carmona Estanca in the presidency of FEDECAMARAS, as he was the first vice-president of the association when the unconstitutional presidency of Carmona Estanca as de facto President was announced. The first official act of Carlos Fernández as president of FEDECAMARAS was to acknowledge the regime of Carmona Estanca, and it was on 12 April 2002 that Mr. Fernández signed the 'Act of Constitution of the Government of Democratic Transition and National Unity' as representative of the employers. The Act referred to tried unconstitutionally to justify the *coup d'état* by the employers, the military, opposition political parties and a minority of 'civil society' with the so-called 'Government of Democratic Transition and National Unity'".
1531. The Government adds that the cited observations were accompanied by the copy of the Act of the so-called transitional government over which Mr. Carmona presided for a few hours and which Mr. Fernández endorsed with his signature on behalf of the employers of Venezuela. These actions, the Government recalls, led to:
- the removal and persecution of the President of the Republic, the Executive Vice-President of the Republic, ministers and other government officials;

- the removal and persecution of governors and mayors belonging to the government party, previously elected (like the President of the Republic) by the will of the people;
 - removal and suppression of the National Assembly (National Legislative Power);
 - removal of the judges of the Supreme Court of Justice (Judicial Power);
 - removal of the Office of the Attorney-General, Office of the Ombudsman and Office of the Comptroller-General of the Republic (Civil Power); and
 - removal of the judges of the National Electoral Council (Electoral Power).
1532. The Government adds that these acts transmitted throughout the country by radio and television clearly showed that these representatives of FEDECAMARAS (president and vice-president) were acting contrary to the Constitution, laws and international Conventions on human rights. These acts include the unconstitutional detention or deprivation of liberty, in the form of kidnapping of the President of the Republic, legitimately elected in 2000 by the vast majority of the Venezuelan people (over 60 per cent of the vote).
1533. The Government states that any attempt to distinguish the action of Mr. Carmona from that subsequently taken by Mr. Fernández is a serious error, both in historical and legal terms, since it was a case of a series of facts or events related to each other, as shown by the actions that were taken.
1534. For example, the Government adds, prior to the indefinite employers' stoppages of December 2002 and January 2003, there had already been the employers' stoppage of 10 December 2001, the employers' stoppage of 9, 10 and 11 April 2002 and the employer's stoppage of 21 October 2002. In all those cases, those who represented FEDECAMARAS as president (first Mr. Carmona and later Mr. Fernández) acted with the support of private television and radio companies on public channels, directing their actions against the democratic system.
1535. As regards the judicial detention of Mr. Carlos Fernández, the Government is concerned at the statements by the Committee on Freedom of Association in its interim conclusions on the judicial detention of Mr. Carlos Fernández, the opinions expressed by the Committee on Freedom of Association and adopted by the Governing Board with the respective reservations by the Government of Venezuela at the 290th Session of the Governing Board (summary record of the meeting annexed). The Committee exceeds its powers on the substance of the matter, when it overlooks the principles of international law on the burden of proof and evaluation of evidence. Consequently, its conclusions are reckless and mistaken because they are based on false suppositions. The Government stresses that Mr. Carlos Fernández is a fugitive from justice, which places him in a special position because he has evaded justice.
1536. In the Government's opinion, the Committee exceeds its powers on the substance of the matter when it passes judgment on matters which are a matter for the criminal courts of Venezuela and which are not established in Conventions Nos. 87 and 98. According to the Government, in pronouncing on whether a person has been the victim of ill-treatment during his detention, the Committee did not take sufficiently into account the observations submitted in this case, as set out in the reply and annexes in March 2004.
1537. The Government indicates that the Committee overlooks the principles of international law concerning the burden of proof and evaluation of evidence. Indeed, according to the Government, the Committee reverses the burden of proof and its evaluation of the evidence submitted by the parties is inadequate. The Committee, by breaching the principles of international law, reverses the burden of proof and finds the complainants' statements to be true even when the Government presented solid evidence and documents such as judicial decisions, and statements by the alleged victim and his wife to the mass media.
1538. Concerning the putative ill-treatment alleged by the complainants, the Government states that, while the complainants stated in the Committee that Mr. Fernández had been ill-treated, the alleged victim never made any complaint in that respect to any national authority. This is a negative fact about which the Government cannot present any evidence, it being up to the complainants to provide evidence that Mr. Fernández entered a complaint of any kind for alleged human rights

violations. In this respect, they should annex the complaints made to the competent judicial organs, i.e. the Office of the Attorney-General and the Office of the Ombudsman. Unlike the complainants, the Government submitted documentary evidence consisting of statements to the mass media by Mr. Fernández' wife saying that he had been well treated.

1539. The Government adds that faced with the above situation, the Committee rejects the evidence presented by the State because it considered that it is "of limited value as evidence". By virtue of the application of the principles of burden of proof, even if a more limited role is given to the value of a statement to the press, the Committee should give it precedence over the statements by the complainants to the Committee on Freedom of Association. The Committee's conclusions and recommendations "to carry out an investigation in this respect and to keep it informed" are futile and difficult to comply with, since the Government cannot initiate an investigation into facts which have never been reported to it by Mr. Carlos Fernández. The Government reiterates that the conditions under which Mr. Fernández was arrested were in accordance with the law and he did not suffer any ill-treatment during his judicial arrest and brief imprisonment.
1540. The Government urges the Committee on Freedom of Association to send the evidence presented by FEDECAMARAS and the IOE in support of the alleged ill-treatment that caused injuries and bruises to Mr. Carlos Fernández at the time of his arrest and imprisonment, such as forensic examinations (physical and psychological), as this would lend greater credibility to the statements of the complainants and the Committee on Freedom of Association.
1541. With regard to the alleged violation of due process to which the Committee refers (paragraph 1075 and following), it is the Government's opinion that although the complainants stated to the Committee that Mr. Fernández' right to due process had been violated, the Government maintains that in the present case the judicial organs respected due process, since the arrested person was immediately brought before a judge and the judge took measures concerning his detention in a reasonable time and in accordance with the current law. In this regard, the Government reiterates the following observations:
- (1) The detention of Carlos Fernández occurred following a legally valid request executed by the Office of the Attorney-General of the Republic, in the person of the Sixth Prosecuting Attorney of the Office of the Attorney-General.
 - (2) The proceedings were originally initiated for the offences of instigation to commit an offence, devastation, incitement to conspire and treason, at the request of the Office of the Attorney-General of the Republic, in accordance with the organic Criminal Procedures Code (COPP). These accusations were brought against him given the extent of the evidence of damage to the country by the repeated public protests by Mr. Fernández which gave rise, among other things, to sabotage of the oil industry, closing of food-producing firms during the public and notorious leadership by Mr. Fernández of the so-called "civic work stoppage" or lockout that took place in December 2002 and January 2003.
 - (3) The trial judge was No. 34 of the criminal jurisdiction of the Metropolitan Area of Caracas, who in turn was challenged by the defence lawyers of Mr. Fernández, exercising his human right to defence, and the case was transferred to trial judge No. 49.
 - (4) The offences of treason, incitement to conspire (conspiracy) and devastation were not accepted by the new judge but the judge upheld the accusations of civil rebellion and instigation to commit offences and ordered Mr. Fernández to be placed under house arrest (at his residence and home), as he suffered from blood pressure problems, thus enjoying procedural privileges and special treatment during the trial proceedings as laid down in our criminal procedures legislation.
 - (5) It should be noted that on 30 January 2003, before his judicial detention, Mr. Fernández made a statement as a witness at the premises of the Office of the Attorney-General, following which he had been summoned to make another statement as a defendant, a summons that he did not attend.

- (6) Consequently, on 18 February 2003, the representatives of the Attorney-General requested the trial judge for the arrest of Mr. Fernández and that he should be brought before the jurisdictional body, and the judge to rule as appropriate.
 - (7) On 19 February 2003, Court No. 34, in the exercise of its powers, agreed to the request and issued an order for the arrest and detention of Mr. Fernández.
 - (8) On 20 March 2003, the Appeals Court decided to free Mr. Fernández, withdrawing the charges against him. Mr. Fernández then immediately left the country.
 - (9) On 20 March 2003, in the Appeals Court of Caracas, the Sixth Prosecuting Attorney in the Office of the Attorney-General lodged an appeal for the protection of constitutional rights (*amparo*) with the Constitutional Division of the Supreme Court of Justice which accepted the allegations set out by the Office of the Attorney-General of the Republic and once again ordered the house arrest of Mr. Carlos Fernández. The Supreme Court of Justice upheld the detention order in a decision read out by the president of the Court on 2 August 2003. As Mr. Fernández was outside the country and did not report to the judicial authorities, he is thus a fugitive from Venezuelan justice.
1542. The Government indicates that, in paragraph 1076 of the report, the Committee observes that the Government had conveyed the decision of the Supreme Court of Justice (8 August 2003) that revoked the decision of the Appeals Court on procedural grounds (missing signature of one of the three magistrates (21 March 2003) who, for reasons of health, had been absent from the court for some hours).
1543. The Government stresses that in any trial, mishaps may occur. In the case of Mr. Fernández, the mishaps that arose were resolved satisfactorily. Specifically, the charges and any other recourse exercised by a plaintiff may not be interpreted, nor should the Committee be “surprised” that “a judge was challenged; three of the charges were suppressed by another judge and the Appeals Court ended up dropping all of them” (...) “The decision of this court was appealed in the Supreme Court of Justice, which revoked it on procedural grounds and once again, at the request of the Office of the Attorney-General (the same prosecuting attorney that had originally accused him of the five offences) ordered the arrest of Mr. Fernández.” All these observations by the Government show that in Venezuela the justice system is autonomous, independent and impartial.
1544. Moreover, the Government is concerned that the Committee did not express an opinion on and did not take into account the Government’s explanations in its reply of March 2004 concerning the conduct of the trade union officials, which was in violation of Article 8 of Convention No. 87: “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”.
1545. The Government indicates that it is clear that the detention of Mr. Carlos Fernández, president of FEDECAMARAS in this instance, having succeeded the dictator Pedro Carmona Estanca, is directly and immediately linked to the employers’ lockout and oil stoppage which took place from 2 December 2002 to the end of January 2003. These are offences laid down in law prior to the events themselves and before the current President of the Republic took office. The Government stresses, as laid down in Article 8 of Convention No. 87 cited above, that no political or trade union activity means, nor can mean, licence to commit offences.
1546. As regards the supposed legitimacy given to the so-called “civic work stoppage” of December 2002 and January 2003, the Government states that, in paragraphs 1080, 1081 and 1082, the Committee refers in worrying terms to the economic sabotage imposed in an anti-democratic manner for two months by the political opposition including the employers’ organization FEDECAMARAS as “civic work stoppages”. The Government’s attention, as representative of the Venezuelan people from which it derives its existence and the legitimacy of its mandates, is drawn to the subtle justification and even validation of breaking the law applicable in the Bolivarian Republic of Venezuela, in relation to the said stoppage. In this regard, reference is made to paragraphs 1080, 1081 and 1082 (part) of the report in question.

1547. The Government indicates that the conclusions expressed by the Committee in this regard are similar to the grounds wrongly asserted by opposition parties during the so-called “civic work stoppage” to justify human rights violations on a massive scale and interruption of essential public services, which seemed to be validated as the inevitable and necessary consequences or lesser evils of the promotion of the stoppage organized against the legitimate authorities and against the Constitution of the Republic.
1548. The Government adds that the extremely broad definition of human rights enshrined in the Constitution is no reason to seek to justify actions in the name of neo-liberalism and neo-fascism to the detriment of the majority and the democratic system which this majority choose freely and in the exercise of its sovereignty.
1549. Thus, the Government indicates, in relation to articles 53 and 97 of the Constitution, the Committee errs in both cases in omitting the provision that rights of public assembly and strike must be exercised in express compliance with the respective laws.
1550. The Government adds that in this regard, article 53 of the Constitution states: “Any person shall have the right to meet, in public or in private, without prior authorization, for lawful purposes and without arms. Meetings in public places shall be regulated by law”. The expression “regulated by law” denotes the importance that this provision of the Constitution attaches to people’s right of assembly, without seeking to undermine the exercise of other rights by the remainder of the population, such as the right to life, food, freedom of movement, etc. However, what is of concern is the expression ignored by the Committee “... for lawful purposes and without arms. Meetings in public places shall be regulated by law”. This needs emphasizing, since precisely what Mr. Fernández was doing was to incite incessantly to violence and breach of the law.
1551. Thus, the Government indicates, the Committee erred in its conclusions by including the phrase “very generously”, alluding in a partial manner to the provisions of the Constitution “and the right to strike, in the public and private sector” (article 97), inexplicably ignoring the rest of article 97 “shall have the right to strike, under such conditions as are established by law”. It is important to stress that the promoters and leaders of the so-called “civic work stoppage” did not comply with the special legislation, the Organic Labour Act, Title VII, Collective Labour Rights, specifically on the regulation of the right to strike.
1552. The Government states that, in the case of the right to strike to which article 97 of the Constitution refers, the Organic Labour Act, which came into force in 1990 and was reformed in 1997, not only expressly does not recognize the concept of general strike but also expressly abolished the concept of lock-out, in contrast to its recognition in the repealed 1936 law. The abolition of the concept of lock-out in the 1990 Organic Labour Act (known as the Caldera Act) was considered as very appropriate by the social actors, which regarded it as a step forward in protection against anti-trade union practices. In any case, the Organic Labour Act and its subsidiary regulations expressly establish the requirements and conditions for the exercise of the right to strike, which may never affect the rights of others and even less so the rights of majorities of the population.
1553. The Government indicates that these aspects were sufficiently supported in the observations sent by the Government in March 2004, because the law specifically guarantees peaceful coexistence of citizens and prevention of anarchy, abuse by a few to the detriment of the majority and contempt for the freedom of all. Thus, those who deliberately ignore it, as well as placing human rights in jeopardy, must be subject for their actions to the appropriate sanctions laid down through due process in the competent judicial organs.
1554. The Government states that, as established in its previous replies on the same events of December 2002 and January 2003 (Case No. 2249), the Committee seems to have fallen unnecessarily into contradictions, including with its own doctrine on paralysis of essential public services, general strike, acute national crisis, among other issues. The Committee’s clear contradiction of a doctrine built up over the years, as well as implying a negative or regressive precedent with respect to human rights, is a worrying signal with regard to legal certainty for members of the Organization.
1555. As to the inappropriate justification of the so-called civic work stoppage based on article 350 of the Constitution of the Republic, the Government indicates that it might be interpreted that the

Committee is trying to minimize or divert attention from the Government's allegations submitted in March 2004, as well as seeking to criticize the Constitution by using the expression "very generously". The broad recognition in the Constitution of rights and guarantees and of a deeply democratic and participatory economic, social, political system cannot be taken and used to distort its content, since the Constitution itself establishes parameters to prevent this, together with the respective laws and court decisions which interpret it.

1556. Thus, the Government states that the unconstitutional and illegal nature of the so-called "civic work stoppage" cannot be justified by the phrase "very generously", by which the Committee refers to the Constitution, especially as it does not take sufficient account of the observations sent by the Government in March 2004. In the light of this situation, we request the Committee on Freedom of Association to provide detailed clarification of the thinking behind its interpretation of our Constitution. This clarification could also involve other organs of the Organization in relation to article 350 of the Constitution.
1557. The Government states that the Committee's interpretation in paragraph 1082 of article 350 of the Constitution coincides with the interpretation made and wrongly invoked by the political opposition. It should be indicated that in this regard the Supreme Court of Justice, in a judgement of the Constitutional Division of 22 January 2003 (annexed by the Government) interpreted the said article 350 and set aside the incorrect interpretations of that article of the Constitution.
1558. The Government indicates that the judgement in question was subsequently ratified by the Constitutional Division of the Supreme Court of Justice itself on 13 February 2003. Both judgements already existed and were fully known, due to the importance of the subject, at the date of the submission of the complaint by FEDECAMARAS and the IOE on 17 March 2003. In other words, they were handed down almost two months before the submission of the abovementioned complaint to the Committee, which shows that they did not act with due reasonableness and fairness before this tripartite body, i.e. in seeking the truth on the interpretation of this constitutional provision.
1559. In any case, the Government points out that, the Committee was informed by the Government of both judgements of the Supreme Court of Justice in a Case (No. 2249) dealing with the same events and the actors acting jointly with FEDECAMARAS in the so-called "civic work stoppage" in a letter sent on 15 June 2004, specifically pages 20-24 inclusive.
1560. The Government indicates that the above is intended to alert the Committee to its mistaken conclusions concerning article 350 of the Constitution of the Bolivarian Republic of Venezuela, since according to the interpretations of the Committee on Freedom of Association, "because this is a recent Constitution, these rights have not been developed in legislation (for example, in cases of conflicts of constitutional rights; or of minimum services to be maintained during strikes)".
1561. On the decision on exchange control and control of issue of foreign currency, the Government views with concern that in paragraph 1085 of the 334th Report, there was minimal mention of the reasons justifying such an urgent and necessary measure as the establishment of exchange control, creating for the purpose the Foreign Exchange Control Commission (CADIVI). In this respect, the Government reiterates that its reply sent in March 2004 contained sufficient explanation, and now provides further details by annexing information on foreign currency authorized, as well as making available to the Committee the explanation by the Ministry of Labour in the abovementioned communication of 10 January this year, including annexes in accordance with the procedure established in article 26 of the ILO Constitution:

With respect to the alleged discrimination in the foreign exchange administration and control system, this was a measure adopted by the Government to control the massive and deliberate flight which depleted international reserves and led to rising inflation in the country which affected access by the population to food and basic services. Employers must satisfy the basic conditions (lack of indebtedness to the tax and social security administration) and in the event of mishaps in the process they may resort to the administrative and judicial authorities. In any case, given the imprecise and general nature of the allegation formulated by the complainants, we consider that they confused the teething problems in implementing a foreign exchange control and administration system with discriminatory action. It is certainly true that historically similar problems of implementation arose when similar measures were taken in 1961, 1983 and 1994. In

order to refute the allegations of the complainants, the distribution of foreign exchange at the end of 2004 is shown in the annexes. This distribution covered all productive sectors, including nationally and internationally owned companies.

1562. In turn, the Government indicates, the Minister of Labour observed in the same communication that:

The Committee, without identifying the companies affected by alleged discriminatory treatment, requests the Government to “modify the current system”, which invades areas of monetary and exchange policy, adopted after a massive capital flight intended to create political instability in 2002 and 2003. This capital flight, as it happened, was accompanied by basic food shortages and sabotage of essential public services (in particular petrol and domestic gas), thereby endangering the lives, health and safety of the country’s population.

1563. The Government says that it still hopes at the present time that the complainants and the Committee on Freedom of Association itself will officially convey the list showing the precise identity of the firms affected by the discriminatory application of the foreign exchange control system operating in the country since 2003. The Government hopes that the complainants will present formal complaints to the competent national authorities with respect to the alleged discriminatory treatment to which the Committee’s report refers.

1564. The Government places on record that it has held regular meetings with the employers’ sector, in particular, the industrial sector affiliated to FEDECAMARAS, and the social actors to resolve problems in the application of the system and to correct its failings. An example of this is the meetings held by CONINDUSTRIA with CADIVI last November.

1565. The Government has systematically explained to the ILO monitoring organs that the existence of armed groups is completely false, let alone that these alleged groups have the support of the Government or other government authorities.

1566. The Government also notes that, according to the 334th Report, paragraph 1087, the Committee regrets that the Government has not specifically replied to these allegations. In this respect, the Government reports that the complainants do not attach the relevant complaints concerning the events about which the Committee requests the Government to inform it in paragraph 1087.

1567. The Government stresses that the specific political violence and intolerance by the sectors in dispute during 2002 and part of 2003, the product of political polarization, which has now been overcome, was a problem addressed from the outset in the so-called Table for Negotiation and Agreement (November 2002-May 2003) facilitated by the Carter Center, the United Nations Development Programme (UNDP) and the Organization of American States (OAS). This forum for dialogue managed to achieve a commitment by both sectors (Government and opposition) to condemn violence, followed by an important product of the agreement, namely the Decree on the disarming of the population (illegal arms) and suspension of the carrying of arms without exception for all citizens of the Republic, in order to establish and maintain a reliable register of those with permits to carry arms in accordance with the law. In addition, the Constitution of the Republic clearly establishes that the State has a monopoly of arms.

1568. In any case, the Government states that the Committee was informed of this and the respective agreements of the Table for Negotiation and Agreement were submitted to it, stressing the participation of FEDECAMARAS on a permanent basis through the president of one of its branches, the Venezuelan Chamber of Food (CAVIDEA).

1569. With respect to the above paragraph, the Government reiterates its comments on the matter in its communication (already indicated), No. 004 of 10 January 2005, which states:

The Committee recommended the Government to establish an “independent” commission, (by people responsible for the *coups d’état* and petroleum lock-out in 2002-2003, with a view to “dismantling”, proscribing or banning various social organizations which exercise the right of association. Among them the Quinta República Movement, a government party with a majority in the National Assembly as well as in 20 of the 22 State governments and 270 of the 340 municipalities in the country and Juventud Revolucionaria del MVR. This political party has won

nine national, regional and local elections between 1998 and the present. It should be noted that the Committee on Freedom of Association requested the “dismantling” of the main political party in Venezuela and other legally constituted social organizations, which is legally impossible, and would not be feasible in practise. (Annexed is a press article which mentions the MVR as the main political party).

1570. As regards the investigation into acts of vandalism and 180 cases of alleged invasion of farms, the Government states what was already explained in the abovementioned letter No. 004 of 10 January 2005, as follows:

As regards the alleged harassment of members of the employers’ organization, it should be stressed that despite the tension experienced at times during the period concerned here, no trade union or employers’ leader was arrested and no trade union office raided, except for those specific measures implemented in accordance with judicial decisions and those of the Office of the Attorney-General. These judicial decisions are directly linked to the investigation into those responsible for the *coup d’état* in April 2002 and the economic and oil sabotage in December 2002 and January 2003. The provisions of the Convention do not authorize or lend legitimacy to acts in violation of the law, but on the contrary require representatives of the social actors to respect the basic rules for living together in a democracy. The measures adopted by the police authorities were always the result of proceedings and previous decisions by the independent and autonomous organs of the public power, which did not involve persecution or limitation of the exercise of rights and freedoms of association.

1571. Regarding the alleged invasions of farms (180) and other abuses, which, according to the employers’ organization, were suffered by the president of CONSECOMERCIO, Mr. Julio Brazón, during an alleged looting of his office, and the harassing of the president of the Bejuma Chamber of Commerce, Mr. Adip Anka, in the form of alleged threats of violence by alleged members of the government party, the Government considers that there is no basis whatsoever in either case, and there is no evidence to support or prove them.

1572. The Government states that the institutions and population in general are fully aware that Venezuela functions under the rule of law and justice, such that whenever there is a breach or violation of the law, the facts must be reported to the appropriate authorities. For this purpose, a complaint must be made to the competent authorities providing evidence of the facts. As evidence that what the complainants in this case allege happened actually happened, the complainants could at least have annexed the respective complaints to the administrative and judicial authorities of the Venezuelan State to the written submission to the Committee on Freedom of Association. The Government therefore regrets that the allegations of the employers’ organization FEDECAMARAS were not supported by sound evidence and requests the Committee to consider this aspect, and to discount it for the reasons set out above.

1573. As to the comments on enabling acts, the Government reiterates what it stated in its reply sent in its communication No. 094 of 9 March 2004, and also sets out what it indicated in its communication of 10 January, namely:

As regards the approval of laws passed in the context of an enabling act of 2000, consultations were held with all sectors, mainly in August 2001, following a systematic method of work and timetable, in particular with FEDECAMARAS and its affiliated organizations. However, it should be clearly understood that after consulting with the sectors concerned and listening to their particular interests, the State adopted measures in which the general interest of the population was given priority or preference, particularly excluded sectors in the urban and rural areas, demonstrating the exercise of political will in accordance with the majority of the electorate which elected it. In any case, any disputes of particular items of the content were examined and decided at the time by the Supreme Court of Justice of Venezuela, and the necessary corrective measures taken, including declaring null certain specific provisions of various bodies of legislation.

1574. In any case, the Government informs the Committee of the results of the appeals by the employers affiliated to FEDECAMARAS in relation to the decree-laws under the Enabling Act and the consultations in the National Assembly concerning review and correction of some articles of those decree-laws. These can be summarized as follows:

On the Decree with rank and force of law, Land and Agrarian Development Act, published in the *Official Gazette*, No. 37,323 of 13 November 2001, it should be pointed out that the Supreme Court of Justice, Constitutional Division, ruled as follows:

ONE: the articles of the laws set out in articles 82 and 84 of the Decree with rank and force of law, Land and Agrarian Development Act published in the *Official Gazette*, No. 37,323 of 13 November 2001 are held to be constitutional.

TWO: interprets and, in consequence, recognizes, in the terms set out in this ruling, the full force and validity of the provisions contained in articles 25, 40 and 43 of the Decree with rank and force of law, Land and Agrarian Development Act published in the *Official Gazette*, No. 37,323 of 13 November 2001.

THREE: articles 89 and 90 of the Decree with rank and force of law, Land and Agrarian Development Act published in the *Official Gazette*, No. 37,323 of 13 November 2001 are found to be unconstitutional.

FOUR: in accordance with the provisions of articles 119 and 120 of the Organic Act of the Supreme Court of Justice, the immediate publication of this judgement in the *Official Gazette* of Venezuela is ordered, stating in the summary the following title:

Ruling of the Supreme Court of Justice, in the Constitutional Division, which holds that articles 82 and 84 are constitutional; which finds that articles 89 and 90 are unconstitutional; and interpretation of articles 25, 40 and 43 of the Decree with rank and force of law, Land and Agrarian Development Act published in the *Official Gazette*, No. 37,323 of 13 November 2001.

FIVE: The effects of this ruling shall be effective with immediate effect, that is from their publication in the *Official Gazette*.

To be published, recorded and notified. Let what is ordered be done.

Done, signed and sealed in the chamber of the Constitutional Division of the Supreme Court of Justice, in Caracas, on this 20th day of the month of November two thousand (2000). Year: 192 of Independence and 143 of the Federation.

The President ...

1575. The Government states that the Supreme Court of Justice, Constitutional Division, in Ruling No. 1157 of 15 May 2003, upheld the application in the present case against Decrees Nos. 1546 and 5120 with force of law, the Land and Agrarian Development Act and the Organic Hydrocarbons Act, published in the *Official Gazette* of the Bolivarian Republic of Venezuela, No. 37,323 of 13 November 2001.
1576. On the Public Registry and Notaries Act (enabling act) the Supreme Court of Justice, Constitutional Division, on 15 July 2003, admitted an action in respect of the unconstitutionality of articles 14, 15, 62, 63, 64, 65 and 66 of that Act.
1577. On the Fisheries and Fish-farming Act (enabling act), the application for nullity on the grounds of unconstitutionality and the request for a temporary injunction to suspend the effects of the decree-law, the Constitutional Division of the Supreme Court of Justice declared inadmissible the application for a temporary injunction, in Judgement No. 408 of 8 March 2002. However, the National Assembly partly reformed that law, which is intended to regulate the fisheries and fish-farming sector by means of provisions which allow the State to encourage, promote, develop and regulate fisheries, fish-farming and related activities, based on guiding principles which ensure the production, conservation, control, administration, promotion, research and responsible and sustainable exploitation of fish-stocks, taking into account the relevant biological, technological, economic, food security, social, cultural, environmental and commercial aspects.
1578. The Government states that on the decree with force of law, the Coastal Zones Act, which was republished in *Official Gazette* No. 37,349 of 19 December 2001, it is clear that "it reserves the rights legally acquired by private individuals ...". With respect to this law, it should be borne in mind that article 9 of Decree No. 1468 with force of law, the Coastal Zones Act, published in the *Official Gazette* No. 37,319 of 7 November 2001, was declared null on 24 September 2003 in Judgement No. 2573-240903-01-2847.

1579. With respect to Decree with Force and Rank of Law, No. 126, which establishes the value added tax, partly amended by the National Assembly, *Official Gazette*, special edition, No. 5,600 of 26 August 2002, the Government states that the Supreme Court of Justice, in Judgement No. 1505 of 5 June 2003, declared admissible the action for protection of constitutional rights (*amparo*) brought by Fernando José Bianco Colmenares, acting as president of the College of Physicians of the Metropolitan District of Caracas and in defence of the broad interests of all Venezuelans against the provision in article 63, paragraph 5, of the Act to amend in part the Value Added Tax Act, published in the *Official Gazette*, special edition, No. 5,600 of 26 August 2002 and reprinted for material error in *Official Gazette*, special edition, No. 5,601 of 30 August 2002. In this case, the Court ruled that the Act did not apply to all value added taxpayers who provided or received private medical services, dental services, surgery and hospitalization, given the effective protection of the general rights and interests inherent in the present case; and in order to ensure effective tax justice, it declared medical and healthcare services, dental services, surgery and hospitalization provided by private bodies exempt from value added tax, for which reason article 3 also of the Act in question did not apply with respect to those services. This means that in this matter, the provisions of the original decree-law in respect of the abovementioned services are reinstated.
1580. The Government indicates that the foregoing summary complements the observations provided in March 2004 on enabling acts, showing that, in the face of non-conformity by the complainants, the Supreme Court of Justice and the National Assembly acted in favour of social harmony and the interests of the Venezuelan population as a whole and the priority economic and political sectors with which it historically maintained relations.
1581. As regards the alleged exclusion and marginalization of FEDENAGA, the Government states that FEDENAGA took part in the forums for social dialogue which were held following the failed *coup d'état* in 2002, which makes it surprising that they should now say that they were not invited. Another problem is the fact that they abandoned this legitimate path provided by the Government using their self-exclusion as justification for their subsequent involvement and participation in the work stoppage called by Mr. Carlos Fernández at the end of 2002.
1582. The Government states that it recognizes the employers' organization FEDECAMARAS and welcomes the positive change in the attitude of FEDECAMARAS as can be seen from its communication No. 004 of 10 January 2005, in which we state that:
- Following the holding of the presidential referendum in August 2004 and the regional and municipal elections in October 2004, a positive development on the part of the FEDECAMARAS leadership can be seen, shifting from disregard for the will of the people, initially coming to a head in loud claims of "electronic fraud", to an appreciation of the efforts made by the Government to restore a climate of social dialogue, with the active participation of the Executive Vice-President of the Republic, as well as several ministries, including the Ministry of Labour. In the latter case, we stress the initiatives taken in promoting consultation on reform of the Organic Labour Act and the various social security laws. Thus the FEDECAMARAS leadership has involved itself in the intensive process of democratic dialogue that has been taking place in the country since 1999, linked initially to the constitutional process and subsequently to the transformation of the political, economic and social model. The Government annexes documentation relating to this.
1583. Concerning the need to maintain a balance and equality in proceedings before the Committee, and with a view to keeping this important tripartite committee on course, its actions must reflect balance and fairness in the treatment of information and its evaluation. Weaknesses perceived in this area will affect both the credibility and the working methods used to reach conclusions and formulate the respective recommendations.
1584. In this respect, and without prejudice to what has been stated above, the Government wishes to stress its concern that the Committee indicated that the press articles presented by the Government as items of evidence or arguments to indicate and rebut the allegations of ill-treatment of Mr. Carlos Fernández were of limited value and practically ignored them in its conclusions, where it states that the press articles are of limited value as evidence.
1585. The Government adds that a few paragraphs later, however, in the same report, specifically paragraph 1082, the Committee, in explaining the issues involved in determining the nature of the work stoppage, considered, with respect to the complainants, the press articles sent by the

Government, and quotes: “includes statements vindicating Mr. Fernández that show that the national civic work stoppage was an act of protest by FEDECAMARAS for employer reasons ...”.

1586. The Government indicates that this differential treatment merits clarification by the Committee on Freedom of Association, since that would make it possible to interpret the inexplicable legitimacy assigned to the declaration by the complainant employers’ organization to justify a series of events including the call to the unconstitutional and illegal work stoppage.
1587. In other words, for the Government, credibility means maintaining predictable, balanced and fair parameters, in order to preserve the necessary legal certainty that the different actors which make up the International Labour Organization deserve, to the exclusion of any differential treatment in the evaluation of arguments or evidence.

C. The Committee’s conclusions

1588. *As regards the various outstanding issues relating to the exclusion of FEDECAMARAS from the social dialogue, in its previous examination of the case the Committee pointed out the following: (1) the Government’s reply does not mention any bipartite or tripartite agreement or consultation with FEDECAMARAS as from September 2001 in matters (policies or legislation) of a labour or economic nature; (2) the Government has not denied that the National Tripartite Commission has not met for years as stated in the allegations; and (3) the Government has also not denied the alleged lack of consultations with FEDECAMARAS in respect of the process of drafting important legislation such as the Labour Procedure Act, the widespread increase in the minimum wage of 20 per cent by way of order or in respect of the process of ratification of ILO Convention No. 169, the new banking control scheme or, on a more general note, the establishment of economic policies and guidelines [see 334th Report, para. 1064]. Furthermore, with reference to the question of the consultations relating to the 47 Decrees which had been issued as a first stage only (up to August 2001) and then interrupted, the Committee had urged the Government to examine together with the social partners, all laws and Decrees adopted without tripartite consultation.*
1589. *The Committee observes that the Government has not replied to its recommendation without delay to periodically convene the National Tripartite Commission as envisaged in the legislation. The Committee again urges the Government to comply with its legislation and without delay to periodically convene the Tripartite Commission.*
1590. *As to the question of laws and Decrees adopted without tripartite consultation mentioned in the complaint, the Committee notes that the Government states that: (1) the complaint fails to mention the process of dialogue conducted by the authorities prior to approval of the legislative measures and even after their approval consultations took place, without prejudice to recourse to other mechanisms and remedies set out in the national legal system; (2) the Government applies an inclusive policy of consultation and decision-making involving all elements of Venezuelan society, both organized and otherwise, eliminating exclusiveness and privilege in the representation of employers, making way for plurality and, for example, allowing FEDEINDUSTRIA and the other productive sectors to participate regularly in dialogue; (3) from 2001 up to November 2004 the conduct of FEDECAMARAS was directed, unacceptably, at marginalizing and excluding itself by changing from a social actor to a political one with actions contrary to the spirit of social dialogue and abstaining from participation in the forums for social dialogue; (4) the consultations on minimum wages since 2002 were conducted through written requests sent to the various social actors at national, regional and local level and in 2003 an agreement was concluded between the Government and the political opposition, also signed by a representative of an organization affiliated to FEDECAMARAS. As to the Government’s assertion that FEDECAMARAS did not take part in the forums for dialogue in 2002, the Committee recalls that this absence was due to the fact that the authorities had not invited the president of the principal workers’ federation in that capacity.*
1591. *In the light of the information in the Committee’s possession (information from the complainants and the Government’s successive replies), it considers that, in the period between August 2001 to the date of the IOE complaint (17 March 2003), the Government’s consultations with FEDECAMARAS on social, economic and labour issues (apart from the consultation on minimum*

wages in 2002 to which the Government now refers) were practically non-existent, and the Government has not shown that in the process of adopting the 47 Decrees, they were significant to the extent of taking duly into account the legal and constitutional defects invoked by FEDECAMARAS and which were detailed in the previous examination of the case [see 334th Report, para. 884]. The Committee observes in this respect that the Government in its reply refers to a series of decisions of the Supreme Court of Justice annulling certain provisions of the Land and Agrarian Development Act or interpreting others, admitting an action for unconstitutionality of various provisions of the Public Registry and Notaries Act, and partially reforming the Fisheries and Agriculture Acts and declaring null an article of the Coastal Zones Act and making the Value Added Tax Act inapplicable to certain services. According to the Government, the remaining Decrees did not give rise to significant observations. The Committee further observes that the Government has not provided specific information which might refute the allegation relating to the lack of consultation in the period covered by the present conclusions with respect to the Labour Procedures Act, ratification of ILO Convention No. 169, the new exchange control system or, more generally, the establishment of economic policies and directives.

1592. *The Committee reiterates the importance of draft bills which affect them directly being the subject of consultation with the most representative workers' and employers' organizations and again points out to the Government the following principle [see 334th Report, para. 1065]:*

The most representative employers' and workers' organizations, and in particular the confederations, should be consulted at length, on matters of mutual interest, including everything relating to the preparation and application of legislation concerning matters relating to them and to the fixing of minimum wages; this would contribute to legislation, programmes and measures that the public authorities have to adopt or apply being more solidly founded and to greater compliance and better implementation. This being the case, the Government should, as far as possible, also base itself on the consensus of workers' and employers' organizations, which should share the responsibility for achieving well-being and prosperity for the community in general. This is particularly true in the light of the growing complexity of problems facing societies, and also, of course, facing the people of Venezuela. No public authority should claim to hold all knowledge nor presume that what it proposes will always and entirely satisfy the objectives in any given situation.

1593. *With respect to the subsequent evolution of social dialogue since the last examination of the case, the Committee observes that the Government reports certain improvements in terms of consultations since the previous examination of the case, specifically consultations with FEDECAMARAS since August 2004 on labour immobility, agreements of the Andean Community of Nations, action plan on child labour, ratification of Conventions, Workers' Food Act (in most cases conducted through correspondence or letters); according to the Government, consultations on the reform of the Organic Labour Act and social security legislation were conducted directly with representatives of the various social actors both in the National Assembly and the Ministry of Labour; the Executive Vice-President of the Republic held meetings with national representatives of FEDECAMARAS and certain affiliated chambers; the president of the National Assembly received the national leadership of FEDECAMARAS and the president of FEDECAMARAS attended the session where the President of the Republic reported to the nation on the management of the previous year. The Committee notes that the Government also reports: (1) that the new political events (constitutional referendum of 15 August 2004 and the regional and municipal elections of 31 October 2004) have enabled the re-establishment of forums for meeting and dialogue, turning the page on the rifts that occurred between 2001 and 2003; (2) that FEDECAMARAS has pointed to government efforts (Vice-President of the Republic and various ministries, including labour) aimed at restoring social dialogue with the leading social actors; and (3) the Government highlights a positive development on the part of FEDECAMARAS and a favourable change of attitude to the extent of appreciating the Government's efforts, and that the FEDECAMARAS leadership has joined in the intensive process of democratic dialogue.*
1594. *The Committee underlines that over and beyond the consultations and meetings held between the authorities and FEDECAMARAS, which the Committee can but encourage, it is important to consolidate these first steps in the new direction and structure them on a permanent footing. The Committee again offers the Government the services of the ILO to provide the State and society with its experience so that the authorities and social partners may regain trust and, in a climate of mutual respect, establish a system of labour relations based on the principles of the ILO Constitution and of its fundamental Conventions, as well as the full recognition, in all its*

consequences, of the most representative confederations and all organizations and important tendencies in the world of work [see 334th Report, para. 1089(d)]. The Committee requests the Government to keep it informed of all instances of social dialogue with FEDECAMARAS and bipartite and tripartite consultations, and any negotiations or agreements that ensue and the Government's intentions with respect to the above offer of ILO technical assistance.

1595. *With respect to the previous recommendation urging the Government to reinstate FEDENAGA to the Agriculture and Livestock Council and to stop favouring CONFAGAN to the detriment of FEDENAGA, the Committee notes that the Government states: (1) that FEDENAGA took part in the forums for social dialogue which were held following the failed coup d'état in 2002; (2) that another problem was the fact that they abandoned this legitimate path provided by the Government using their self-exclusion as justification for their subsequent involvement and participation in the civic work stoppage called by Mr. Carlos Fernández at the end of 2002. The Committee points out that the forums for social dialogue to which the Government refers still do not exist, and are not the same as the Agriculture and Livestock Council. Consequently, the Committee reiterates its previous recommendation and requests the Government to reinstate FEDENAGA to the Agriculture and Livestock Council.*
1596. *As regards the recommendations concerning the president of FEDECAMARAS, Mr. Carlos Fernández, the Committee noted that the Government states that it "reiterates" that the conditions under which Mr. Fernández was arrested were in accordance with the law and he did not suffer any ill-treatment during his judicial arrest and brief imprisonment, that he did not report these matters to the authorities and that it produced documentary evidence (press articles) consisting of statements to the mass media by Mr. Fernández and his wife that he had been well treated. The Committee wishes to refer to the Government's comments critical of the fact that limited value as evidence had been attached to the press extracts and expressing the view that it had exceeded its powers. In this respect, the Committee points out: (1) that it is one thing for the Government to refer to press articles as it did in its first reply and quite another, as now, to state categorically that Mr. Fernández' arrest was in accordance with the law and he did not suffer any ill-treatment; (2) that the Committee did not state that Mr Fernández had suffered ill-treatment but had requested an investigation into the alleged instances of ill-treatment listed; (3) that the Committee has expressed an opinion many times on allegations of physical ill-treatment in the course of criminal judicial proceedings. As to the absolute contradiction between the allegations and the Government's new reply and taking into account its assertion that Mr. Fernández may lodge complaints if he so wishes, the Committee will not proceed with examination of this aspect of the case.*
1597. *As regards the recommendations and allegations concerning a number of irregularities or breaches of due process, the Committee notes all the statements and comments made by the Government which essentially reiterate its previous statements. The Committee refers to the extensive allegations of the complainants [see 334th Report, paras. 1073 and 1074] on these questions, points out that the Government had not replied in detail to them and recalls its previous conclusions that in this case there had been a lack of impartiality [see 334th Report, para. 1076].*
1598. *Concerning the substance of the matter (trial and detention of Mr. Carlos Fernández, president of FEDECAMARAS), the Committee notes the Government's statements and once again observes that they essentially reiterate previous statements. The Committee recalls its final conclusions on that subject. In relation to this and to certain Government's statements, the Committee stresses: (1) that the national civic work stoppage of December 2002-January 2003 was several months after the coup d'état and was massively supported by a large part of the population and that on some days a million-and-a-half people took part in the protests; (2) that the oil sector is not an essential service in the strict sense of the term, that is the interruption of which would affect the life, safety or health of the persons and that the principles of freedom of association recognize the right to general strike in protest against the Government's economic and social policy; (3) that the Government has not provided a single piece of evidence to show that Mr. Carlos Fernández incited sabotage, acts of violence or similar offences; the Committee stresses that the causes of the civic work stoppage have their roots in the absence of social dialogue and the Government's economic and social policy, as it appears from the allegations, and that in its previous reply, the Government sent press articles on FEDECAMARAS' criticisms of that policy; (4) that for the reasons set out by the Committee, it does not share the view that the civic work stoppage had nothing to do with employers'*

organizations or trade union matters as the Government asserted, even though the work stoppage did also have obvious political ends which were nevertheless not illegal at the time; (5) that criminal responsibility of members of trade unions or employers' organizations for any individual offences must not be transferred to leaders of the organizations; (6) that apart from the president of FEDECAMARAS and the CTV, no other organizer of the civic work stoppage (NGO, political parties, etc.) was arrested; (7) that in its reply, the Government gave incomplete quotations from the Committee's previous conclusions; (8) that it is surprised that the Government invokes the shortage of basic foods, gas or petrol or the Committee's principles in cases of acute national crisis or paralysis of essential services to suggest that the Committee has breached such principles in the present case given that the Government did not provide any solution whatsoever by imposing minimum services essential to the community, either in this long civic work stoppage or in previous civic work stoppages; (9) that in its conclusions the Committee did not criticize the Constitution but indicated that the legislation (new legislation) had still not determined the scope of public rights and freedoms and that it could give rise to confusion (as happens every time a new Constitution is adopted in a country); (10) that in relation to this question, the Government itself refers in its reply to decisions which, for example, interpret article 350 of the Constitution and indicates that the judgement "set aside the incorrect interpretations of that article of the Constitution"; and (11) that the Committee had not interpreted the wording of the Constitution but had merely indicated that some of its provisions provided very generously for certain human rights, for which reason it does not understand why the Government can think that the Committee was criticizing the Constitution in this regard since the Committee had no intention to make criticisms. Finally, the Committee points out that the Government has not explained why it implicates the president of the private sector workers' confederation in the paralysis of the state oil company PDVSA.

1599. Taking all the foregoing into account, the Committee again considers that the arrest of Carlos Fernández, as well as being discriminatory, aimed to neutralize or act as retaliation against this employers' official for his activities in defence of employers' interests and, therefore, it urges the Government to take all possible steps to annul immediately the judicial proceedings against Carlos Fernández and to ensure that he may return to Venezuela without delay and without risk of reprisal. The Committee requests the Government to keep it informed in this respect. The Committee deeply deplores the arrest of this employers' official and emphasizes that the arrest of employers' officials for reasons linked to actions relating to legitimate demands is a serious restriction of their rights and a violation of freedom of association, and requests the Government to respect this principle. The Committee deplores the fact that this employers' leader has already been in exile for several years and cannot return to the country for fear of reprisal by the authorities.
1600. With regard to the previous recommendation concerning the application of the new system of exchange control, the Committee notes that the Government states: (1) that the complainant organizations have not indicated the specific firms allegedly suffering discrimination under this system; (2) that the Minister of Labour stated that "the Committee, without identifying the companies affected by alleged discriminatory treatment, requests the Government to 'modify the current system', which invades areas of monetary and exchange policy, adopted after a massive capital flight intended to create political instability in 2002 and 2003". In this respect, the Committee stresses that it did not request the current system to be modified but after criticizing the fact that it was established unilaterally requested the Government "to examine with FEDECAMARAS, without delay, the possibility of modifying the current system", following allegations of discrimination by the authorities against firms belonging to FEDECAMARAS in relation to administrative permits to purchase foreign exchange. The Committee notes in this respect that the Government has held regular meetings with the employers' sector affiliated with FEDECAMARAS and the social actors to resolve problems in the application of the system and correct any failings found in it. The Committee trusts that this dialogue will ensure that the exchange control system will be applied without discrimination against firms affiliated to FEDECAMARAS.
1601. As regards the Committee's recommendation concerning the allegations regarding the operations of paramilitaries (the Government had not replied specifically to that allegation) the Committee notes that the Government states: (1) that the Committee had requested the "dismantling" of the main government political party (Movimiento Quinta República) and other legally constituted social organizations (the Committee underlines in this respect that the Government did not reply to the allegations about paramilitary groups, that the allegations did not mention that political party but rather groups such as "Círculo Bolivarianos Armados, Quinta República" or "Juventud

Revolucionaria del MVR” and that it did not request the dismantling of the Movimiento Quinta República); (2) that the existence of armed groups is completely false, let alone that these alleged groups have the support of the Government or other government authorities; (3) that the specific political violence and intolerance by the sectors in dispute during 2002 and part of 2003, the product of political polarization, which has now been overcome, was a problem addressed from the outset in the Table for Negotiation and Agreement (November 2002- May 2003) facilitated by the Carter Center, the United Nations Development Programme (UNDP) and the Organization of American States (OAS); (4) that this forum for dialogue managed to achieve a commitment by both sectors (Government and opposition) to condemn violence, followed by an important product of the agreement, namely the Decree on the disarming of the population (illegal arms) and suspension of the carrying of arms without exception for all citizens of the Republic, in order to establish and maintain a reliable register of those with permits to carry arms in accordance with the law; (5) that the Constitution of the Republic clearly establishes that the State has a monopoly of arms. The Committee observes that the Government recognizes that there was political violence and intolerance in 2002 and part of 2003 by the conflicting parties. The Committee also observes that, since the submission of the complaint, the complainant organizations have not sent new allegations relating to acts of violence by violent or armed groups. The Committee will therefore not pursue the examination of this aspect of the case unless the complainant organizations produce new evidence.

1602. *As regards the previous recommendations urging the Government: (a) to carry out, without delay, an investigation with regard to the acts of vandalism at the premises of the Lasa Chamber of Commerce by Bolivarian groups supporting the Government (12 December 2002); the looting of the office of Julio Brazón, president of CONSECOMERCIO (18 February 2003); the threats of violence on 29 October 2002 by alleged members of the government political party against Adip Anka, president of the Bejuma Chamber of Commerce; (b) to carry out an investigation, without delay, into the allegations relating to 180 cases (up to April 2003) that have not been resolved by the authorities of illegal invasion of lands in the states of Anzoátegui, Apure, Barinas, Bolívar, Carabobo, Cojidas, Falcón, Guárico, Lara, Mérida, Miranda, Monagas, Portuguesa, Sucre, Táchira, Trujillo, Yaracuy and Zulia; and (c) requested that, in the case of expropriations, it fully respect the legislation laid down and the relevant procedures, the Committee notes that the Government states that these allegations are unfounded, that there is no evidence to support them and that those concerned have not lodged complaints with the national authorities. Nevertheless, the Committee considers that, whether or not the parties concerned lodged complaints with the national authorities, these are serious and relatively precise allegations, for which reason it reiterates its previous recommendations and suggests that the Government should make direct contact with the persons and institutions mentioned and with FEDECAMARAS with a view to carrying out an independent judicial investigation.*

The Committee’s recommendations

1603. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee again urges the Government to comply with its legislation and without delay to convene periodically the tripartite commission.*
 - (b) *The Committee reiterates the importance of draft bills which affect them directly being the subject of consultation with the most representative workers’ and employers’ organizations and again points out to the Government the principles set forth in the conclusions concerning consultations.*
 - (c) *The Committee underlines that over and beyond the consultations and meetings held between the authorities and FEDECAMARAS, which the Committee can but encourage, it is important to consolidate these first steps in the new direction and structure them on a permanent footing. The Committee again offers the Government the services of the ILO to provide the State and society with its experience so that the authorities and social partners may regain trust and, in a climate of mutual respect, establish a system of labour relations based on the principles of the ILO Constitution*

and of its fundamental Conventions, as well as the full recognition, in all its consequences, of the most representative confederations and all organizations and important tendencies in the world of work. The Committee requests the Government to keep it informed of all instances of social dialogue with FEDECAMARAS and bipartite and tripartite consultations, and any negotiations or agreements that ensue and the Government's intentions with respect to the above offer of ILO technical assistance.

- (d) The Committee again urges the Government to reinstate FEDENAGA to the Agricultural and Livestock Council and to stop favouring CONFAGAN to the detriment of FEDENAGA.*
- (e) The Committee once again considers that the arrest of Carlos Fernández, president of FEDECAMARAS, as well as being discriminatory, aimed to neutralize or act as retaliation against this employers' official for his activities in defence of employers' interests and, therefore, it urges the Government to take all possible steps to annul immediately the judicial proceedings against Carlos Fernández and to ensure that he may return to Venezuela without delay and without risk of reprisal; the Committee requests the Government to keep it informed in this respect. The Committee deeply deplores the arrest of this employers' official and emphasizes that the arrest of employers' officials for reasons linked to actions relating to legitimate demands is a serious restriction of their rights and a violation of freedom of association, and requests the Government to respect this principle. The Committee deplores the fact that this employers' leader has already been in exile for several years and cannot return to the country for fear of reprisal by the authorities.*
- (f) The Committee again urges the Government to carry out, without delay, an independent investigation with regard to: (1) the acts of vandalism at the premises of the Lasa Chamber of Commerce by Bolivarian groups supporting the Government (12 December 2002); (2) the looting of the office of Julio Brazón, president of CONSECOMERCIO (18 February 2003); (3) the threats of violence on 29 October 2002 by alleged members of the government political party against Adip Anka, president of the Bejuma Chamber of Commerce; and (4) the allegations relating to 180 cases (up to April 2003) that have not been resolved by the authorities of illegal invasion of lands in the States of Anzoátegui, Apure, Barinas, Bolívar, Carabobo, Cojidas, Falcón, Guárico, Lara, Mérida, Miranda, Monagas, Portuguesa, Sucre, Táchira, Trujillo, Yaracuy and Zulia, and urges that, in the case of expropriations, it fully respect the legislation laid down and the relevant procedures. The Committee suggests that the Government should make direct contact with the persons and institutions mentioned and with FEDECAMARAS with a view to carrying out an independent judicial investigation.*

Appendix V

Latest reply by the Government to Case No. 2254

Ministry of Labour,
Bolivarian Republic of Venezuela

Ms. Cleopatra Doumbia-Henry
Director of the International
Labour Standards Department

Caracas, 26 October 2005

May I reiterate hereby the contents of the communications transmitted by the Government of the Bolivarian Republic of Venezuela, on 9 March 2004 (ref. 094) and 25 February 2005 (ref. 094/2005), and request the Committee fairly to evaluate the testimonies contained in said documents, as well as evidence provided in support thereof.

The Government also reiterates its deep concern with the incorrect evaluation of the allegations submitted by the various parties involved in the complaint. The Government wishes in particular to draw attention to the unfair and inappropriate treatment afforded to the evidence submitted by the Government of the Bolivarian Republic of Venezuela, as opposed to the presumed veracity and legitimacy given to the allegations submitted by the complainant organization. In addition, it is somewhat paradoxical that an international body in charge of the protection of human rights should not take into account a public and notorious fact, i.e. the coup d'état of April 2002, nor the responsibilities of those who participated in that criminal act and now requests the end of the inquiries launched to punish those who were responsible for this extremely serious violation of the human rights of all citizens.

Notwithstanding the above, and in a spirit of full cooperation, the Government hereby provides a chronological compilation of events from August to October 2005, supported by documents establishing the reinforcement of the social dialogue initiated by the Government, which calls for the participation of a major number of interested partners, and seeks the successful signing of agreements in the labour, social and economic fields; these agreements will benefit the majority of citizens and will reinforce the struggle against poverty and social exclusion that has been launched for several years in our country.

This evidence shows that, inasmuch as employers' organizations and their affiliates have resumed their associative functions and recognized the legitimacy of the President of the Republic, who has been elected democratically in conformity with the provisions of the Constitution and the legislation, this created a new situation which strengthened social dialogue, by integrating each time an increasing number of new and former partners of the socio-economic order. In that process of reactivation of social dialogue, it has become clear that the traditional employers' organizations gradually steered away from radical groups that still want to overthrow the constitutionally elected President, as these organizations acknowledge the evident social and economic progress and growth resulting from the actions of the Government.

As demonstrated by the evidence adduced, there was never and there is no Government favoritism towards any employers' organization or its affiliates. Quite the contrary, those who refused social dialogue and promoted counter-productive confrontation were the employers' associations that participated actively in the coup d'état of April 2002 and in the successive attempts at overthrowing the constitutionally elected President of the Bolivarian Republic of Venezuela. Fortunately, these days are now a thing of the past, and common sense has finally prevailed within employers' circles, which should now recognize that it is necessary to go back to using the institutions of democratic participation.

It is worth emphasizing in this context that the current president of FEDECAMARAS, Mr. José Luis Betancourt, who until recently was president of FEDENAGA, the two complainant organizations in this case, publicly recognized the Government's proactive attitude as regards social dialogue and expressed their intention to participate in such dialogue, by sending the president and the executive of FEDECAMARAS to participate in high-level meetings with Mr. Hugo Chávez

Frías, constitutionally elected by the vast majority of the people of the Bolivarian Republic of Venezuela.

One should also mention that, as demonstrated by the evidence adduced, social dialogue has been initiated with employers' organizations in the regions, where agreements have been signed and spaces of economic cooperation created, between private employers and the national and state governments.

Finally, the Government requests the Committee to evaluate the evidence and arguments in a fair and balanced fashion, that is by applying uniform procedures, so as to reinforce the legitimacy, transparency and credibility of such an important international organization.

Yours sincerely,

(Signed) Rubén Dario Molina,
Office of International Relations
and Liaison with the ILO.

Geneva, 11 November 2005.

(Signed) Professor Paul van der Heijden,
Chairperson.

<i>Points for decision:</i> Paragraph 358;	Paragraph 755;	Paragraph 1099;
Paragraph 384;	Paragraph 821;	Paragraph 1113;
Paragraph 408;	Paragraph 834;	Paragraph 1154;
Paragraph 457;	Paragraph 869;	Paragraph 1174;
Paragraph 470;	Paragraph 890;	Paragraph 1186;
Paragraph 493;	Paragraph 942;	Paragraph 1210;
Paragraph 511;	Paragraph 958;	Paragraph 1228;
Paragraph 535;	Paragraph 983;	Paragraph 1257;
Paragraph 603;	Paragraph 998;	Paragraph 1283;
Paragraph 644;	Paragraph 1023;	Paragraph 1305;
Paragraph 681;	Paragraph 1056;	Paragraph 1312.
Paragraph 711;	Paragraph 1073;	
Paragraph 737;	Paragraph 1085;	