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Report of the Committee on Freedom of Association

343rd Report of the Committee on Freedom of Association

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Introduction

1. The Committee on Freedom of Association, set up by the Governing Body at its 117th Session (November 1951), met at the International Labour Office, Geneva, on 2, 3, 4 and 10 November 2006, under the chairmanship of Professor Paul van der Heijden.

2. The members of American, Argentinian, Chilean, Guatemalan, and Japanese nationality were not present during the examination of the cases relating to the United States (Case No. 2292), Argentina (Cases Nos. 2438 and 2440), Chile (Case No. 2392), Guatemala (Cases Nos. 2341, 2361, 2413 and 2445) and Japan (Case No. 2319), respectively.

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3. Currently, there are 127 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 30 cases on the merits, reaching definitive conclusions in 17 cases and interim conclusions in 13 cases; the remaining cases were adjourned for the reasons set out in the following paragraphs.

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

4. The Committee considers it necessary to draw the special attention of the Governing Body to Cases Nos. 1787 (Colombia), 2449 (Eritrea), 2445 (Guatemala) and 2313 (Zimbabwe) because of the extreme seriousness and urgency of the matters dealt with therein.

New cases

5. The Committee adjourned until its next meeting the examination of the following cases: Nos. 2492 (Luxembourg), 2494 (Indonesia), 2497 (Colombia), 2498 (Colombia), 2500 (Botswana), 2501 (Uruguay), 2503 (Mexico), 2504 (Colombia), 2507 (Estonia), 2508 (Islamic Republic of Iran), 2511 (Costa Rica), 2512 (India), 2513 (Argentina), 2514 (El Salvador), 2515 (Argentina), 2516 (Ethiopia), 2517 (Honduras), 2518 (Costa Rica), 2519 (Sri Lanka), 2520 (Pakistan), 2521 (Gabon), 2522 (Colombia), 2523 (Brazil), 2524 (United States), 2525 (Montenegro), 2526 (Paraguay), 2527 (Peru) and 2528 (Philippines), since it is awaiting information and observations from the governments concerned. All these cases relate to complaints submitted since the last meeting of the Committee.

Observations requested from governments

6. The Committee is still awaiting observations or information from the governments concerned in the following cases: Nos. 1865 (Republic of Korea), 2254 (Bolivarian Republic of Venezuela), 2318 (Cambodia), 2323 (Islamic Republic of Iran), 2372 (Panama), 2422 (Bolivarian Republic of Venezuela), 2450 (Djibouti), 2477 (Argentina), 2480 (Colombia), 2482 (Guatemala), 2485 (Argentina) and 2487 (El Salvador).

Observations requested from complainants

7. The Committee is still awaiting observations or information from the complainant in the following case: No. 2481 (Colombia).

Partial information received from governments

8. In Cases Nos. 2177 (Japan), 2183 (Japan), 2203 (Guatemala), 2262 (Cambodia), 2241 (Guatemala), 2295 (Guatemala), 2317 (Republic of Moldova), 2356 (Colombia), 2365 (Zimbabwe), 2434 (Colombia), 2437 (United Kingdom), 2462 (Chile), 2465 (Chile), 2469 (Colombia), 2475 (France), 2476 (Cameroon), 2488 (Philippines), 2489 (Colombia), 2490 (Costa Rica) and 2498 (Colombia), 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. 2268 (Myanmar), 2373 (Argentina), 2400 (Peru), 2423 (El Salvador), 2448 (Colombia), 2454 (Montenegro), 2456 (Argentina), 2458 (Argentina), 2460 (United States), 2466 (Thailand), 2470 (Brazil), 2474 (Poland), 2478 (Mexico), 2479 (Mexico), 2483 (Dominican Republic), 2484 (Norway), 2486 (Romania), 2491 (Benin), 2493 (Colombia), 2495 (Costa Rica), 2496 (Burkina Faso), 2502 (Greece), 2506 (Greece), 2509 (Romania) and 2510 (Panama), the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting.

Urgent appeals

10. As regards Cases Nos. 2459 (Argentina), 2461 (Argentina), 2463 (Argentina), 2464 (Barbados), 2467 (Canada), 2468 (Cambodia), 2471 (Djibouti) and 2473 (United Kingdom/Jersey), 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.

Article 26 complaints

11. The Committee is awaiting the observations of the Government of Belarus in respect of its recommendations relating to the measures taken to implement the recommendations of the Commission of Inquiry.

12. As regards the article 26 complaint against the Government of the Bolivarian Republic of Venezuela, the Committee recalls its recommendation for a direct contacts mission to the country in order to obtain an objective assessment of the actual situation.

Withdrawal of a complaint

El Salvador (Case No. 2505)

13. In a communication, dated 24 August 2006, the Varias enterprises' trade union of the International Airport of El Salvador Maintenance Workers (SITEVMAIES) and the International Confederation of Free Trade Unions (ICFTU) inform the Committee that the SITEVMAIES has obtained legal personality, the object of the complaint in front of the Committee, and ask that the complaint be withdrawn. The Government confirms the granting of legal personality in a communication of 22 September 2006. *The Committee takes note of this information with satisfaction and decides to withdraw the complaint.*

Admissibility of complaint

14. The Committee decided that the complaint in Case No. 2409 (Costa Rica) was admissible.

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: Cambodia (Case No. 2443), Indonesia (Cases Nos. 2236 and 2336) and Nigeria (Case No. 2432).

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

Case No. 2377 (Argentina)

16. The Committee last examined this case at its meeting in March 2006 [see 340th Report, paras. 263-273]. The complainants alleged violations of the right to collective bargaining and to strike of education workers in the public sector of the province of Buenos Aires. The Committee expressed the hope that the Government would enact shortly the Decree that was in the process of adoption with a view to implementing the provisions of article 24 of Act No. 25877, on collective labour disputes, which, in its final paragraph, stipulates that "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 90 days, in accordance with the principles of the International Labour Organization".

17. In communications dated 28 March and 4 April 2006, the Government reported that on 10 March 2006, Decree No. 272/2006 was published, regulating article 24 of Act No. 25877 on collective labour disputes (the Government encloses a copy of the aforementioned Decree).

18. *The Committee notes that article 2 of Decree No. 272 provides that the committee established under article 24, paragraph 3, of Act No. 25877 will be named the Guarantees Commission and pursuant to article 2 of the Decree will be mandated, inter alia, to "… advise the implementing authority on fixing minimum services, in the event that the parties have not reached an agreement to this effect or that the agreements are insufficient, in order to reconcile the exercise of the right to strike with the other rights recognized by the National Constitution, in accordance with the procedure set out in the present*

document". The Committee is of the opinion that the new system represents an improvement over the previous one, in that the Guarantees Commission advising the administrative authority includes representatives of workers' and employers' organizations, as well as other independent members. Nevertheless, the final decision on the fixing of minimum services still rests with the administrative authority. Under these circumstances, the Committee requests the Government to provide information on the practical application of the new provision and specifically, to supply information on the number of cases in which the administrative authority has modified the terms of rulings on minimum services issued by the Guarantees Commission.

Case No. 2433 (Bahrain)

19. The Committee last examined this case, which concerns legislation prohibiting government employees from establishing trade unions of their own choosing and the refusal to grant trade union leave to trade union officers, at its June 2005 meeting. The Committee stated that it expected that the legislative amendment allowing public workers and employees to establish trade unions of their own choosing would be adopted in the very near future and requested the Government to inform it of developments in this respect. It also requested the Government to ensure that any new legislation adopted would enable workers in both the public and private sectors to establish more than one trade union per enterprise, and asked the Government to transmit a copy of Ministerial Decree No. 9/2005 on granting leave to union members in order to undertake trade union activities [see 340th Report, paras. 309-327].

20. In its communication of 31 May 2005, the Government indicates that the draft amendment to article 10 of the Trade Union Act was currently before Parliament for approval; the said amendment would allow employees in the government sector to establish trade unions for the defence of their interests. Together with its communication, the Government attaches a translated copy of the draft amendment, as well as a translated copy of Ministerial Decree No. 9/2005 on granting leave to union members to undertake their trade union activities.

21. *The Committee takes note of the information supplied by the Government. It notes with interest that the draft amendment to article 10 of the Trade Union Act grants public workers and employees the right to establish trade unions of their own choosing, and also allows workers in both the public and private sectors to establish more than one union per enterprise. Further noting the Government's indication that the draft amendment was currently before Parliament, the Committee reiterates its expectation that the said amendment would be adopted and promulgated in the very near future; it requests the Government to continue to keep it informed of developments in this respect. Finally, the Committee takes due note of the copy of Ministerial Decree No. 9/2005, which grants worker representatives leave for the exercise of their trade union activities without loss of pay or benefits.*

Case No. 2402 (Bangladesh)

22. The Committee examined this case at its November 2005 meeting [see 338th Report, paras. 458-470] and on that occasion, it formulated 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.

23. In its communication of 3 May 2006, the Government of Bangladesh asserts that the transfer orders of four staff nurses were issued in the public interest. The Government indicates that according to the government service rules, every public servant may be transferred for the sake of public interest. The Government reiterates that the four aggrieved nurses filed writ petitions to the High Court Division of the Supreme Court against their transfer orders. The High Court Division stayed the transfer orders but the appellate division annulled the stay order. The nurses joined their posts to which they were transferred and are now employed by the following institutions: Ms. Krishna Beny Dey, D/o Haripada Dey, Senior Staff Nurse, deputed to the National Institute of Cardio Vascular Diseases Hospital, Dhaka; Ms. Israt Jahan, D/o Iman Ali Darbesh, Senior Staff Nurse, transferred to the National Institute of Chest Diseases and Hospital, Mohakhali, Dhaka; Mr. Golam Hossain, S/o Md. Joynal Bishwash, Senior Staff Nurse (he had no complaint against the order and is now posted in the former place); Mr. Kamaluddin, S/o Md. Kalai Akhand, Senior Staff Nurse, deputed to the Shaheed Sohorawardi Hospital, Share Bangla Nagar, Dhaka.

24. The Government further refutes the complainant’s allegation that up to 200 other members of the Bangladesh Diploma Nurses Association (BDNA) were told that they would receive transfer orders.

25. *The Committee notes the observations transmitted by the Government and regrets that no information was provided in respect of the other six central executive members of the BDNA who were also allegedly transferred along with the abovementioned four persons. It further regrets that the Government did not give effect to the Committee’s recommendation to institute an independent investigation into the allegations of anti-union discrimination against the officials and members of the BDNA. While noting the Government’s indication that according to the government service rules, every public servant may be transferred for the sake of public interest, the Committee considers that additional measures of protection may be necessary so as to ensure that an employer cannot merely invoke “public interest” to justify the transfer of trade union officials where such measures may actually have been taken in retaliation for the legitimate exercise of trade union rights. In this regard, the Committee notes with regret that, while indicating that the stay orders issued by the High Court Division of the Supreme Court in respect of the transfers of four nurses had been annulled by the appellate division, the Government has provided no information as to whether the appellate division examined the allegations of anti-union discrimination. The Committee recalls in this regard that the transfers were ordered just two days prior to a major BDNA conference. It requests the Government to transmit a copy of the decision to annul the stay orders.*

26. *Considering that acts of anti-trade union discrimination should not be authorized under the pretext of “public interest”, the Committee must once again emphasize 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 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 [see ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 724]. In addition, the transfer of trade union officials can have a significant negative impact upon the organizational structure of a union and its functioning. 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 and effects of anti-union discrimination brought to their attention [see* ***Digest****, op. cit., para. 754].*

27. *The Committee expects that the Government will ensure full respect for these principles in the future. The Committee once again requests the Government to conduct an independent investigation into all allegations of anti-union discrimination suffered by the officials and members of the BDNA and if these allegations are found to be true, to provide redress for the damages suffered. The Committee requests the Government to keep it informed of the outcome of the investigation.*

Case No. 2382 (Cameroon)

28. In its previous examination of the case at its November 2005 session [see 338th Report, paras. 512-535], the Committee requested the Government: to provide it with a copy of any court ruling regarding the legality of the second congress of the Single National Union of Teachers and Professors in the Teachers' Training Faculty (SNUIPEN); to keep it informed of the conclusions of the inquiry by the Secretary of State for Defence into the circumstances surrounding Mr. Ze's detention on 16 April 2004; 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; 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; and to keep it informed of the action taken on all the recommendations above.

29. In a communication dated 7 March 2006, Mr. Joseph Ze, in his capacity as general secretary of the SNUIPEN, informs the Committee that he was released on 22 November 2005 after being held in preventive detention for ten months. Mr. Joseph Ze, on behalf of the SNUIPEN, states that the persecution against him continues as, following his acquittal by the Court of First Instance for unspecified acts, the public ministry launched an appeal and he is under threat of being arrested again. Mr. Joseph Ze has submitted a report to the Committee titled "Manifesto against violations of trade union rights in Cameroon" which repeats, in particular, the circumstances of his arrest, detention and the legal proceedings regarding the charge against him of embezzling public monies.

30. In his communication of 19 May 2006, Mr. Joseph Ze, in his capacity as general secretary of the SNUIPEN, reiterates his complaint. He explains why he does not trust the legal system. Mr. Joseph Ze states that the Government believes him to have embezzled trade union funds whereas in law he has been accused of embezzling public monies. Mr. Joseph Ze states that the Government considers that he is no longer the general secretary of the SNUIPEN. This proves, according to Mr. Ze, that the SNUIPEN has suffered gross interference. Mr. Joseph Ze alleges that the Government has knowingly ratified false resolutions and encouraged dissident factions within the unions, dissidents who organized a destabilizing congress.

31. In communications dated 2 May and 31 August 2006, the Government replies to the additional information provided by Mr. Joseph Ze. According to the Government, the fact that Mr. Joseph Ze was acquitted shows that the earlier allegations of judicial harassment were unfounded. As regards the possibility of an arrest in the future, the Government maintains that it is within its rights to lodge an appeal. The Government does not believe its role is to cover up for trade unionists accused of embezzling trade union funds.

32. *The Committee takes note of Mr. Joseph Ze's release on 22 November 2005. It also notes his acquittal by the Court of First Instance for embezzling public monies and the appeal lodged against this acquittal by the Government. It requests the Government to keep it informed of the result of this appeal. As regards the allegations regarding the legality of calling a second SNUIPEN congress and the alleged removal from office of Mr. Ze, the Committee recalls that the parties may request the competent court to examine this matter and make a ruling based on proven facts and relevant provisions of the SNUIPEN's by-laws. The Committee requests the Government and the complainant to indicate if such an appeal has been made and, if so, its outcome. In addition, the Committee reiterates its request for the Government to keep it informed of the conclusions of the inquiry by the Secretary of State for Defence into the circumstances surrounding Mr. Ze's detention on 16 April 2004.*

Case No. 2439 (Cameroon)

33. In its previous examination of the case at its March 2006 session [see 340th Report, paras. 328-372], the Committee requested the Government: (a) to issue without delay the certificate of registration to SNI-ENERGIE; (b) to ensure that the principles of freedom of association are fully respected in the AES-SONEL enterprise, particularly as concerns the non-interference of the enterprise in favour of a trade union, and to ensure that all negative effects of favouritism are rectified; (c) to keep it informed of the outcome of the decisions concerning the CSIC's participation in the electoral process of the judicial authority; (d) to ensure that in the future, the restrictions concerning the right to strike, more specifically in the case of notice of strike action, should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties can take part at every stage; (e) to communicate to it the text of the judgements handed down concerning the legality of the collective agreement and to keep it informed of the development of the situation in this respect; (f) to make sure that, in the event of any future restructuring, including rationalization and staff reduction processes, the process involves consultations or attempts to reach agreement with the trade union organizations; (g) to keep it informed of the outcome of the proceedings undertaken regarding the cases of Messrs. Fouman and Ndzana Olongo and to communicate to it the final judgements handed down by the courts in this respect; (h) to set up immediately an independent inquiry on the allegations of anti-union discrimination against the officials and members of the CSIC and SNI-ENERGIE; (i) to take rapidly the necessary measures so that the trade union officials dismissed in violation of national legislation might benefit effectively from all the protections and guarantees provided for under this legislation. If it is found that acts of anti-union discrimination have been committed, the Committee requests the Government to take the necessary measures to guarantee their reinstatement; and (j) to provide its observations on the supplementary information provided by the CSIC in its communications of 2 December 2005 and 23 January 2006.

34. The Confederation of Independent Trade Unions of Cameroon (CSIC), in communications dated 2 December 2005, 23 January, 22 May and 15 September 2006 signed by Mr. Ndzana Olongo in his capacity as general secretary of the CSIC, reiterates its allegations. In its communication of 22 May 2006, the CSIC adds that the Government has created a split in the organization by asking a small group to resign and create a new trade union in the same sector of activity and to join the Trade Union Confederation of Workers

in Cameroon (CSTC) which is, according to the complainant, in the service of the Government. The CSIC claims that the Government gives two different versions of the circumstances surrounding the non-registration of the SNI-ENERGIE: on the one hand, the Government claims that it was not registered because the trade unions' registrar had left, and on the other hand it claims that it was not registered because a group had resigned from SNI-ENERGIE. According to the CSIC, SNI-ENERGIE was not registered because it is independent from the administration, the employers and the indiscretions of the Minister of Labour and Social Security and the acts of corruption of the Ministry's civil servants.

35. The CSIC also alleges that the Minister of Labour and Social Security invited individuals to the 120th International Festival of Labour who did not have the standard or the mandate to address workers on behalf of the CSIC. Those purporting to represent the CSIC were also invited to various events, including a reception with the Prime Minister within the framework of social dialogue, on 18 January 2006, and the National Day on 20 May 2006. The CSIC alleges that the Government has attempted to destabilize it.

36. The Government replied in two communications dated 2 and 9 May 2006 to the additional allegations made by the complainant in their communications of 2 December 2005 and 23 January 2006, in which the CSIC reiterates and clarifies its allegations. Regarding the registration of SNI-ENERGIE, the Government affirms in its communication of 2 May that there has been dissociation from CSIC and a new trade union has been created, the National Union of Electric Energy (SNEE), and that SNI-ENERGIE therefore falls under article 8 of the Labour Code requiring at least 20 signatures for registration. In addition, in its communication of 9 May, the Government states that the CSIC might have wanted a government reaction to the organization's internal quarrels. It adds that Mr. Ndzana Olongo has been struck off from the CSIC and can no longer speak on behalf of the organization.

37. The Government, in a communication of 15 June 2006, reports that it has noted the Committee's recommendations and reiterates its commitment to implementing the provisions contained in the Conventions it has freely signed up to. It adds the following comments regarding the Committee's recommendations:

– regarding recommendation (a) on the registration of SNI-ENERGIE, the Government reaffirms that members of that union disassociated themselves from CSIC and created a rival organization which was duly registered with the registrar. In these conditions it would be difficult, according to the Government, to register SNI-ENERGIE as it no longer has any members;

– regarding recommendation (b) on the non-interference of AES-SONEL in favour of a trade union, the Government states that an inquiry will be launched to clarify these destabilizing attitudes. The Government specifies that a report will be sent to the Committee in due course;

– regarding recommendation (c), the Government guarantees that judicial decisions will be communicated as soon as they are available;

– regarding recommendation (d), the Government states that the conciliation and arbitration proceedings are defined in the Labour Code and are respected;

– regarding recommendation (e) on the collective agreement in the AES-SONEL enterprise, the Government states that the procedure is being followed and that relevant information will be forwarded as soon as it becomes available;

– regarding recommendation (f) on the consultations with professional organizations with regard to restructuring, the Government affirms that there are provisions pertaining to this in the Labour Code in article 40 which apply;

– regarding recommendation (g), the Government clarifies that the deliberations in the Fouman and Ndzana cases will be carried out according to the laws and regulations in force and that copies of the rulings will be sent to the Committee as soon as possible;

– regarding recommendation (h), the Government states that a committee will be set up to carry out an independent inquiry into the allegations of discrimination, because they are so serious. A copy of the inquiry report will be sent to the Committee as soon as possible;

– regarding recommendation (i), the Government guarantees that measures will be taken with regard to the reinstatement of union officials if these allegations are proven by the inquiry.

38. *The Committee takes note of the Government's statement regarding the dissociation from CSIC by members of SNI-ENERGIE and the creation of a new organization by those members, SNI-ENERGIE therefore falling under article 8 of the Labour Code requiring at least 20 signatures for registration; the Committee notes the complainant's allegation that the Government has created a split in the organization by asking a small group to resign and create a new trade union in the same sector of activity and to join the CSTC which is, according to the complainant, in the service of the Government. The Committee recalls the fundamental principle of non-interference by the authorities in the internal business of trade unions, laid down in Article 3, paragraphs 1 and 2, of Convention No. 87, and the principle that workers should be able to establish and join organizations of their own choosing in full freedom. [**Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 274.]*

39. *The Committee notes with interest the Government's intention to launch an investigation to clarify the allegations of interference by AES-SONEL and expects that its outcome will be communicated to it quickly along with the Government's decision to implement, as recommended by the Committee, an investigating committee to examine the allegations of anti-union discrimination towards officials and members of the CSIC and SNI-ENERGIE, and hopes that this will be set up immediately. The Committee notes that the Government will send it the judicial decisions regarding the CSIC's participation in the electoral process and copies of the rulings in the Fouman and Ndzana cases as soon as possible. Also, the Committee notes that the Government will send information concerning the collective agreement in the AES-SONEL enterprise. The Committee requests the Government to send all the judicial decisions made in relation to this case. The Committee notes the Government's statements that the provisions of article 40 of the Labour Code apply to the consultations with professional organizations with regard to restructuring. The Committee notes the Government's observations on the CSIC's communications of 2 December 2005 and 23 January 2006 regarding acts of government interference in the legitimate activities of the trade union, particularly that in which the Government reaffirms its commitment to respecting the principle of non-interference in the internal affairs of trade unions, and adds that "the CSIC might have wanted a government reaction to the organization's internal quarrels". The Committee highlights the fundamental principle that the authorities and employers should refrain from any discrimination between trade union organizations, especially as regards recognition of their leaders who seek to perform legitimate trade union activities [see **Digest**, op. cit., para. 307] and trusts that the Government will fully uphold this principle. The Committee expresses its hope that the Government will send the information requested above as soon as possible.*

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

40. The Committee last examined this case, which concerns allegations that Cathay Pacific Airways dismissed the Hong Kong Aircrew Officers' 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 November 2005 meeting [see 338th Report, approved by the Governing Body at its 294th Session, paras. 44-59] and requested the Government to: take measures with a view to ending the dispute through a negotiated settlement which may be considered by both parties as fair and equitable without delay, given that the proceedings before the High Court are still pending, four years after the lodging of a complaint for unlawful dismissal by several pilots of Cathay Pacific Airways. The Committee also requested the Government to inform it of the actual stage of the proceedings before the High Court; to keep it informed of the progress made in amending the Employment Ordinance; 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; to adopt legislative provisions prohibiting acts of interference, coupled with efficient appeal procedures and sufficiently dissuasive sanctions; and 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.

41. In a communication dated 7 June 2006, the Government provided information on the above recommendations. The Government indicated in particular that, with regard to the recommendation concerning measures to end the dispute through a negotiated settlement, the Labour Department of the Government had been maintaining close contact with Cathay Pacific Airways and the HKAOA. The negotiation had yielded a positive outcome; Cathay Pacific Airways offered the dismissed pilots financial settlement or re-employment to pilot positions (subject to their successfully passing a medical check and job interviews) in return for withdrawing their legal action relating to the dismissal. Members of the HKAOA voted in favour of the offer at an Extraordinary General Meeting on 13 April 2005 and recommended that the dismissed pilots accept the offer. Altogether, 33 of the dismissed pilots have accepted the offer, while the rest have declined it. With respect to the civil action brought before the High Court, both parties are in the process of fixing a date for a full hearing.

42. The Government stated, with regard to the recommendation concerning amendments to the Employment Ordinance, that the Labour Department was still working on a draft bill that seeks to introduce new provisions on mandatory reinstatement/re-engagement under the Employment Ordinance. The legislative exercise had turned out to be far more complicated than originally envisaged, and the Government was endeavouring to introduce the bill into the Legislative Council as soon as possible.

43. With regard to the recommendation on the adoption of protective machinery against acts of anti-union discrimination, the Government indicated that it fully recognized the importance of guarding against acts of anti-union discrimination. The right of employees to join trade unions and participate in union activities were clearly spelt out in the Employment Ordinance, and active steps had been taken to promote employees' awareness of these rights through publicity and educational activities. The Government stated that workers and trade unions aggrieved by the acts of their employers could seek the advice and assistance of the Labour Relations Division of the Labour Department, which renders free and speedy conciliation service to resolve grievances and disputes between employers on the one hand and workers and their unions on the other. Offences detected in the course of conciliation and handling of complaints would be thoroughly investigated; prosecution

would be initiated if there was sufficient evidence. The Government added that aggrieved parties could also seek civil remedies.

44. The Government added that the judicial system of Hong Kong SAR was based on equity, fairness and openness. The standard of proof applicable to offences under the Employment Ordinance is the common law standard, which applies to all criminal offences. In 2005, as a result of the Labour Department's prompt investigation and successful prosecution, two employers were convicted and fined for acts of anti-union discrimination.

45. With regard to the recommendation concerning protection against acts of interference, the Government stated that it fully recognized the importance of guarding against acts of interference in workers' organizations, and that its legislation and administrative systems already provided adequate legal protection.

46. With regard to the recommendation on measures to promote bipartite collective bargaining, the Government indicated that it attached great importance to promoting negotiated solutions to collective disputes, as well as to promoting bipartite bargaining. The Labour Department had been maintaining close contact with Cathay Pacific Airways and the HKAOA, and the majority of the dismissed pilots had accepted the employer's settlement offer and withdrawn from the legal action relating to their dismissal.

47. The Government stated that its system of direct and voluntary bipartite negotiations, underpinned by free conciliation services rendered by the Labour Department, was working well. Moreover, nine tripartite committees had been established in order to provide effective forums for consultation and negotiation at the industrial level. At the enterprise level, officers of the Labour Department, after resolving disputes through conciliation, invariably encourage employers and employees to draw up agreements on terms and conditions of employment; several agreements in the cargo-handling industry had been concluded with such assistance. The Government added that it must be remembered that over 98 per cent of private enterprises were small and medium-sized ones, comprising over 268,000 entities, and that this fact posed a major limitation on the development of collective bargaining.

48. *The Committee notes the information provided by the Government. With regard to the recommendation on measures to end the dispute through a negotiated settlement, the Committee welcomes the fact that Cathay Pacific Airways had made an offer of financial settlement or re-employment for the dismissed pilots, which the HKAOA had voted in favour of. The Committee requests the Government to transmit a copy of the settlement agreement. The Committee expresses its concern, however, that for those dismissed pilots who had declined the settlement offer and are continuing with the civil action, no date for a full hearing had yet been fixed – in spite of the fact that the complaint was lodged five years ago. It further regrets that no measures had been taken by the Government to prevent irreparable damage to the said plaintiffs pending the resolution of this case. Accordingly, the Committee once again asks the Government to intercede with the parties with a view to promoting interim measures preventing irreparable damage for the dismissed pilots continuing this civil action, pending final judgement on it. The Committee also requests the Government to keep it informed of the stage of the proceedings before the High Court.*

49. *With respect to the recommendation relating to amendments to the Employment Ordinance, the Committee notes the Government's statement that the Labour Department was still working on a draft bill of amendments, and that the exercise had turned out to be far more complicated than originally envisaged. Under these circumstances, the Committee once again emphasizes 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]. It asks the Government to continue to keep it informed of the progress made in amending the Employment Ordinance.

50. *With respect to the recommendation concerning the adoption of appropriate machinery geared to prevent and redress acts of anti-union discrimination, the Committee observes that the Government partially repeats information it had previously submitted on the existing laws intended to protect against acts of anti-union discrimination. While taking note of the Government's additional indication that, due to the efforts of the Labour Department, two employers were convicted and fined in 2005 for acts of anti-union discrimination, the Committee nevertheless expresses its regret that the Government has not indicated any further steps taken to adopt appropriate machinery to protect against acts of anti-union discrimination. The Committee recalls that it had drawn the Government's attention to shortcomings in the laws and procedures meant to protect against acts of anti-union discrimination in its last examination of this case [see 338th Report, paras. 55-56]. In this connection, the Committee stresses yet again that respect for the principles of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress, which are expeditious, inexpensive, and fully impartial [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 741] and 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.*

51. *With respect to the recommendation made on the issue of interference, the Committee regrets that the Government limits itself to stating that its legislation and administrative systems already provided adequate legal protection, even though the Committee had previously pointed out that there was no explicit prohibition of acts of interference in the law, or any prompt and effective mechanism to address complaints of interference [see 338th Report, para. 57]. Under these circumstances, the Committee once again 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.*

52. *Finally, the Committee takes due note of the information supplied on the various activities to promote collective bargaining. Noting specifically the Government's indication that nine tripartite committees had been established in order to provide effective forums for consultation and negotiation at the industrial level, the Committee asks the Government to provide further information on the activities of these bodies – and in particular to indicate whether instances of bipartite collective bargaining had been initiated as a result of the said Committees' efforts.*

Case No. 1962 (Colombia)

53. The Committee last examined this case at its June 2003 meeting [see 331st Report, paras. 20-25]. On that occasion, the Committee requested the Government to speed up the inquiry that had been reportedly initiated into the dismissal of all the workers and members of the Public Servants and Employees' Trade Union of Pitalito-Huila by the Municipality of Pitalito and, if it were concluded that the dismissals occurred for anti-union reasons, to

take measures to ensure that the injured parties were reinstated in their jobs without loss of earnings.

54. The Committee notes that, in its communication of 1 December 2005, the trade union states that the Ministry of Labour and Social Security expedited the inquiry against the municipality and sentenced it to a fine for violation of the collective agreement (clause 14 concerning job stability). The Committee takes note of the Government's reply, dated 30 October 2006, by which it indicates that the Supreme Court has ordered compensation payment, given the physical and legal impossibility of reinstating the workers. It observes nonetheless that the payment receipts the Government refers to have yet to be received. In these circumstances, the Committee asks the complainant organization to confirm whether the compensation has been received.

55. Regarding the workers dismissed at the Municipality of Neiva in violation of the collective labour agreement, concerning whom the Committee requested the Government to ensure that full compensation was paid immediately to the workers dismissed [see 329th Report, para. 417], the Committee notes that, in its communication of 26 May 2006, the Public Employees' Trade Union of the Municipality of Neiva states that it filed *amparo* proceedings before the Constitutional Court, which were rejected, as was the nullity appeal brought against the ruling rejecting the proceedings. In its communications of 15 May and 24 July 2006, the Government confirms the Court's rejection of the *amparo* proceedings and nullity appeal. *Given that these two actions do not by their nature have a bearing on the substance of the matter at issue, i.e. payment of full compensation to the workers, and that the court ruling provides that "it is not incompatible with the need for the Government and the trade unions to proceed in such a way as to secure adequate compliance with the recommendations of the Committee on Freedom of Association ...", the Committee invites the Government and the trade union to make a joint effort to seek a solution to the dispute so that the dismissed workers are duly compensated.*

Case No. 2237 (Colombia)

56. The Committee last examined this case at its March 2006 meeting [see 340th Report, para. 69-71]. On that occasion, the Committee requested the Government to keep it informed of developments in regard to: (a) any steps taken with regard to the disparity in wages paid to different workers employed in the same departments at the Hilazas Vanylon Enterprise S.A.; (b) any legislative measures adopted with regard to the allegation concerning the conclusion of service contracts with workers' cooperatives in the enterprises mentioned by the complainant (Fabricato Tejicóndor, Coltejer and Textiles Rionegro, Riotex, Leonisa, Everfit Indulana), thereby obstructing freedom of association, the right to present lists of demands and the right to strike; and (c) with regard to the allegation that in the enterprise Riotex, part of the Fabricato group, unionized members have not benefited from the 7.49 per cent increase since 16 July 2003.

57. In its communication of 7 July 2006, the Government states, in regard to the latter allegation concerning the Riotex S.A. enterprise, that the 7.49 per cent pay rise was granted to all the workers without distinction. The Committee notes this information. However, it observes that the Government has not attached either the certificate of the auditor of the enterprise confirming the information provided which, according to the Government was sent to the Committee, or the copy of the communication signed by the Coordinator of the Prevention, Inspection, Monitoring and Control Group of the Antioquia Territorial Directorate certifying that no complaint has been filed by the workers against the enterprise in this regard, also mentioned by the Government. *The Committee requests the Government to send this documentation.*

58. Moreover, the Committee regrets that the Government has not sent information on the matters that remained pending concerning any steps taken by the Government with regard to the disparity in wages paid to different workers employed in the same departments at the Hilazas Vanylon Enterprise S.A. and any legislative measures adopted with regard to the conclusion of service contracts with workers' cooperatives in several enterprises, thereby obstructing freedom of association, the right to present lists of demands and the right to strike. *The Committee requests the Government to keep it informed in this respect.*

Case No. 2239 (Colombia)

59. The Committee last examined this case at its June 2006 meeting [see 342nd Report, para. 83-86]. On that occasion, the Committee requested the Government to keep it informed of the final outcome of the appeal lodged by SINTRAIME against the ruling of the Territorial Directorate of Cundinamarca, which had declared that it was not competent in the matter of the suspected irregularities at the GM Colmotores enterprise. In this respect, the Committee notes the Government's communication of 8 August 2006, forwarding a communication from SINTRAIME informing it that it was abandoning the complaint in view of an improvement in relations between the trade union and the enterprise, manifested in the recent conclusion of a new collective agreement. The Committee notes this information.

60. With regard to the allegations concerning the murder of Mr. Luis Alberto Toro Colorado, a member of the National Executive Committee of the National Union of Workers in the Weaving, Textiles and Clothing Industry (SINALTRADIHITEXCO), concerning which the Government had informed it of an ongoing investigation by the Attorney-General's office which had been assigned to the Bello District Criminal Court, the Committee observes that it has not yet received any further information from the Government on the matter and requests it to continue doing everything 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. Bearing in mind that equally serious allegations are pending before the Committee under Case No. 1787, the Committee will continue its examination of these allegations under that case.

61. The Government sent a communication of 27 June 2006 on matters that had already been examined. For its part, the SINALTRADIHITEXCO sent additional information in a communication of 30 May 2006. That information refers to the unilateral annulment by the Tejicóndor enterprise of the signed collective agreement following its merger with Fabricato. In this regard, the Committee had noted that, according to the Government: (a) the agreement signed by the workers at Tejicóndor enterprise was applied to these workers once Tejicóndor had merged with Fabricato until its expiry date; (b) after that the collective agreement signed between Fabricato and the SINDELHATO trade union, which represented 56 per cent of workers in the company, was extended to them; (c) SINALTRADIHITEXCO had initiated lawsuits in the ordinary courts against the enterprise and SINDELHATO, in which the courts ruled in favour of the enterprise; the ruling was upheld in the Court of Second Instance where it was shown that the agreement concluded with SINDELHATO was much more to the advantage of the workers than that concluded with Tejicóndor; and (d) at present, a new collective agreement signed on 5 April 2005 with SINDELHATO is in force, and will remain so until 4 April 2008. However, in its new communication, the trade union denies the truth of the Government's assertions. In particular, it denies that the enterprise duly applied the collective agreement that was in force up to 31 July 2003 [see 338th Report, paras. 135-138, in which these matters were examined for the first time], and maintains that in regard to the refusal by the enterprise to bargain with SINALTRADIHITEXCO on the grounds that it is a minority union, its status as a minority union does not date back to 2003, when the collective dispute arose as a result of the refusal, but to 2005, when the Government sent its

observations to the Committee. *The Committee notes that the Government has not sent its observations on the matter and requests it to do so without delay*.

Case No. 2297 (Colombia)

62. The Committee last examined this case at its March 2006 meeting [see 340th Report, paras. 72-74]. On that occasion, the Committee requested the Government to inform it whether any legal action had been taken for anti-union discrimination following the dismissals and transfers alleged to have taken place during the process of restructuring at the General Directorate of Taxation Support of the Ministry of Finance and Public Credit.

63. The Single Confederation of Workers sent a communication on 31 May 2006 denouncing the absence of a reply from the Government on the issues that remained pending. For its part, in its communications of 23 May and 26 October 2006, the Government states that Ms. Elba Rosa Zapata was relieved of her duties and dismissed; she was subsequently reinstated and ultimately resigned. Ms. Imelda Alzate was reinstated and now works in the National Tax Administration. Mr. José Vivencio Jiménez Suárez was relieved of his duties. The Committee notes further that the Government states that there have been no instances of legal action having been taken for anti-union discrimination during the process of restructuring at the General Directorate of Taxation Support of the Ministry of Finance and Public Credit.

Case No. 2258 (Cuba)

64. At its previous examination of the case, at its meeting in May-June 2005, the Committee made the following recommendations on the issues that remained pending [see 337th Report, para. 854]:

– Taking into account the previous cases presented to the Committee relating to harassment and detention of members of trade unions that are independent of the established structure, and also taking into account the fact that the convictions of seven trade unionists were issued in the context of very brief summary proceedings and that for the third time the Government has failed to send the requested judgements containing these sentences, the Committee urges the Government to take steps to ensure the immediate release of the trade unionists referred to in the complaint (Pedro Pablo Alvarez Ramos (sentenced to 25 years' imprisonment), Carmelo Díaz Fernández (15 years), Miguel Galván (26 years), Héctor Raúl Valle Hernández (12 years), Oscar Espinosa Chepe (25 years), Nelson Molinet Espino (20 years), and Iván Hernández Carrillo (25 years)), and to keep it informed in this respect.

– With regard to the allegations that: (1) on 6 September 2002 CONIC held its second national assembly, amidst retaliation by the State; (2) a heavy-handed operation was conducted by the political police to prevent the annual trade union assembly being held; (3) the political police threatened the CONIC officials with possible charges of rebellion if any demonstration was held in the vicinity of the premises where the assembly was taking place; (4) they stopped all people trying to enter the building, checking their identity and the reason for their presence, and they also denied access to a number of trade unionists, violently ejecting them from the vicinity, the Committee requests the Government to carry out a detailed investigation into these allegations and keep it informed in this respect.

– The Committee requests the Government to accept a direct contacts mission.

65. In its communication of 28 March 2006, with regard to the individuals mentioned in the Report of the Committee on Freedom of Association, the Government expresses its regret that the Committee continues to ignore the wealth of specific arguments and information presented showing that those people are not trade union members, they do not have any

employment links with workers' bodies or collectives in the country and they were not sanctioned for trade union activities; all this means that pursuing this case within the framework of the proceedings of the Committee on Freedom of Association is inappropriate and has no legal objectivity. It should be noted that the manifest misinformation in the Report is such that it even calls for the release of two individuals who were given leave to serve a portion of their sentence outside prison under house arrest *(licencias extra penales)* in June and November 2004, something that was widely reported in the international press.

66. When it is stated in paragraph 838 of the Committee's Report that, if it had had these rulings at its disposal, the Committee "would have been in a position to examine the basis on which the persons in question had been convicted", this unjustly discounts the arguments sent in promptly by the Government of Cuba in response to each request for information.

67. The Government adds that it believes the recommendations in paragraph 854 of the 337th Report and the valued judgements expressed about the judicial proceedings that issued the mentioned rulings impinge upon the integrity and the independence of the courts that passed those sentences in accordance with procedural laws and in full respect of the guarantees established by those laws in the Constitution of the Republic of Cuba. Everybody involved in the proceedings was notified and made aware of these rulings. As such, the Government reiterates the information regarding the all-important laws, procedures and guarantees in the cases mentioned, which were promptly submitted to the Committee on Freedom of Association in response to its requests.

68. The Government adds that the Committee on Freedom of Association continues to argue that there is a lack of information because the Government's responses with regard to the people included in the complaint are general. The Government reminds the Committee that, in its communication of 23 February 2004, additional and specific information was sent about all the people mentioned, as well as detailed replies to all the allegations in the complaint, all of which is reiterated in this communication, along with the Government's thoughts on this case, which have already been sent in previously.

69. The Government states that it has systematically kept in contact with ILO officials who have visited the country for various technical assistance missions and it maintains close relations with directors and specialists in the Mexico and Costa Rica Offices as well as with the Regional Office in Lima, through its Regional Director, who recently conducted a visit to the country that was extremely beneficial for both parties. Moreover, the Government has allowed ILO experts, of different categories and specialities, including those who specialize in activities for workers, to come and inspect conditions in the country. Cuba reiterates its policy of principles and its willingness to continue developing technical cooperation with ILO mechanisms with a universal mandate and which are not based on politically motivated and discriminatory decisions which lack objectivity.

70. The Government indicates that, as it has said before, the Committee on Freedom of Association has enough information to conclude its consideration of Case No. 2258 without any further delay. Continuing to prolong it threatens the credibility of the work of the bodies responsible for promoting and protecting freedom of association in all parts of the world. Lastly, the Government of Cuba states its hope that the objectivity and impartiality that should characterize this important ILO monitoring body will prevail, and lead it to the unavoidable conclusion that the time has come to end this unjust manoeuvre, that is Case No. 2258.

71. *The Committee notes all the information provided by the Government and in particular the release from prison of two people who were given leave to serve a portion of their sentence*

outside prison under house arrest (licencias extra penales) *in June and November 2004, as well as that various technical assistance missions have visited the country and that Cuba reiterates its policy of principles and its willingness to continue developing technical cooperation with ILO mechanisms.*

72. *The Committee regrets that the Government has not accepted the direct contacts mission that it had proposed and, more generally, that it only repeats previously-given information and arguments without taking measures to secure the immediate release of five members of trade unions independent of the established structure who have been given long prison sentences and has not acted on its previous recommendation on the allegations regarding CONIC.*

73. *In light of the indirect accusation of political and discriminatory motivation and a lack of objectivity, the Committee highlights that this is unfounded given that the Government has for the fourth time failed to send in the judgements of the convicted trade union members and has not acted on its recommendation to launch a detailed investigation into the allegations regarding the CONIC organization.*

74. *The Committee once again requests the Government to act on its previous recommendations.*

Case No. 2208 (El Salvador)

75. At its previous examination of the case, the Committee had requested the Government to inform it whether the Lido S.A. enterprise had reinstated four trade union officials who had remained dismissed [see 340th Report, para. 83].

76. In its communication of 21 July 2006, the Government states that the parties met in the joint committee provided for under the terms of the collective agreement and agreed to reinstate the four officials who had remained dismissed, who were in fact reinstated in September and October 2005.

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

Cases Nos. 2017 and 2050 (Guatemala)

78. The Committee last examined these cases at its March 2006 meeting [see 340th Report, paras. 98-100] and on that occasion made the following recommendations:

(a) with respect to the allegations concerning the Banco de Crédito Hipotecario Nacional (anti-union dismissals and suspensions), the Committee recalled that the Government had provided information about action being taken by the negotiating committee in respect of these allegations and requested the Government to keep it informed of the progress made by that committee;

(b) with respect to the allegations relating to the Tamport S.A. company (dismissals due to the company's closure), the Committee requested the Government to inform it of the final results of the legal proceedings under way;

(c) with regard to the dispute at the La Aurora National Zoological Park, the Committee noted that the judicial authority had confirmed the arbitrator's decision which had been appealed by the company. It also noted that the arbitrator's decision was at that time in the implementation phase, waiting for the joint commission, established in accordance with the arbitrator's decision, to issue the respective report; the Committee requested the Government to keep it informed of the report of the joint commission mentioned;

(d) with regard to the dismissals from the La Exacta and/or San Juan El Horizonte farm, in respect of which reinstatement had been ordered, the Committee requested the Government to keep it informed of the reinstatement proceedings under way;

(e) with regard to the murder of Mr. Baudillo Amado Cermeño Ramírez in December 2001, the Committee requested the Government to send it the ruling handed down in that respect;

(f) with regard to the allegations concerning the kidnapping of and assaults and threats against the trade unionist of the Santa María de Lourdes farm, Mr. Walter Oswaldo Apen Ruiz, and his family, the Committee requested the Government to send its observations and to ensure that the safety of the trade union member, which had been threatened, was guaranteed; and

(g) with regard to the allegations relating to the murder of trade union members Efraín Recinos, Basilio Guzmán, Diego Orozco and José García Gonzáles, the injuries to 11 workers and the detention of 45 workers of the La Exacta and/or San Juan El Horizonte farm, the Committee urged the Government to send information in this respect without delay.

79. In a communication dated 29 May 2006, the Trade Union of Workers of Guatemala (UNSITRAGUA) indicates in respect of the allegations concerning the Banco de Crédito Hipotecario Nacional of Guatemala, that the present authorities of the Bank have increased their actions of repression and intimidation against the trade union leaders and the rank and file members of the trade union organization, which can be summarized as follows: (a) in March 2005, the executive committee of the trade union was informed by the general manager of the Bank of the closure of 29 of the institution's agencies and of the dismissal of 102 workers. When the trade union leaders expressed their disagreement with the measure and requested that the workers concerned be placed in other jobs, the general manager convened a general assembly of workers both affiliated and not affiliated to the trade union, during which he made a whole series of pejorative and anti-union comments against the trade union leadership; (b) in June 2005, the authorities of the Banco de Crédito Hipotecario Nacional of Guatemala began a campaign to make the workers leave the trade union, threatening that if they did not renounce their trade union membership they would be dismissed. It should be noted that all the disaffiliations that occurred as a result of that campaign were submitted to the general management of the Bank and not to the executive committee of the trade union, as per the statutes of the trade union organization. The head of the Human Resources Department ordered that trade union dues should not be deducted from the wages of the workers concerned, without the disaffiliations having been recognized and approved according to the procedures established in the statutes of the trade union organization; (c) in July 2005, the authorities of the Banco de Crédito Hipotecario Nacional of Guatemala took a series of actions against the trade union which contravened the prevailing collective agreement, including: (1) no longer sending copies of the hearings notified to the workers affiliated to the trade union, in order to prevent it from advising them; (2) refusing the trade union access to the labour records of their affiliates; (3) not informing the trade union of the hiring and departures of personnel; (4) initiating disciplinary actions against the trade union leaders, maintaining that "they must inform the Bank" of the activities they carry out during their union leave; (5) the authorities of the Bank issuing the trade union leaders with veiled death threats; (d) on 15 July 2005, the general manager of the Bank prohibited the trade union from using the institution's vehicle, which had been assigned for the trade union to use; (e) on 19 July 2005, after the trade union had transmitted some complaints to the ILO, the three telephone lines that had been assigned to the trade union for its use were blocked by order of the general manager of the Bank; (f) on 25 July 2005, a funeral wreath was laid at the headquarters of UNSITRAGUA, together with a number of death notices threatening the trade union leaders with death; (g) on 14 March 2006, in view of the refusal of the trade union's executive committee to report to the general management of the Bank on the activities they carried out during their union leave, disciplinary administrative proceedings were initiated

against the trade union leaders and resulted in them being suspended without pay. The aim of this measure is to establish a case against the trade union leaders in order to ask the courts for authorization to dismiss them; nevertheless, the sanctions are being imposed without any legal foundation; (h) on 23 March 2006, taking as a pretext a trade union sports bulletin inviting the workers to participate in sporting activities to celebrate the 43rd anniversary of the foundation of the trade union, the general manager of the Bank issued a new publication in which he threatened, without having any grounds, to initiate penal action against the leaders of the trade union, a threat which was preceded by all manner of pejorative statements about the leaders of the trade union; (i) at present a further two disciplinary administrative proceedings are being brought against the leaders of the trade union, based on the premise that they should either inform the general management of the activities they carry out during their union leave or should no longer be granted it. Although the Ministry of Labour and Social Welfare was asked to intervene to ensure that freedom of association was maintained, it referred this matter to the Tripartite Committee on International Labour Affairs (which has not yet begun to process the case) and to the Alternate Conflict Resolution Unit.

80. As to the allegations concerning the enterprise Tamport S.A., UNSITRAGUA alleges that the case is being examined by the Seventh Labour and Social Welfare Court of the First Economic Zone under illegal work stoppage incident No. 270-2000, and is in the execution phase, only pending the sale of the seized property at public auction. Nevertheless, on 28 November 2005, the court suspended the execution on the grounds of the death of Ms. Dora Elizabeth Tanchez Portillo, who had acted in the case through a judicial representative. Nevertheless, in deciding that suspension, the court omitted to apply article 1722 of the Civil Code, which governs such situations. In the present case, the proceedings had been initiated and had entered the execution phase during the lifetime of Ms. Tanchez Portillo; in other words, the execution of the case constitutes a pending rather than a new matter. Despite this, the court procedurally dissociated the judicial representative and imposed an unnecessary suspension on the case, maintaining that the female workers should initiate new proceedings to appoint a new legal representative, an aim which, in addition to not being in keeping with the law, considerably defers the execution phase. This case was put before the Tripartite Committee on International Labour Affairs, but in spite of this, to date it has not yet begun to process it.

81. With respect to the La Exacta enterprise (San Juan El Horizonte farm), UNSITRAGUA indicates that the Government has shown no interest whatsoever, either as regards ensuring the reinstatement of the workers or investigating and criminally prosecuting those responsible for the murders of the dead trade unionists. The case in question was addressed to the Tripartite Committee on International Labour Affairs, but to date it has not been dealt with at all.

82. In communications dated 10 and 29 May and 28 June 2006, the Government states in relation to the dispute at the La Aurora Zoological Park that on 11 August 2005 the Workers' Union of the La Aurora National Zoological Park and the La Aurora National Park definitively signed a collective agreement on working conditions before the competent jurisdictional body. As to the allegations relating to the La Exacta farm, the Government indicates that information was requested from the District Prosecutor of the Government Prosecutor's Office of the municipality of Coatepeque of the department of Quetzaltenango, which stated that in October 1996 the competent judge ordered the provisional closure of the case in favour of the trade unionists due to the offences of triple murder, injuries and abuse of authority, as well as coercion and usurpation. In 2001 the Government Prosecutor's Office requested that the investigation be reopened, which the first instance judge allowed. At present, the case is in the investigation phase, the examining magistrate having summoned the trade unionists pending the first declaration in respect of the offences mentioned. By a communication of 21 September 2006, the

Government states that the trade unionist Walter Oswaldo Apen Ruiz quit his job with the municipality of Tecún Umán.

83. *The Committee notes the information communicated by the Government on the allegations relating to the dispute at the La Aurora Zoological Park and to the criminal proceedings of the workers of the La Exacta farm as well as Mr.Walter Oswaldo Apen Ruiz's departure from his job with the municipality of Tecún Umán. The Committee regrets that the Government has not sent any information relating to the other pending questions and requests it to do so without delay, including those relating to the kidnapping, assaults and threats against the trade unionist Walter Oswaldo Apen Ruiz, as well as its observations on the additional information sent by UNSITRAGUA on 29 May 2006.*

Case No. 2259 (Guatemala)

84. The Committee last examined this case at its March 2006 meeting [see the Committee's 340th Report, paras. 831-861]. On that occasion, the Committee made the following recommendations:

(a) As regards the allegations concerning illegal dismissals, disciplinary proceedings, dismissals without just cause in connection with reorganization, and transfers intended to force workers belonging to UNSITRAGUA in the Office of the Attorney-General of the Nation to resign, the Committee requests the Government to keep it informed regarding the pending legal decisions and to inform it whether the other dismissed or transferred workers have initiated legal or administrative proceedings and, if so, to inform it of the decisions taken.

(b) As regards the alleged acts of anti-union discrimination against members of the Trade Union of Workers of the Secretariat of Public Works of the First Lady of the Republic (Dilia Josefina Cobox Ramón and Edna Violeta Díaz de Reyes), the Committee requests the Government to carry out an independent inquiry without delay and to keep it informed in that regard.

(c) As regards the alleged supervision and interference by the State in the management of trade union funds, the Committee once again requests the Government to ensure that the functions of the Superintendent for Tax Administration are brought into line with the specific principles of the financial autonomy of trade union organizations and, in consultation with the trade union confederations, to modify the legislation as necessary in this direction, and to keep it informed of measures taken in this respect.

(d) In regard to the undertaking by the Union of Independent Traders of the Central Campus of the University of San Carlos of Guatemala (SINTRACOMUSAC) and the University to resolve, by means of a direct agreement, the conflict between them, reached during the meeting held on 9 June 2005 within the framework of the Tripartite Commission on International Labour Affairs, the Committee requests the Government to keep it informed in regard to the direct agreement to be reached.

85. In its communication of 29 May 2006, the Trade Union of Workers of Guatemala (UNSITRAGUA) stated, in connection with the allegations concerning the Secretariat of Public Works of the First Lady of the Republic, that the cases have not been brought before the courts because the National Civil Service Board has not taken a decision on the complaints concerning the dismissals.

86. As regards the supervision of the State in the management of trade union funds, UNSITRAGUA indicates that to date there has been no consultation with the trade union organizations on any reforms aimed at preventing such supervision by the Superintendent for Tax Administration.

87. As regards the allegations concerning the University of San Carlos of Guatemala, the trade union states that no agreement has been reached, that the University's advisers and

representatives have refused to acknowledge the representative character of the Union of Independent Traders of the Central Campus of the University of San Carlos of Guatemala (SINTRACOMUSAC) and have insisted on negotiating with individual union members, rejecting any agreement with the union.

88. In its communications of 1 and 28 June 2006, the Government indicates, with regard to the dismissal of Ms. Edna Violeta Díaz de Reyes, who held the post of secretary for inter-union relations within the executive committee of the Trade Union of Workers at the Secretariat of Public Works of the First Lady of the Republic that, on 22 May 2006, the labour inspectors visited the secretariat, with both the employer and workers' representatives being present. The latter stated that, in 2004, there were dismissals, but that proceedings against that decision were still in progress. The Government states, in this regard, that the parties at that meeting stated their intention to resolve the disputes still pending through conciliation. According to the Government, the workers' representatives at that meeting stated that there were currently no anti-union acts.

89. The Committee takes note of this information. It notes, however, that UNSITRAGUA states that the National Civil Service Board has not yet given a ruling on the complaints lodged by the workers concerned, which prevents them from seeking recourse to the courts. *In this regard, given the Government's information with regard to the situation of Ms. Cobox Ramón to the effect that although proceedings are under way, the social partners concerned are willing to resolve the issue through conciliation, the Committee requests the Government to indicate whether that includes the alleged acts of anti-union discrimination against Ms. Cobox Ramón and Ms. Díaz de Reyes, as the Government does not refer to these, and to keep it informed of any agreement reached.*

90. As regards the undertaking by SINTRACOMUSAC and the University to resolve, by means of a direct agreement, the dispute between them, the Committee notes that according to the most recent communication of UNSITRAGUA, not only has no agreement been reached, but the University, in addition, insists on negotiating with individual union members. The Committee recalls that direct negotiation between the undertaking and its employees, bypassing representative organizations where these exist, might be detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted [see *Digest of decisions and principles of the Freedom of Association Committee*, 4th edition, 1996, para. 785]. *The Committee requests the Government to take the necessary steps to ensure that the parties reach a direct agreement to end the collective dispute between them, in accordance with their undertaking, and to ensure that negotiation with individual workers is not detrimental to collective negotiation with the trade union organization.*

91. The Committee notes that the Government has not sent its observations on: (a) the allegations concerning illegal dismissals, disciplinary proceedings, dismissals without just cause on grounds of reorganization, and transfers intended to force members of UNSITRAGUA at the Office of the Attorney-General of the Nation to resign, in connection with which it had requested the Government to keep it informed of any pending judicial decisions and inform it as to whether the other dismissed or transferred workers had initiated legal or administrative proceedings and, if so, to inform it of the decisions taken; and (b) the alleged supervision and interference by the State in the management of trade union funds, in connection with which the Committee had requested the Government to ensure that the functions of the Superintendent for Tax Administration were brought into line with the principles relating to the financial autonomy of trade union organizations, and, in consultation with the trade union confederations, to modify the legislation as necessary in this direction, and to keep it informed of measures taken in this respect. *The Committee once again requests the Government to keep it informed of these two issues.*

Case No. 2421 (Guatemala)

92. The Committee last examined this case at its June 2006 meeting [see 342nd Report, paras 567-583] and, on that occasion, the Committee requested the Government to ensure compliance with section 20 of the collective agreement applicable to the National Trade Union of Health Workers of Guatemala (SNTSG) (concerning union leave), and drew the Government's attention to the fact that, in the event of conflicting interpretations of a collective agreement in the public sector, the definitive interpretation should not be that of the public administration, which would be judge and a party in the case, but rather that of an independent authority. The Committee also recalled that collective agreements must be binding on both parties, and urged the Government to take the necessary measures without delay to ensure compliance with section 21 of the collective agreement relating to the deduction of union dues for the SNTSG, including the establishment of the appropriate infrastructure.

93. In a communication of 16 June 2006, the Government states that it had sent its observations on this case in a communication of 14 July 2005 and in a report for July-August of that year (these communications had not reached the Office). Concerning the allegations, the Government adds that the opinion issued by the General Labour Inspectorate of 2001 was contrary to the regulations governing the activity of public institutions, which cannot be evaded even in the presence of workers' alleged acquired rights, since they are public interest regulations and hence their application is universal and mandatory. One of the most important of these regulations is the Organic Act respecting the budget, section 76 of which provides that "no personal payments shall be made that are not earned, neither shall payment be made for services not rendered". As it happened, the General Labour Inspectorate of 2001 failed to take a public interest regulation into account. However, that was a technical-legal opinion and is not binding even on the General Labour Inspectorate itself. That opinion contained an interpretation to the effect that trade union officials should not work at all during their term of office.

94. The Government states that at the request of the employer side, the General Labour Inspectorate issued a new opinion on 20 December 2004 concerning trade union leave in the Ministry of Public Health and Social Welfare, taking account of public interest regulations and incorporating the collective agreement on terms and conditions of employment, interpreted together with ordinary labour law, as they complement one another. According to the Government, the opinion of 2004 does not in any way infringe the principles of freedom of association and collective bargaining, much less represent official interference in matters within the sole competence of trade unions; rather, it is consistent with the legal mandate under which the General Labour Inspectorate has the duty to respond to consultations on the part of workers, employers and trade unions concerning the manner in which the legal provisions within its remit are to be applied. Neither does it mean that a previous decision has been revoked, as the complainants state, since, as already pointed out, it is not a decision but rather an opinion that is not binding on the parties to the employment relationship, much less on the General Labour Inspectorate itself. The fact that the document at issue in the complaint has the nature of an opinion and not a decision is confirmed by the complainants themselves since, if it had been a decision (an administrative act), it could be challenged through the procedures laid down in national legislation, which these persons did not do, but took their case directly to an international body.

95. *The Committee notes this information. The Committee requests the Government to keep it informed on the implementation of the collective agreement applicable to the SNTSG, in particular as regards the grant of trade union leave and the deduction of union dues.*

Case No. 2236 (Indonesia)

96. The Committee last examined this case, which concerns allegations of anti-union discrimination by the Bridgestone Tyre Indonesia Company against four union officers suspended without pay, at its March 2006 meeting. On that occasion, the Committee urged the Government to ensure that no decision could be rendered or enforced in respect of the dismissal proceedings against the four trade union officers before the question of anti-union discrimination was fully examined and elucidated. In particular, noting that the anti-union discrimination proceedings had been hampered by the absence of the former director-president of the company, it requested the Government to ensure that the proceedings for the examination of these allegations be completed without further delay and in a fully impartial manner, so that these trade unionists did not suffer any injustice by the fact that the former director-president had left the country. If the allegations of anti-union discrimination were found to be true, but the workers had already received formal notification of their dismissals, the Committee again urged the Government to ensure, in cooperation with the employer concerned, the reinstatement of the workers concerned or, if reinstatement was not possible, that they were paid adequate compensation taking into account the damage caused and the need to avoid repetition of such acts in the future. The Committee requested the Government to keep it informed of developments and transmit a copy of the Supreme Court judgement relating to the request for dismissal as soon as it was handed down. Moreover, the Committee once again requested the Government to take the necessary measures so that workers who consider that they have been subject to anti-union discrimination, in violation of section 28 of Act No. 21/2000, can have access to means of redress which, in addition to being speedy, should not only be impartial but also be seen to be such by the parties concerned. Finally, the Committee requested the Government to take all necessary measures to promote and encourage negotiations in the Bridgestone Tyre Indonesia Company with a view to the conclusion of a new collective agreement [see 340th Report, paras. 104-113].

97. In a communication dated 9 June 2006 the Government stated, with respect to the anti-union discrimination proceedings, that the Indonesian police authorities had communicated with the Japanese police authorities asking for assistance in having Mr. H. Kawano (the ex-director of Bridgestone Tyre Indonesia Company) appear before the court. The Government has been in continuous contact with the Government of Japan regarding this matter. The Government also expressed its concern that the Committee was repeating its requests to the Government, even though the Government had previously provided clear responses to them.

98. *The Committee notes the information provided by the Government. As regards the anti-union discrimination proceedings of the four trade union officers, it notes with regret that the Government limits itself to repeating that it has been in contact with the Japanese authorities on bringing Mr. H. Kawano to appear before the Indonesian court – even though the Committee had requested that the said proceedings be completed without further delay, so that the four union officers did not suffer any further injustice due to the former director-president's absence from the country. Noting with concern that four years have now elapsed since the complaint of anti-union discrimination was first made, and that no progress on these proceedings has been reported by the Government, the Committee once again urges the Government to ensure that the proceedings for the examination of allegations of anti-union discrimination against the four trade union officers be completed without further delay and in a fully impartial manner, regardless of the fact that the former director-president has since left the country. Moreover, recalling that it had previously noted with regret that the anti-union discrimination and the dismissal proceedings had gone ahead simultaneously, the Committee requests the Government to inform it of the decision of the Supreme Court with respect to the appeal made by these four trade union officers on the decision of the National Administrative High Court and to transmit all*

relevant texts and to confirm that no decision in favour of dismissal will be enforced prior to the resolution of the question of anti-union discrimination. If the allegations relating to anti-union discrimination are found to be true, but the trade union officers have already received formal notification of their dismissals, the Committee once again urges the Government to ensure, in cooperation with the employer concerned, that the trade union officers are reinstated or, if reinstatement is not possible, that they are paid adequate compensation such as to constitute sufficiently dissuasive sanctions, taking into account the damage caused and the need to avoid repetition of such acts in the future. The Committee once again requests to be kept informed in this respect.

99. *Noting with regret that the Government has provided no information on the measures taken so that workers who consider that they have been subject to anti-union discrimination, in violation of section 28 of Act No. 21/2000, can have access to means of redress which, in addition to being speedy, are not only impartial but also seen to be such by the parties concerned, the Committee refers this legislative aspect of the case to the Committee of Experts on the Application of Conventions and Recommendations.*

100. *Finally, the Committee regrets that the Government has provided no information on the measures taken to promote and encourage negotiations in the Bridgestone Tyre Indonesia Company with a view to the conclusion of a new collective agreement. It recalls in this respect that the complainant had alleged that the company had refused to negotiate with the new executive committee of the union and that there was, as a result, no collective agreement for the period 2005-07. The Committee once again requests the Government to encourage negotiations with a view to the conclusion of a collective agreement, and to indicate whether the workers at Bridgestone Tyre Indonesia Company are now covered by a collective agreement.*

Case No. 2336 (Indonesia)

101. The Committee last examined this case, which concerns several freedom of association violations at the Jaya Bersama Company such as its refusal to recognize the plant-level trade union affiliated to the Federation of Construction, Informal and General Workers (F-KUI), the anti-union dismissal of 11 trade union members, including all the officials, and acts of intimidation against employees, at its March 2006 meeting. On that occasion, the Committee: (1) once again requested the Government to take the necessary steps to ensure trade union recognition and encourage collective bargaining in good faith between the company and the plant-level F-KUI trade union; (2) requested the Government to continue to take all necessary measures to obtain the execution of the Central Committee for Labour Dispute Settlement’s decision ordering the payment of severance pay to the 11 dismissed workers, and to keep it informed in this respect; and (3) urged the Government to adopt sufficient mechanisms for preventing and remedying acts of anti-union discrimination, in particular by ensuring that such allegations are examined in the framework of national procedures that are prompt, impartial and considered as such by the parties concerned [see 340th Report, paras. 114-119].

102. In a communication dated 9 June 2006, the Government indicated that efforts had been made via the police authorities, as well as by placing the related employer on the Wanted Persons List (Daftar Pencarian Orang/DPO) in order to secure payment of severance pay for the 11 dismissed workers.

103. *The Committee notes the information provided by the Government. The Committee recalls that the Government had previously encountered difficulties in obtaining the execution of the Central Committee’s decision ordering severance pay for the 11 dismissed workers. It notes with concern that in spite of the ongoing efforts of the Government the 11 dismissed workers have still not received their severance pay and urges the Government to take all*

necessary measures to ensure that this decision is complied with. The Committee requests to continue to be kept informed in this respect.

104. *The Committee regrets that the Government has provided no information on the measures taken to ensure trade union recognition and encourage collective bargaining in good faith between the company and the plant-level F-KUI trade union. The Committee recalls that it had previously taken note of information indicating that the company was opposed to the establishment of a trade union, and that no collective agreement had been entered into by the parties [see 340th Report, para. 117]. In this connection, the Committee requests the Government to inform it of the steps taken to ensure trade union recognition and encourage collective bargaining in good faith between the company and the plant-level F-KUI union.*

105. *Finally, regretting that the Government has provided no information on the measures taken to adopt sufficient mechanisms for prevention against acts of anti-union discrimination, the Committee draws this legislative aspect of the case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.*

Case No. 1991 (Japan)

106. The Committee last examined this case, which concerns allegations of anti-union discrimination arising out of the privatization of the Japanese National Railways (JNR) taken over by the Japan Railway Companies (the JRs), at its June 2004 meeting. Noting the complexity of the factual and legal issues, the Committee expressed its regret that no solution acceptable to all workers' organizations could be found, including on the basis of the Four-Party Agreement that it had urged the parties to accept as far back as its November 2000 session, since it considered that it offered a real possibility of speedily resolving the issue of non-hiring by the JRs. Taking into account the Supreme Court ruling of December 2003, the serious nature of the allegations, as well as the serious social and economic consequences that resulted for a large number of workers, the Committee invited the Government to pursue discussions with all parties concerned in the spirit of political and humanitarian considerations that once prevailed, in order to resolve the issues, and requested it to keep it informed of developments [see 334th Report, paras. 25-34].

107. In a communication dated 26 December 2005, the National Railways Workers' Union (KOKURO) explains that it has repeatedly approached the Government and the Japan Railway Construction Transport and Technology Agency (JRTT) to pursue discussions, based on ILO recommendations. Whilst the Government maintained its position that it had already made all efforts that it could make, it stated in the Diet that it "would closely monitor the developments between the parties". On 15 September 2005, the Tokyo District Court ruled, in a case initiated against the JRTT by a group of dismissed workers and the families of deceased employees (in total 297 workers), that the JNR had treated the plaintiffs unfairly by giving general low marks to KOKURO members during the hiring process; the Court ordered the JRTT to pay most plaintiffs a compensation of 5 million yen. The Court, however, dismissed other aspects of the claim, i.e. continuation of employment and payment of salaries after dismissal. KOKURO underlines that the case is pending before the Tokyo High Court and will take years to be completed, that the average age of dismissed workers is 52, and that 31 of them have already died; it has therefore started discussions with all other trade unions concerned to overcome past differences over the Four-Party Agreement and adopt a common stance in discussions with the Government, in order to achieve a comprehensive political settlement.

108. In its communication dated 10 October 2006, KOKURO recalled that almost 20 years have passed since the original incident of this case happened, i.e. the drawing up of the recruitment candidate lists for new JR Companies. A much desired solution has not been

found yet despite the facts that both the labour commissions and the Court confirmed the fact that there were unfair labour practices in the process of this JNR privatization, that genuine efforts to solve this dispute were made by the political parties and that the ILO Committee on Freedom of Association has made recommendations several times.

109. As the report in June 2003 of the Committee on Freedom of Association pointed out, finding a fair solution is a matter of urgency, given the number of affected workers who have already died (41 out of 1,047 workers as of September 2006) or passed retirement age. It also pointed out that further delay will make whatever solution ultimately found increasingly illusory. It should also be noted that, for KOKURO and its majority of affected workers who have not yet started a court case against JRTT, the statute of limitations, which is said to be three years following the Supreme Court judgement on 22 December 2003, will run out soon.

110. The affected workers and unions including KOKURO therefore are united in seeking a negotiated political solution within this year and to this end are jointly approaching the JRTT and the Government. KOKURO has also discussed this matter with the other trade unions namely JR-RENGO and JR-SOREN and they expressed their readiness to support an early solution. However, we have to say that there is very little time left to realise a political solution based on humanitarian considerations.

111. In order to avoid further prolonging the dispute at any cost, KOKURO, in consultations with another complainant KENKORO and four groups of the affected workers, in addition to efforts made within Japan, have decided to ask the ILO for its more active assistance and involvement in finding a solution. KOKURO believes that, for instance, the ILO's good offices and advice to set up a table for the discussions with all parties concerned would surely be a great help for finding a solution.

112. If a process for a solution will be established through ILO assistance and involvement, the union side will take it as the last chance for a solution and commit to the process with full strength in order to realise a solution. KOKURO sincerely hopes that positive considerations will be given to its request and that the ILO will approach the Government of Japan to obtain its full cooperation.

113. In a communication dated 25 September 2006, the Government, although not a contesting party in the "JRTT lawsuit", provided additional information on the Tokyo District Court judgement and the current situation.

114. The so-called "JRTT lawsuit" was a case filed against JRTT on 28 January 2002 by members of KOKURO and the deceased workers' families (approximately 300 people) who opposed the "Four Party Agreement". The workers were not hired by the JRs when they started and did not find new employment at the end of the three-year period during which assistance such as job placement was offered by the JNR Settlement Corp. and finally were dismissed from the JNR Settlement Corp. following the expiration of the said law on 1 April 1990.

115. The plaintiffs insisted that the dismissal in this case was illegal and therefore had no effect, and requested: (a) confirmation of the existence of employment relations with JRTT; (b) payment of salaries after the illegal dismissal; and (c) payment of consolation money, and so on.

116. Against the above complaint, JRTT insisted that: (a) the dismissal in this case was not illegal because the employment contract was terminated by the dismissal procedure provided by the rules of employment, following the expiration of the Re-employment Promotion Act; and (b) the right to claim compensation for damage including consolation money had expired because of the completion of prescription.

117. In the Tokya District judgement on this case rendered on 15 September 2005, the Tokyo Districk Court ruled that: (a) the employment relations were not confirmed; and (b) the need to pay the salaries were not confirmed either. It also ruled, however, that there was unfair labour practice by JNR in the process of making the employment list for JRs, therefore it ordered consolation money of 5 million yen for each plaintiff (except for a few plaintiffs). Both plaintiffs and defendants appealed the judgement to the Tokyo High Court and this case is now pending there. The Government will provide the ILO with details of its development as needed. The Government adds that three other similar lawsuits have been filed and are pending before the Tokyo District Court. Moreover, according to the Government, KOKURO is said to have made an organizational decision in July 2006 that the workers who belong to KOKURO and have not filed any lawsuits yet (approximately 600 people) would newly file a lawsuit against the JRTT.

118. In conclusion, the Government indicates that it has taken all possible measures under the law, since the time around the reform of the JNR, and made necessary efforts under the "Four Party Agreement" from a humanitarian viewpoint. Such efforts, however, proved fruitless due to the lack of consensus among KOKURO members. In addition, under the circumstances that KOKURO is not able to obtain understanding or consent of other parties concerned like other JR trade unions, the Government finds it difficult to take any new measure and would hardly obtain the public understanding thereon. The Government requests the ILO's full understanding of the above situation. Finally, in a communication dated 30 October 2006, the Government states that it has not ascertained the statement made in the complainant's latest communication that it is ready to support an early solution. The Government considers that there has been no change in the attitude of the other parties concerned, such as the other JR trade unions. It requests the Committee to give full consideration to the long history and complex background of this case and the Government's previous submission.

119. *The Committee notes all the above information and in particular the Tokyo District Court ruling of 15 September 2005. It recalls once again that it has dealt with this case in some depth since 1998, with two detailed examinations on the merits (318th and 323rd Reports) and four follow-ups (325th, 327th, 331st and 334th Reports). Stressing that some issues, particularly in the field of labour relations, do not lend themselves to strictly judiciary solutions, the Committee welcomes the indication in the latest communication from KOKURO of its desire to find a negotiated political solution to the matters raised. It further takes due note of KOKURO's request for ILO assistance and advice in bringing the parties together to that end. It requests the Government to give serious consideration to receiving such assistance from the ILO with a view to reaching a conclusion which is satisfactory to all parties concerned in this long-standing labour dispute. The Committee requests the Government to keep it informed of developments in this matter.*

Case No. 2176 (Japan)

120. The Committee examined this case on its merits at its November 2002 session. The complainant organization, Japan Postal Industry Workers' Union (YUSANRO), alleged that the existing legal provisions against unfair labour practices and anti-union discrimination, as well as their implementation, were inadequate. The Committee concluded that the relevant procedure was far too slow and inadequate; it requested the Government to ensure that, in future, complaints of unfair labour practices be processed speedily and effectively, and to keep it informed of the outcome of Case No. 2-1998, once it was finalized by the Central Labour Relations Commission (CLRC) [see 329th Report, paras. 549-566].

121. In communications dated 5 and 6 January 2006, the Government indicates that the case in question was divided as follows: Case No. 2(2) 1998, concerning the lease of the trade

union's office; and Case No. 2(1) 1998 concerning the change of postings. According to the Government, on 7 October 2005, the CLRC ruled partially in favour of the complainant in Case No. 2(2) 1998 regarding the leases. Case No. 2(1) 1998 regarding the change of postings was dismissed by the CLRC on 24 November 2004. The Government adds that the CLRC decided, in March 2005, that it would handle cases swiftly and would aim at closing new complaints as rapidly as possible, and in any event within 18 months.

122. In a communication dated 22 May 2006, YUSANRO states that CLRC hearings took place on 27 March and 28 April 2003 (a tentative amicable settlement failed); the examination and pleadings were concluded on 6 September 2004. On 18 November, the CLRC issued a relief order regarding the transfer of a union branch leader aimed at weakening the union. On 13 September 2005, the CLRC ruled that the refusal to rent an office to the union constituted an unfair labour practice, as follows: "Japan Post must authorize the Postal Industry Workers' Union to use a room in the premise of each post office as union office. Prior to acknowledging each union office, Japan Post must also consult quickly and in good faith with the Yusanro branch concerned and conclude a reasonable agreement about the location, the area and other concrete conditions for renting the office."

123. Japan Post appealed to the Tokyo District Court, demanding the annulment of the CLRC decision, with which it refused to comply, even though it should do so until a court finally decides to annul the order. In such circumstances, the CLRC may request the Tokyo District Court to issue an urgent order, upon which Japan Post should comply or pay a penalty to the complainant. However, in spite of YUSANRO's repeated requests, the CLRC has refused to initiate the procedure to have an "urgent order" issued by the Court; merely waiting for the final court decision on this administrative matter would aggravate the damage already suffered so far by YUSANRO.

124. *The Committee takes note of this information. Noting that this complaint, filed in February 2002, concerns events that go back as far as June 1998, the Committee recalls that justice delayed is justice denied and requests the Government to provide its observations on the additional information provided by YUSANRO on 22 May 2006.*

Case No. 2381 (Lithuania)

125. The Committee last examined this case at its March 2005 meeting [see 336th Report, paras. 555-575]. On that occasion, it urged the Government to engage in consultations with the trade union organizations concerned in order to settle the question of the assignment of property and to provide information on the development of the situation.

126. By its communication of 5 April 2006, the complainant organization, the Lithuanian Trade Union (LTU) "Solidarumas", submits further allegations of interference into its internal affairs and refers, in particular, to the illegal search of its premises, the seizure of its documents and computer, the suspension of its vice-president from his trade union duties and the freezing of the union bank accounts.

127. The LTU "Solidarumas" explains that, following the ruling of the Constitutional Court, it took possession of the premises in the Trade Union Palace. In order to improve its financial situation, it sought to sell its part of the building. To that effect, it placed an invitation to tender, as required by the national legislation. After the confirmation of the transaction between the company offering the best conditions and the union by the Trade Union Coordinating Council (the highest authority of the LTU "Solidarumas" between the congresses), the union's acting president signed an agreement on the interchange of properties. The following day, a member of the Coordinating Council filed a complaint with the Prosecutor's Office. An investigation into the legality of the sale of the Trade Union Palace to another legal entity was opened. The complainant submits that the legality

of this transaction is unquestionable as it was authorized by the Trade Union Coordinating Council and was in the best interest of trade union members, as was previously proven by the state audit.

128. The complainant further submits that on 31 January 2006, its office was illegally searched and its documents and computer illegally seized. The complainant explains that: (1) the search was carried out on the basis of a decision of investigators and not of the pre-trial investigation judge, as required by article 145 of the Code of Criminal Procedure; (2) the seized documents were related to the transaction of purchase confirmed by the notary; (3) contrary to article 149 of the Code of Criminal Procedure, the office was searched without any announcement or explanation; and (4) the union's computer, an item not listed in the decision of the investigators, was also seized.

129. Furthermore, on 1 February 2006, Mr. Petras Grebliauskas, acting president of the LTU "Solidarumas", was accused of squandering public property. On 2 February 2006, the first Vilnius Circuit Court suspended Mr. Grebliauskas from his post of union vice-president as well as from his activities at all levels and structures of the union for six months. The Coordinating Council of the LTU "Solidarumas" evaluates this decision as illegal and groundless on 4 February 2006. According to the complainant, such interference by the authorities in the internal activities of the union is undemocratic and is contrary to freedom of association principles. The union acted within its sphere of competence and there was no threat to public interest. Moreover, the complainant considers that it is not sufficient for the law to provide for the right to appeal against the administrative decision – such decision should not take effect until the expiry of the statutory period for lodging an appeal or until the confirmation of such a decision by the judicial authority.

130. Finally, the complainant alleges that on 10 February 2006, the accounts of the union were frozen, completely paralysing its activities. The LTU "Solidarumas" considers that the above actions on behalf of the authorities are clear violations of Conventions Nos. 87 and 98.

131. By its communication dated 17 July 2006, the Government forwards the observations of the Vilnius County Prosecutor's Office on the matters raised in the complainant's latest communication. According to the information provided by the Prosecutor's Office, a pre-trial investigation No. 10-1-70058-06, launched on 30 January 2006, when transferring the part of the building belonging to the union, concerns the legitimacy of the actions of the vice-president of the LTU "Solidarumas" and not the activities of the union itself. A natural person and not a legal entity is accused of squandering high-value property belonging to another person.

132. The Prosecutor's Office further submits that it is not aware of any infringement of the rights of a natural person or a legal entity, which took place during the course of the investigation, as claimed by the complainant. The investigation was carried out in accordance with the requirements of the Code of Criminal Procedure. Moreover, it indicates that if the person thinks that his or her rights were infringed in any manner whatsoever, he or she has a right to appeal against the actions and the ruling that allegedly infringed his or her rights, in accordance with the procedure laid down in the Code of Criminal Procedure.

133. *The Committee notes from the complainant's communication that the question of the assignment of property has now been settled by the Constitutional Court. The Committee further notes the latest allegations of the complainant and the Government's reply thereon. It notes, in particular, the Government's statement to the effect that it is Mr. Petras Grebliauskas, the union vice-president who was under investigation and not the union. The Committee regrets that the Government has not provided further details as to the reasons*

for the investigation, nor has it replied to the allegations of the freezing of the union bank account.

134. *The Committee recalls that freedom of association implies the right of workers and employers to elect their representatives in full freedom and to organize their administration and activities without any interference by the public authorities parties [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 416]. As for the suspension of Mr. Grebliauskas, noting that this measure was taken before the conclusion of the investigation opened against him, the Committee recalls that individuals have the right to be presumed innocent until found guilty and considers that in these circumstances, the question as to whether Mr. Grebliauskas should continue in his post as union vice-president should have been left to the union members themselves in application of their relevant by-laws. The Committee therefore considers that the suspension of Mr. Grebliauskas from his post as well as from his activities at all levels and structures of the union is incompatible with the principle that trade union organizations have the right to elect their representatives in full freedom and to organize their administration and activities. Noting that more than six months have elapsed since this measure was taken against him, the Committee requests the Government to indicate whether his suspension has now been lifted. It further requests the Government to communicate the results of the investigation.*

135. *As for the alleged illegal search of the union office, the Committee notes the contradictory information provided by the complainant and the Government and is therefore unable to reach a definitive conclusion in this respect. It nevertheless wishes to draw attention to the importance of the principle that the property of trade unions should enjoy adequate protection [see* ***Digest****, op. cit., para. 184]. The Committee further requests the Government and the complainant to indicate whether all seized items, including the union computer, have since been returned.*

136. *With regard to the allegation of the freezing of the trade union accounts, recalling that the freezing of union bank accounts may constitute a serious interference by the authorities in trade union activities [see* ***Digest****, op. cit., para. 439], the Committee requests the Government and the complainant to indicate whether this measure has now been lifted.*

Case No. 2048 (Morocco)

137. The Committee last examined this case at its meeting in June 2005 [see 337th Report, paras. 91-93], when it urged the Government to provide, without delay, copies of the two decisions of the Rabat Court of the First Instance and of the Rabat Court of Appeal concerning the criminal proceedings that resulted from certain events during the collective labour dispute at the Avitema farm in 1999 and the charges of "abuse of power" brought against Mr. Abderrazzak Challaoui, Mr. Bouazza Maâch and Mr. Abdeslam Talha [see 337th Report, para. 93].

138. In a communication dated 8 August 2006, the Government informed the Committee that according to data gathered from the external offices of the Ministry of Employment and Professional Training, the social climate is currently stable and the enterprise is operating normally. The Government assures the Committee that it will keep it informed of any decisions taken in this regard.

139. *The Committee notes the information from the Government and once again urges it to provide, without delay, copies of the two decisions concerning the criminal proceedings that resulted from certain events during the collective labour dispute at the abovementioned farm in 1999 and the charges of "abuse of power" brought against Mr. Abderrazzak Challaoui, Mr. Bouazza Maâch and Mr. Abdeslam Talha.*

Case No. 2416 (Morocco)

140. During its last examination of the case relating to the dispute at Valeo at its meeting in March 2006 [see 340th Report, paras. 1000-1030], the Committee made the following recommendations [see 340th Report, para. 1030]:

– The Committee requests the Government to promptly carry out an independent inquiry to determine whether, during the police intervention on 19 April 2005, there were any casualties, including any requiring hospitalization, and to keep it informed of the outcome.

– The Committee requests the Government to keep it informed of the appeal verdicts given by the relevant courts in respect of the nine members of the trade union committee charged with "obstructing the freedom to work", as well as the appeal verdict in respect of the verdict finding Mr. Elkafi guilty of simple theft.

141. In a communication of 29 May 2006, the Government recalls that the dispute in question was resolved through an amicable and negotiated settlement, whereby a protocol of agreement was signed between the parties, providing for the reinstatement of the trade union representative, thus ending the dispute. The Government also informs the Committee that copies of the decisions to be issued in relation to the cases of the employees on trial and the case of Mr. Elkafi will be sent to the ILO.

142. *The Committee notes the information sent by the Government. It once again requests to be kept informed of the outcome of the independent inquiry requested in March 2006 into the intervention by the police on 19 April 2005. The Committee requests the Government to communicate the verdicts on the cases of the employees on trial for obstructing the freedom to work and in the case of Mr. Elkafi as soon as they are given.*

Case No. 2275 (Nicaragua)

143. At its last examination of the case, at its November 2005 meeting, the Committee formulated the following recommendations [see 338th Report, para. 1113]:

(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.

144. In its communication of 14 January 2006, the complainant (National Federation of "Heroes and Martyrs" Trade Unions of the Textile, Clothing, Leather and Footwear Industry (FNSHM)) stated with regard to the "Idalia Silva" Workers' Trade Union (STIS) in the export processing zone that the Second Labour Court of Managua handed down a ruling ordering that the case concerning dissolution of the trade union be shelved since neither of the parties had expedited the proceedings, and a subsequent ruling ordering the dissolution of the trade union, followed by cancellation of the trade union's registration by the Ministry of Labour (notified on 28 November 2005). The complainant points out the contradiction between the two judicial decisions, which also violate the principle of double jeopardy. Moreover, the general secretary of the trade union, Ruth Meza Orozco, was dismissed on 23 December 2005 on grounds that she was no longer covered by trade union immunity, followed by Zoila Cáceres, secretary of the organization.

145. *The Committee requests the Government to reply without delay to the additional information sent by the complainant, and to the Committee's previous recommendations. The Committee regrets the Government's delay in sending this information and requests it in particular to send the rulings handed down and information concerning the alleged threats against Marjorie Sequeira and Johana Rodríguez, the dissolution of the STIS and the dismissal of trade union officials Ruth Meza Orozco and Zoila Cáceres.*

Case No. 2354 (Nicaragua)

146. The Committee last examined this case at its March 2006 meeting and, on that occasion, requested the Government to keep it informed of the court judgement concerning the dismissal of trade union leaders Norlan José Toruño Araúz and José Ismael Rodríguez Soto and, if the court so directed, to take the necessary effective measures to comply with the reinstatement order immediately [see 340th Report, paras. 1143-1158].

147. In a communication of 18 May 2006, the Government points out that, as it had stated in its previous communication, the administrative authority authorized the termination of the teaching contracts of Mr. Norlan José Toruño Araúz and Mr. José Ismael Rodríguez Soto at the request of the director of the NERA "Rubén Darío" educational establishment, in accordance with sections 48, subsection 18(a), (b), (c), (d), (h) and (m), and 231 of the Labour Code, and sections 25(4), 32(6) and 37(1) and (2), of the Act respecting the teaching profession, as well as sections 99, 109(1), (2) and (4), 135(a) and 138(a), (c) and (d) of the latter Act, which relate to unethical conduct, dereliction of duty, and repeated and unjustified failure to discharge the obligations inherent in the job. The Departmental Inspectorate for the Service Sector approved the termination, and its decision was upheld on appeal by the General Labour Inspectorate. Since Mr. Toruño and Mr. Rodríguez did not agree with the decisions handed down by the administrative authority, on 24 November 2004, they decided to initiate proceedings for reinstatement before the court of the municipality of Tipitapa which, on 18 November 2005, handed down a judicial decision rejecting the action brought before the ordinary labour court. An appeal against the judicial decision in the first instance was filed with the Appeal Court of Managua and is now pending judgement.

148. *The Committee notes this information. The Committee hopes that the judicial authority in the second instance will hand down a decision shortly and requests the Government to keep it informed of the judgement rendered.*

Case No. 2429 (Niger)

149. The Committee examined the substance of this case (allegations of dismissal for reasons of anti-union discrimination and hampering of legitimate trade union activities) at its March 2006 session. On that occasion, the Committee called on the Government to issue appropriate instructions to the management of NIGELEC to respect the legislative provisions designed to guarantee equal treatment of trade union organizations legally present within an enterprise, and not to discriminate against SYNTRAVE; the Committee also called on the Government to undertake rapidly an independent inquiry into the alleged arbitrary transfers of several members and officers of SYNTRAVE and, should they prove to be substantiated, to take the necessary action to ensure that appropriate corrective steps were taken swiftly; finally, the Committee urged the Government to continue its efforts to resolve, to the satisfaction of the two parties, the dispute concerning the dismissal of Mr. Diamyo El Hadj Yacouba and requested it to keep it informed of any ruling handed down in that respect [see 340th Report of the Committee, para. 1198].

150. In a communicated dated 22 March 2006, the Government informs the Committee that, following the implementation of Order No. 10 of the Appeal Court of Niamey, on

6 February 2006, Mr. Daimyo El Hadj Yacouba was reinstated as of 1 March 2006. *The Committee notes this information with interest.*

151. *Noting, however, that the Government has not provided any information on the effect given to its other recommendations, the Committee again invites the Government to communicate rapidly its observations in this regard, that is: (1) to issue appropriate instructions to the NIGELEC enterprise to respect the legislative provisions designed to guarantee equal treatment of trade union organizations legally presented within an enterprise, and not to discriminate against SYNTRAVE; (2) to undertake rapidly an independent inquiry into the alleged arbitrary transfers of several members and officers of SYNTRAVE and, should they prove to be substantiated, to take the necessary action to ensure that appropriate corrective steps are taken swiftly.*

Case No. 2267 (Nigeria)

152. At its November 2005 session, the Committee noted that it had not received any response in respect of the complaint in this case concerning the dismissal of 49 academic lecturers, including five trade union officials, for having exercised the right to strike, as far back as May 2001, and reiterated its previous recommendation that it firmly expected the Government to ensure that the complaint was resolved by the competent labour institutions, including the National Industrial Court, in conformity with freedom of association principles and to keep it informed rapidly of developments in this respect. The Committee further asked the Government to intercede with the parties with a view to obtaining the execution of the judgement of the Federal High Court of Lorin ordering the reinstatement of the 49 academics; comment on the new allegations made by the complainant to the effect that the Government had been trying to take away the right of the union to collective bargaining; and to communicate the text of any bill concerning collective bargaining with university unions [see 340th Report, paras. 145-152].

153. In a communication dated 26 May 2006, the Government indicates that Nigeria is very conscious of its obligation to implement the provisions of Conventions Nos. 87 and 98 and that it has in every aspect encouraged collective bargaining. Concerning the complaint that the objection of the Academic Staff Union of Universities (ASUU) to the Industrial Arbitration Panel's (IAP) award was not referred to the National Industrial Court (NIC), the Government reports that the Minister wanted to ensure that justice was not subverted, even though the IAP award was in its favour and the Minister has only applied section 12(3) of the Trade Disputes Act (Cap 432), 1990 (discretionary authority to refer awards back to the IAP); the ASUU challenged the Minister's decision in the Federal High Court which further stalled action; the High Court, on 7 May 2006, held that the Minister's action was within the "ambit of the law"; and the Minister has subsequently referred the case to the IAP in accordance with section 12(3) of the Act.

154. Concerning the complainant's allegation about the Government's directive to the effect that the Governing Councils of Federal Universities should negotiate conditions of service with individual chapters of ASUU, the Government states that the ASUU is registered as a trade union under the 1990 Trade Union Act, its Constitution describes its activities and mode of operation and the Government does not interfere. However, according to the Government, each Federal University is an autonomous entity with its Governing Council established under the law, and each university is therefore an employer by law that has the right to discuss labour issues with its employees or their representatives.

155. As to the allegation that the Bill before the National Assembly aimed at decentralizing negotiations with university unions, the Government states that Nigeria is operating a democratic administration where individuals and corporate organizations are free to initiate

bills before the National Assembly. According to the Government, the onus is on the ASUU to present its memorandum to the National Assembly on the matter.

156. *The Committee takes note of the decision rendered by the Federal High Court of Nigeria on 7 March 2006 to the effect that the Government's decision not to refer the case to the NIC and to refer it back to the IAP was "within the tolerable ambit of the law". The Committee asks the Government to inform it of the outcome of the procedure before the IAP.*

157. *The Committee further notes the information provided by the Government to the effect that each Federal University is an autonomous entity with its Governing Council established under the law, and each university is therefore an employer by law that has the right to discuss labour issues with its employees or their representatives. The Committee also notes the Government's comment concerning the possibility for the ASUU to present a memorandum to the National Assembly on the matter of the Bill allegedly aimed at decentralizing negotiations with university unions. The Committee recalls that adequate consultation should be held prior to the introduction of legislation through which the Government seeks to alter bargaining structures in which it acts actually or indirectly as employer [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 857]. The Committee reiterates its request that the Government communicates the text of any bill concerning collective bargaining with university unions. Concerning the allegation that the Government refuses to renegotiate the collective agreement even though this renegotiation was envisaged in the collective agreement, and failed to implement an agreement to constitute a negotiating team, the Committee expects that the Government respects all agreements reached with the ASUU and reiterates its request to the Government to provide it with comments.*

158. *The Committee, noting that it has not received any information concerning its request that the Government intercede with the parties with a view to obtaining the execution of the judgement of the Federal High Court of Lorin ordering the reinstatement of the 49 academics, reiterates the importance it attaches to the principle that cases concerning anti-union discrimination be examined rapidly. An excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned [see* ***Digest****, op. cit., para. 749]. The Committee requests once again to be kept informed of the execution of the judgement of the Federal High Court, as well as any further judgements rendered on appeal.*

Case No. 2096 (Pakistan)

159. The Committee last examined this case at its November 2005 meeting [see 338th Report, paras. 267-274]. On that occasion it requested the Government: (1) 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 and, more specifically, to ensure that the United Bank Limited (UBL) employees' unions can negotiate the terms and conditions of employment of its members with the managers of the UBL branches concerned; and (2) to conduct an independent inquiry to thoroughly and promptly consider the allegations of anti-union dismissals at the UBL and to take appropriate measures in response to any conclusions reached in relation to these allegations of anti-union discrimination and, if it appears that the dismissals occurred as a result of involvement by the workers concerned in the activities of a union, to reinstate those workers in their jobs without loss of pay or to pay an adequate compensation, so as to constitute sufficiently dissuasive sanctions, to the workers concerned, if the independent inquiry finds that reinstatement is not possible.

160. In communications of 28 January and 18 February 2006, the UBL employees' union, affiliated to the complainant organization, alleges total lack of progress made in respect of implementation of the Committee's recommendations in this case. According to the UBL employees' union, the UBL continues to refuse to negotiate the terms and conditions of employment, about 500 trade union leaders in the banking sector dismissed from their services pursuant to section 27-B of the Banking Companies Act were not yet reinstated and many other leaders are facing hardship due to this law. Furthermore, as a result of the abovementioned legislation, no trade union activities are possible in the banking sector, especially in the UBL.

161. In its communication dated 6 October 2006, the Government indicates that the matter of amending the Banking Companies Act was taken up with the Ministry of Finance. According to the Ministry, the Act was under review and all observations and concerns expressed regarding section 27-B were being discussed by the Banking Laws Review Commission, which was actively engaged in formulating a draft law which would replace the Banking Companies Act.

162. *The Committee takes note of this information and requests the Government to keep it informed of the progress made in respect of the law amending the Banking Companies Act. It further deplores that the Government provided no reply to the complainant's latest communications.*

163. *While noting that section 27-B of the Banking Companies Act is under review, the Committee recalls from the previous examination of the case that while according to the Government, the Industrial Relations Ordinance (IRO) 2002 took precedence over the Banking Companies Act 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, this assertion was contested before the high court and 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. On that occasion, the Committee considered that where difficulties with regard to the interpretation of rules concerning the election of trade union officers created situations where the employers refused to negotiate with the union concerned and, more in general, to recognize such a union, problems of compatibility with Convention No. 87 arose [see 338th Report, para. 273]. The Committee therefore urges 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 urges 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. It further requests the Government to keep it informed of the decision taken by the high court in respect of the prevalence of the IRO over the Bank Companies Act.*

164. *As concerns the alleged cases of dismissal, the Committee urges the Government, as it already did in its previous report [see 338th Report, para. 274] 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 expects 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. 2342 (Panama)

165. The Committee last examined this case at its November 2005 meeting [see 338th Report, paras. 1175-1186], at which it formulated 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 antiunion in nature, to reinstate Mr. Alain without delay. The Committee requests the Government to keep it informed of developments in this regard.

166. In a communication dated 29 April 2006, the National Federation of Associations and Organizations of Public Servants (FENASEP) states that the present Government or, failing that, the authorities of the 15 institutions involved, have ignored the Committee's recommendations concerning the reinstatement and payment of the wage arrears of the officials of the associations who were dismissed without cause by the previous administration, merely for belonging to a different political party, in violation of their immunity as public sector union officials. To date, there has been no recognition of their entitlement to the wages unpaid since their dismissal, and they have been unable to obtain employment in any state institution. FENASEP adds that, in January 2006, the Ministry of Labour and Employment Development sent letters to the different authorities of the institutions concerned, saying that the officials should be once again "considered for a post within the institution" in question, but the authorities of these institutions have ignored this request. In this regard, the Ministry of Labour should have set an example and reinstated three officials, but this has not been done either.

167. In a communication of 12 September 2006, the Government states that, through the Ministry's efforts and in order to try to give effect to the Committee's recommendations in this case, the Bipartite Committee consisting of FENASEP and MITRADEL has continued to meet to seek appropriate means of reinstating, as far as possible, the officials of the Association of Employees of the Ministry of Youth, Women, Children and the Family (now renamed the "Ministry of Social Development – MIDES") dismissed by the previous administration. As a result of these efforts, the Government has recently received information from MIDES, in a note of 7 August 2006, indicating that Ms. Melissa Fergusson is in the process of being reinstated in that Ministry, pending final verifications in the Ministry of the Economy and Finance. As regards the rest of the members of the Association, the Government points out that MIDES is taking appropriate steps to reinstate, as far as possible, the dismissed officials referred to in this case.

168. *The Committee notes the information provided by the Government and the additional information sent by FENASEP. In this regard, the Committee requests the Government: (1) to continue taking the necessary measures to ensure that all the trade union officials in question are reinstated; and (2) to send its observations concerning the dismissal of the*

trade union official, Mr. Pedro Alain, stating in particular whether the investigation requested by the Committee at its November 2005 meeting has been initiated.

Case No. 2086 (Paraguay)

169. The Committee last examined this case concerning the trial and sentencing in the first instance for "breach of trust" of the three presidents of the trade union confederations, CUT, CPT and CESITEP, Alan Flores, Jerónimo López and Barreto Medina, at its March 2006 meeting [see 340th Report, paras. 158-161]. On that occasion, the Committee noted that, on 31 December 2003, the judicial authority had cancelled the preventive detention of the trade union officials in question, who were currently at liberty, and expressed the hope that the judicial proceedings initiated against the trade union officials would be concluded in the near future. The Committee requested the Government to keep it informed of the final ruling handed down in this case.

170. In a communication dated 6 June 2006, the Trade Union Confederation of State Employees of Paraguay (CESITEP) reported that the criminal proceedings had not been concluded and alleged further violations of procedural rights in the second instance.

171. *The Committee notes the information communicated by the complainant organization and regrets that the Government has not communicated its observations on the matter. The Committee expresses the hope that due process of law will be respected in the framework of the judicial proceedings initiated against the trade union officials, and that the proceedings will be concluded in the near future. The Committee requests the Government to keep it informed of the final ruling handed down in this case and to send its observations without delay concerning the communication from CESITEP dated 6 June 2006.*

Case No. 2375 (Peru)

172. In its previous examination of the case in November 2005, the Committee, in the absence of any observations from the Government, made the following recommendations [see 338th Report, para. 1228]:

(a) the Committee requests the Government to take the necessary steps to amend article 45 of Decree-Act No. 25593 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.

173. In this regard, it should be recalled that in its conclusions, in its previous examination of the case, the Committee noted that Decree-Act No. 25593, relating to collective labour relations, dated 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" [see 338th Report, para. 1223].

174. The Committee also noted, in its previous examination, the statement in the preamble to the ruling of the Constitutional Court of 26 March 2003, which highlights the State's obligation to promote collective bargaining by virtue of article 28 of the Constitution and Article 4 of ILO Convention No. 98:

> [...] 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. [...]

[See 338th Report, para. 1223.]

175. In its communications of 2 November 2005 and 1 June and 29 September 2006, the Government states that there have been no objections voiced by the ILO to article 45 of the Collective Labour Relations Act, and casts doubt on certain claims made by the complainant organizations of employers, providing a detailed account of the development of branch-level collective bargaining in the construction sector since 1962 (with particular emphasis on the era of the dictatorship in the 1990s and its negative effect on trade union membership and collective bargaining) and the various legislation and standards applied in this regard, and pointing out that the negotiating parties (the Civil Construction Federation of Peru and the Peruvian Chamber of Construction) have been engaged in collective bargaining at the branch level since 2001; in 2005, a collective agreement for 2005-06 was concluded without any apparent hesitation or objection on the part of the employer party. The Government refers to a ruling by the judicial authority concerning collective bargaining in the construction sector, which states that the level of negotiation cannot by established by an administrative decision. Nevertheless, the Constitutional Court has expressed the opinion that the principle of equality is not being violated, since the particular nature of the construction sector means that it is "reasonable and justified" for the State to intervene and establish measures to encourage effective bargaining.

176. The Government underlines the following points:

– since 1992, the provisions of national legislation with regard to collective bargaining have been gradually adjusted in order to ensure that they correspond with the relevant international conventions;

– the ILO has not raised any objections to the provisions of article 45 of the Collective Labour Relations Act (despite the fact that it has been examined in a number of cases brought before the Committee on Freedom of Association), nor has it considered that the third transitional provision of the Act represents an infringement of the abovementioned article, since it states that all current collective bargaining must be

concluded at the level on which it is taking place, and that, in the absence of agreement, it is to be understood that collective bargaining shall be conducted at the enterprise level;

– the differences between the positions held by CAPECO and the State, which have been successfully reconciled by the judicial authority, are as follows:

(a) in the case of the civil construction sector, there is no so-called new collective bargaining taking place. Since 1965, this sector has had a tradition, for various well-established reasons accepted by the parties (custom), of branch-level bargaining, such that article 45, paragraph 1, of the Collective Labour Relations Act does not apply;

(b) activities performed within the civil construction sector do not equate to ordinary work, owing to the particular characteristics of this sector, as set out in the ruling by the Constitutional Court, concerning the duration of the employment relationship (temporary), the conditions under which it is pursued and the dispersal of the workforce, all of which mean that it is to be expected that branch-level collective bargaining should take place in this productive sector. Lower-level negotiation is not possible and when it does (occasionally) arise, it is not undertaken under balanced circumstances;

(c) Ministerial Resolutions Nos. 053-93-TR and 051-96-TR, issued as national legislation, are defective in normative terms, since both administrative decisions dictate the level of negotiation applicable to the civil construction sector;

(d) article 45, paragraph 2, of the Collective Labour Relations Act (the section to which the employers object) does not violate any ILO standard – and has received no objections – since it does not dictate the level at which negotiation must be pursued by the parties, but rather sets out a potential solution (drawing on precedent or previous actions by the parties) to failure by the parties to reach an agreement, on the basis of an acknowledged source of law in labour legislation: custom. In the absence of an agreement, negotiation will continue to take place within the same context as was previously the case. Employers have tended not to object to this aspect, which entails negotiation being taken to the enterprise level in the event of new collective bargaining;

(e) in view of the above, no violation of the principle of bargaining freedom enshrined in Convention No. 98, Article 4, is considered to be taking place, since the promotion of collective bargaining, which falls to the State, is provided for in article 45, paragraph 2, of the Collective Labour Relations Act, as applied by the national judiciary;

(f) the administrative ruling to the effect that collective bargaining within the civil construction sector should be continued is consistent with provisions whose overall goal is to promote collective bargaining and prevent it from becoming ineffective. Thus, any provisions or allowances whereby a refusal by one of the parties entails an obligation for negotiation to take place at the enterprise level constitute a total violation of the principles enshrined in both Convention No. 87 and Convention No. 98;

(g) in the event that the position being put forward by the complainant employers' organization were to be accepted, in spite of the longstanding national tradition of branch-level bargaining, workers in the Peruvian civil construction sector would be required to obtain agreement from employers on the level of negotiations for every proposed negotiation, and in the absence of such

agreement from the business sector, collective bargaining could not take place. Given the above, it is clear that this solution does nothing to encourage, and much less promote, the exercise of the right to collective bargaining enshrined in ILO Convention No. 98;

(h) article 45, paragraph 2, of Decree-Act No. 25593 makes reference to prior negotiation and good faith in the course of bargaining, which we understand to entail obligatory observance of the level at which negotiations have historically taken place, but also a requirement for good faith and a willingness to at least engage in dialogue and initiate bargaining at that level, without the need for a decision or resolution to be imposed from beyond the sphere of the economic dispute. The fact that an employers' organization is declining to engage in dialogue or negotiations at the branch level, or indeed at any proposed level, does not appear to be consistent with the principle of good faith in negotiations, particularly bearing in mind that collective bargaining at an enterprise or site level is not substantively possible, with unilateral regulation by the employer the most usual outcome.

177. Lastly, the Government requests the Committee to consider three key points:

– there is a need to differentiate the specific case of bargaining within the civil construction sector, resolved by the Constitutional Court through a ruling resulting in the re-entry into force of the agreement on branch-level collective bargaining, which had been affected by the application of the third final and transitional provision of Decree-Act No. 25593. In strict terms, if a historical agreement of a permanent nature exists with respect to level of negotiation, article 46 of Decree-Act No. 25593 does not have any specific effect, provided that the permanent status results from the agreement and is not the result of state regulation;

– the item concerning article 46 of Decree-Act No. 25593 does not refer to the question of collective bargaining in the civil construction sector, since this sector contains an agreement on the determination of the level of negotiation, which is once again in force following a ruling by the Constitutional Court with the status of *res judicata*. An examination of article 46, bearing in mind that this is a general regulation, gives an appreciation of the condition of trade union membership in Peru and of the power imbalances in the labour market, which give rise to unfair remuneration and working conditions. This situation has led the Peruvian State to put in place measures to promote the right to collective bargaining, one of which is supra-enterprise collective bargaining, involving a less symmetrical relationship between employers' and workers' organizations than at the enterprise level. Legislation takes the form of affirmative action (positive assurance) to encourage supra-enterprise bargaining in a "post-traumatic" social context in which the weakness of existing trade unions means that collective bargaining requires a coherent setting if it is to be conducted effectively (in real and tangible terms). The above does not prevent the parties from proposing other levels; Decree-Act No 25593 even provides for the possibility of parallel negotiations at various levels, enabling these to be linked;

– assessing the appropriate level at which collective bargaining is to be carried out is a form of positive assurance on the part of the State. Each party's right to bargain is promoted, with due respect for content, since either party may opt not to negotiate or arrive at an agreement, with the collective dispute thus remaining open. The special ability to promote a level of negotiation derives from the fact that the legally regulated collective bargaining procedure involves stages, with intervention by the Administrative Labour Authority to facilitate the transmission of lists of demands, the drafting of economic reports, mediation, conciliation, etc. As can be seen, the State

plays a collaborative role at every stage, whilst the autonomy of the parties is guaranteed;

– in this particular case, branch-level collective bargaining was a result of historical negotiations which took place between the parties.

178. Lastly, the Government, to sum up, quotes a conclusion by the CEACR, given in paragraph 236 of its General Survey of 1994, in which it warns against the tendency to give precedence to individual rights over collective rights in employment matters and against structural change being used to undermine the trade unions if the necessary measures are not taken by the authorities to prevent this.

179. The Government encloses a lengthy report from the Federation of Civil Construction Workers of Peru, dated 25 April 2006, which covers all the main points of the complaint. The Federation, which in essence draws on the arguments and information given by the Government and the Constitutional Court, is of the opinion that the current system does not run counter to the spirit of Convention No. 98, and is opposed to the position adopted by the complainant organizations in Case No. 2375, who wish to see a return to enterprise-level bargaining. The Government adds that industry-level bargaining has an historical precedent and is the only viable means of giving effect to the right to collective bargaining in the construction sector.

180. *The Committee notes the comprehensive reply by the Government that contains information on the special characteristics of the industrial relations system and collective bargaining in the construction sector and the comments made by the Federation of Civil Construction Workers of Peru annexed to the Government's reply. Whilst the Committee did indeed examine the case in November 2005, having received no reply from the Government and after having made an urgent appeal for it to send such a reply, the Committee emphasizes that the complainant organizations (OIE, CONFIET and CAPECO) transmitted a copy of the Constitutional Court ruling on this matter, and that the Government (in its reply) and the abovementioned federation draw arguments from that ruling.*

181. *The Committee notes the arguments in respect of the conclusions reached in the previous examination of the case put forward by the Government, as well as the comments of the Federation of Civil Construction Workers of Peru and the decision of the Constitutional Court in favour of branch-level collective bargaining within the construction sector. The Committee wishes to make quite clear that in its previous conclusions, it had not adopted a stance either in favour of bargaining at the level of the branch of activity (which has been taking place for many years) or at the enterprise level. The fundamental principle mentioned by the Committee concerns the need for the level of collective bargaining to be freely determined by the parties concerned. In this regard, the Committee notes that in applying national legislation and invoking ILO Convention No. 98, the Constitutional Court has ruled that all collective bargaining within the construction sector should take place at the branch level, thereby overriding the principles of freedom of the parties and free and voluntary bargaining, both of which cannot be dissociated from the right to collective bargaining as enshrined in Convention No. 98. The Committee was of the opinion that in the event of disagreement between the parties concerning the level of negotiations, and in place of a general ruling by the judicial authority in favour of branch-level bargaining, it would be more in keeping with the letter and spirit of Convention No. 98 and Recommendation No. 163 for a system to be established by the parties by common agreement in which their interests and points of view can be specifically expressed. Bearing the above in mind and noting the Government's declaration that it is legally possible for links between collective bargaining at the branch and enterprise level to be established, the Committee reiterates the conclusions and recommendations made at its*

meeting in November 2005 and requests the Government to invite the most representative workers' and employers' organizations to establish a system of settling disputes regarding the level at which collective bargaining is to take place (for example, a body with independent membership, which has the confidence of the parties) and to take steps to amend article 45 of Decree-Act No. 25593 and article 46 of Act No. 27912, which regulate the question of the level of collective bargaining.

Case No. 2252 (Philippines)

182. The Committee last examined this case at its May-June 2006 session [see 342nd Report, paras. 146-157]. On that occasion: (1) with regard to the appeal made by the Toyota Motor Philippines Corporation (TMPC) against the certification election of Toyota Motor Philippines Corporation Workers' Association (TMPCWA) in 2000 on the ground that it should have been opened to the members of the rank-and-file bargaining unit – a question which appeared to continue to be at issue in respect of the latest certification election of 16 February 2006 – the Committee expressed the firm expectation that the Court of Appeals would be in a position to render its decision without delay so that the conditions for the certification elections of the TMPC could be firmly and clearly established; (2) with regard to the latest allegations by the complainant, the TMPCWA, concerning the new certification election of February 2006 (i.e. that the Government conspired with the TMPC to continue the certification election and that the Department of Labor showed favouritism towards the Toyota Motor Philippines Corporation Labor Organization (TMPCLO) – which was established under the dominance of the employer – by granting its motion to open the challenged votes' envelopes and ordering the parties to submit position papers for the opening of segregated ballots), the Committee requested the Government to transmit its observations in this respect as well as any decisions rendered in respect of the legal action taken by the complainant with regard to the election of February 2006 and the decision of the National Labor Relations Commission of 9 August 2005 dismissing the unfair labour practice case filed by the TMPCWA; (3) with regard to its previous request for the reinstatement of the 122 workers dismissed from the TMPC (who had not accepted the compensation package) or, if reinstatement was not possible, the payment to them of adequate compensation, the Committee requested the Government to provide information on the measures taken to initiate discussions on this issue; (4) with regard to the criminal charges laid against 18 trade union members and officers the Committee requested the Government to transmit a copy of the court judgements as soon as they are rendered; it also requested the Government to institute an independent inquiry into the allegations of harassment by the police in respect of these 18 unionists and to keep the Committee informed of the outcome.

183. In a communication dated 29 August 2006, the complainant organization provides additional information in support of its complaint.

184. In a communication dated 25 May 2006, the Government provides further information with regard to point (ii) above, in particular, the allegations of the complainant that the Department of Labor and Employment – National Capital Region (DOLE-NCR) failed to issue a resolution on the results of the certification election and that it showed partiality in granting the motion for the opening of the challenged votes filed by the TMPCLO and by ordering the parties to submit their respective position papers relative to the opening and counting of the segregated votes. According to the Government, a review of the records revealed that, on 16 February 2006, a certification election was conducted among the rank-and-file employees at the TMPC which yielded the following results: TMPCLO: 424; TMPCWA: 237; no union: 8; spoiled ballots: 15; segregated votes: 210; valid votes cast: 669; eligible voters: 994. On 20 February 2006, the TMPCWA filed a protest, seeking the nullification of the certification election. The TMPCLO, on the other hand, opposed the TMPCWA's protest and moved for the opening and counting of the 121 segregated votes

of the alleged supervisory employees but insisted that the 89 votes of the dismissed employees should remain segregated. On 2 March 2006, the DOLE-NCR mediator-arbiter directed the parties to submit their respective position papers on the propriety of the opening and counting of the segregated votes. On 8 March 2006, both parties submitted their position papers; on 5 April 2006, they appeared on the hearing concerning the issue of the propriety of the opening of the segregated votes. On 7 April 2006, the mediator-arbiter issued an order denying TMPCWA's protest for lack of merit. The mediator-arbiter ruled that the votes of the 121 employees should remain segregated, as the issue of whether levels 5 and 8 employees were supervisors was pending resolution by the Court of Appeals. As to the 89 employees who were questioning their dismissal from employment before the Supreme Court, the mediator-arbiter ruled in favour of their eligibility to vote being qualified voters pursuant to section 5, Rule IX, of Department Order No. 40, series of 2003. However, since the 89 votes were insufficient to overturn the results of the certification election, the TMPCLO was certified as the sole and exclusive bargaining agent of all the rank-and-file employees in the establishment. Consequently, the TMPCWA filed an appeal from the mediator-arbiter's order, which is now pending before the Bureau of Labor Relations.

185. The Government added that it vehemently objected to the allegations of deliberate delays and/or refusal of the DOLE-NCR to resolve the TMPCWA protest, as bereft of any legal basis. The TMPCWA's accusations against this Department, in the letter dated 27 March 2006, were prematurely raised before the ILO since the said letter predated the actual hearing on the protest filed by the TMPCWA which was scheduled on 5 April 2006. The TMPCWA was fully aware that the issue of whether the segregated votes should be opened and counted was not yet ripe for resolution in view of the fact that the scheduled hearing on the issue was yet to be conducted. Nevertheless, a resolution was issued as early as 7 April 2006. Similarly, the allegation that the DOLE displayed partiality in favour of the TMPCLO, for the reason that the mediator-arbiter granted the TMPCLO's motion for the opening of the challenged votes, likewise, lacks merit. For the same reason and as borne out by the records, the TMPCWA's allegation of partiality was prematurely raised before the ILO, accusing the DOLE of partiality even before the mediator-arbiter rendered a decision on 7 April 2006. In fact, in the said decision, the mediator-arbiter denied the TMPCLO's request for the opening of the segregated votes. Moreover, the decision to allow the parties to submit their position papers did not in any way amount to an act of partiality, as it was necessary to afford the parties their right to due process.

186. *The Committee takes note of the information provided by the Government according to which: (i) the election carried out on 16 February 2006 yielded the following results: TMPCLO: 424; TMPCWA: 237; no union: 8; spoiled ballots: 15; segregated votes: 210; valid votes cast: 669; eligible voters: 994; (ii) on 20 February 2006, the TMPCWA filed a protest seeking the nullification of the certification election; (iii) the TMPCLO opposed the TMPCWA's protest and moved for the opening and counting of the 121 segregated votes of the alleged supervisory employees but insisted that the 89 votes of the dismissed employees should remain segregated; (iv) on 2 March 2006, the DOLE-NCR mediator-arbiter directed the parties to submit their respective position papers on the propriety of the opening and counting of the segregated votes, the parties did so on 8 March 2006 and appeared on the related hearing on 5 April 2006; (v) on 7 April 2006, the mediator-arbiter issued an order denying the TMPCWA's protest for lack of merit. The mediator-arbiter ruled that the votes of the 121 employees should remain segregated, as the issue of whether levels 5 and 8 employees were supervisors was pending resolution by the Court of Appeals. As to the 89 employees who were questioning their dismissal from employment before the Supreme Court, the mediator-arbiter ruled in favour of their eligibility to vote being qualified voters pursuant to section 5, Rule IX, of Department Order No. 40, series of 2003. However, since the 89 votes were insufficient to overturn the results of the certification election, the TMPCLO was certified as the sole and exclusive bargaining*

agent of all the rank-and-file employees in the establishment. Consequently, the TMPCWA filed an appeal from the mediator-arbiter's order, which is now pending before the Bureau of Labor Relations.

187. *While the Committee takes due note of this information, it also notes that the Government does not address the issue of whether the TMPCLO obtained the absolute majority of votes which is required for certification – an issue which is contested by the TMPCWA. The Committee requests the Government to provide clarifications on this point and to keep it informed of the outcome of the appeal filed by the TMPCWA against the mediator-arbiter's order certifying the TMPCLO as the sole and exclusive bargaining agent of all the rank-and-file employees in the TMPC pursuant to the certification election of 16 February 2006.*

188. *The Committee also notes the Government's rejection of the allegations of deliberate delays, partiality and/or refusal of the DOLE to resolve the TMPCWA protest. The Government emphasizes that these allegations were made in a letter of 27 March 2006, which predated the actual hearing of 5 April 2006 on the protest filed by the TMPCWA. The Government emphasizes, moreover, that an order on this subject was issued as early as 7 April 2006 and that, in the order, the mediator-arbiter denied the TMPCLO's request for the opening of the segregated votes (contrary to the allegations). Moreover, the decision to allow the parties to submit their position papers did not in any way amount to an act of partiality, as it was necessary to afford the parties their right to due process.*

189. *While taking due note of this information, the Committee regrets that the order for a new certification ballot was granted before the issues arising from the previous certification ballot could be resolved before the courts. Noting that this certification ballot took place in the particularly difficult context of the repeated refusal by the TMPC to recognize and negotiate with the TMPCWA, the Committee requests the Government once again to communicate the decision of the National Labor Relations Commission of 9 August 2005 dismissing the unfair labour practice case filed by the TMPCWA alleging company domination of the TMPCLO. Moreover, noting that the Government does not provide new information on the progress of proceedings in the appeal that the TMPC filed against the certification election of the TMPCWA in 2000 on the ground that it should have been opened to the members of the rank-and-file bargaining unit – a question which appears to continue to be at issue in respect of the latest certification election of 16 February 2006 – the Committee requests the Government to indicate the conditions established for the recent elections on the basis of which the TMPCLO was certified as bargaining agent and to specify whether the employer has changed its position on the question as to the workers that constitute the bargaining unit, as well as any impact that such a change may have on the case pending before the Court of Appeals. The Committee also requests once again the Government to communicate the text of the decision of the Court of Appeals as soon as it is handed down.*

190. *Noting that the Government does not provide information on the other pending points, the Committee once again requests the Government to initiate discussions on the reinstatement of the 122 workers dismissed from the TMPC (who had not accepted the compensation package), or if reinstatement is not possible, the payment to them of adequate compensation and keep the Committee informed in this respect. It also once again requests the Government to transmit a copy of the court judgements concerning the criminal charges laid against 18 trade union members and officers, as soon as they are rendered, and to institute an independent inquiry into the allegations of harassment by the police in respect of these 18 unionists and keep the Committee informed of the outcome. The Committee also requests the Government to reply to the recent allegations made by the TMPCWA in its communication of 29 August 2006.*

Case No. 2383 (United Kingdom)

191. The Committee last examined this case at its November 2005 meeting [see 338th Report, approved by the Governing Body at its 294th Session, paras. 314-318] and requested to be informed of developments with regard to the following issues: (a) the progress of consultation with private contractors on the establishment of appropriate mechanisms to compensate prisoner custody officers in private sector companies to which certain of the functions of the prison have been contracted out, for the limitation of their right to strike; (b) the progress of consultations with a view to improving the current mechanism for the determination of prison officers' pay in England, Wales and Northern Ireland, in the context of which it had been proposed that: (i) the criteria for appointment to the Prison Service Pay Review Body (PSPRB) 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 PSPRB.

192. In a communication dated 26 May 2006, the Government indicated that the complainant Prison Officers' Association (POA) had raised concerns in regard to three specific areas where they felt that the prison service had an unfair influence on the overall process of the PSPRB, these being: (i) the involvement of the Director of Personnel being the chair of the selection panel for the panellists of the PSPRB; (ii) that having been allowed to select panellists, then the Director of Personnel is also involved in setting, directing and providing evidence to the PSPRB; (iii) the Director of Personnel also drafts the remit letter to the PSPRB on behalf of the Home Secretary. The POA felt that these points provided the prison service with undue influence with the PSPRB which acted disadvantageously to the interests of its members. The prison service responded to these comments as follows: (i) the prison service had again checked with the Cabinet Office on the issue of who should chair the selection panel. The advice they received was that the Commissioner for Public Appointments considered that guidance set out in the Code of Practice for Ministerial Appointments to Public Bodies should be followed. In accordance with this guidance, the selection panel should include: (a) a senior official from the department as chair; (b) a representative from the public body (that is the PSPRB) or other interested group. This has usually been officials from the Office for Manpower Economics and the Treasury; (c) an independent assessor, usually drawn from a person on the OPSA list of such suitable persons. (ii) The Director of Personnel's role is wide ranging, as is that of all prison service directors. Whilst the evidence for PSPRB may be drafted in part by the Director, it is presented on behalf of the Secretary of State who has to agree to it prior to submission. Thus, it is the Secretary of State's evidence not that of any single official. (iii) Similarly, the remit letter to the PSPRB is approved and issued by the Secretary of State. It is far from a rubber-stamping exercise. On several occasions, including last year, the draft submitted by officials had been significantly altered by the Secretary of State himself. In conclusion, on this point, the prison service felt that the above considerations demonstrated that there were in place necessary checks and balances to ensure that the Director of Personnel was unable to wield any influence over the PSPRB, a point that was best proved by the level of awards made by the PSPRB over recent years which had consistently exceeded prison service proposals in evidence.

193. With regard to the issue of trade union involvement in the process, the POA had raised the issue that they would like to see a trade union representative in the process throughout. The Government indicated that there would seem to be room for this to occur under the Code of Practice as inclusion under "interested party". Such a representative would need to meet the required level of competence in selection procedures and have the confidence of the parties. The prison service would need to consult the Commissioner for Public Appointments but, in principle, the prison service would be happy to invite the POA to propose a nominee whose name could be put forward for inclusion on future panels.

194. In summary, the Government indicated that having taken into account the matters raised by the ILO, the prison service's view was that extensive measures had been taken to fulfil the undertakings given. The proposal to include a trade union representative on the selection panel would strengthen the undertakings given, whilst the prison service felt that the concerns about undue influence over PSPRB selection were unfounded, due to the presence of the Independent Assessor, who was in attendance throughout the process and was required by the Commissioner to issue a certificate of fairness at the end of the selection procedure.

195. *The Committee takes note with interest of this information, in particular, the Government's intention to satisfy a claim by the POA to include a trade union representative in the selection panel for the PSPRB. It requests the Government to keep it informed of developments in this respect. The Committee also requests the Government to keep it informed of developments concerning consultations with private contractors on the establishment of appropriate mechanisms to compensate prisoner custody officers in private sector companies, to which certain of the functions of the prison have been contracted out, for the limitation of their right to strike.*

Case No. 2087 (Uruguay)

196. The Committee last examined this case at its March 2005 session [see 336th Report, paras. 798-812] and made the following recommendations:

(a) The Committee requests the Government to do all in its power without delay in order that the appeals of the Savings and Loans Cooperative of Officials of the Armed Forces (CAOFA) against the decree of 28 April 2003 of the General Labour and Social Security Inspectorate result in a definitive decision as soon as possible. The Committee requests the Government to keep it informed in this regard.

(b) The Committee requests the Government to verify that Ms. Virginia Orrego has been returned to the position that she occupied at the time of her transfer or to another equivalent post appropriate to her qualifications and experience, if the court establishes that this transfer had anti-union motives. The Committee requests the Government to keep it informed in this regard.

(c) The Committee requests the Government to provide it with information on the current trade union situation in the CAOFA and, in particular, on the following aspects: (1) the possibility for workers to join an organization of their choice in practice, and, in particular, to join the complainant organization, without fear of reprisals, and the question of which trade union is currently active in the cooperative; (2) the situation with regard to collective bargaining and, in particular, to the conclusion of a collective agreement.

197. In a communication dated 25 April 2006, the Government reports the following:

– *(a)* situation of the appeals against the General Labour and Social Security Inspectorate Decree of 28 April 2003. As recorded in the observations made on 22 December 2004, this sanctioning Decree was confirmed by the two administrative bodies on 5 and 30 January 2004. Having exhausted the administrative options, the enterprise took its appeal to have the Decree revoked to the Court of Administrative Proceedings on 17 March 2004 and, as indicated by the Ministry of Labour and Social Security at the appropriate time, it duly contested this request within the time allowed. Currently, it is pertinent to report that through Decree No. 6503 of the Court of Administrative Proceedings, on 9 November 2005, the certification of the evidence produced was stipulated; no ruling is yet ready to be given in this case.

– *(b)* situation of the worker Virginia Orrego. According to information provided by the complainant AEBU, the enterprise complied with the ruling and signed up to the

special compensation as ordered. The Committee on Freedom of Association should note that since these acts took place, several legislative elements have changed, in that Act No. 17940 on the protection of freedom of association was approved, expressly establishing the action of reinstating officials whose trade union activity has resulted in their dismissal or been detrimental to them;

– *(c)* situation of trade unions and collective bargaining in CAOFA. According to a verbal report from AEBU, there is no trade union activity in the enterprise CAOFA and on the occasions when fresh efforts have been made to organize, they have not succeeded. However, the Government reminds the Committee of the recent ratification, on 2 January 2006, of the Act on the protection of trade union activity.

198. *The Committee takes note of this information, and is particularly interested to note that the worker Virginia Orrego has been reinstated and paid the compensation ordered by the judicial authority. The Committee requests the Government to keep it informed of the ruling of the Court of Administrative Proceedings with regard to the appeals lodged against the General Labour and Social Security Inspectorate Decree of 28 April 2003.*

Case No. 2271 (Uruguay)

199. At its meeting in June 2004, the Committee noted the sharp fall, from 95 per cent to 16 per cent, in the proportion of workers in all sectors covered by collective agreements, a fact that was not denied by the Government. Furthermore, the Committee requested the Government to examine, with the complainant and all other concerned parties, the state of collective bargaining in the graphic arts sector, and to communicate the measures taken to promote collective bargaining in that sector [see 334th Report, para. 812, approved by the Governing Body at its 290th Session (June 2004)]. At its meeting in March 2005, the Committee reiterated its earlier recommendations [see 336th Report, paras. 132-134].

200. In a communication dated 25 April 2006, the Government indicated that since the date of the last report, various changes have been made in labour relations and that in May 2005, the Government convened the Wages Councils, tripartite cooperative bodies whose principal tasks are to set wages and categories. In that regard, an atmosphere of collective bargaining was fostered in the various sectors. Graphics workers remained included in group No. 17 (National Executive Decree No. 138/05) and in that group of activity the following three subgroups were created: (a) general printing works; (b) journalistic enterprises (the press); and (c) advertising on public highways. Collective agreements were reached in the three groups of activity lasting one year and expiring on 30 April 2006. In addition, there are already plans to convene another session of the Wages Councils in early May.

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

Case No. 2088 (Bolivarian Republic of Venezuela)

202. In its previous examination of the case in March 2006 [see 340th Report, paras. 220-223] the Committee noted that, in its communication dated 18 October 2005, the complainant organization, the National Organized Single Trade Union of Court and Council of the Judicature Workers (SUONTRAJ), referred to the Government’s statements in relation to various allegations, described the statements in question as false, and made new allegations. The Committee requested the Government to send its observations on this most recent communication.

203. Specifically, SUONTRAJ stated the following:

– the trade union official Mr. Oscar Rafael Romero Machado is taking legal action for reinstatement, but the Executive Directorate of the Judiciary is ignoring the law and preventing his return to work, using the courts to escape its obligations: (1) following a request by Oscar Romero, the Labour Inspectorate ordered his reinstatement on 5 February 2002; (2) it subsequently sought a reinstatement compliance order from the First Administrative Disputes Court on 8 April 2002 and, whilst this body referred the matter to the Court of Appeal, the Executive Directorate of the Judiciary demanded the annulment of the reinstatement order, with the result that he has been unable to return to work since 2002 (ruling on 27 July 2005), with the case being brought before the Administrative Policy Branch of the Supreme Court of Justice; and (3) the Government claims to be respecting the independence of the public authorities and that it is awaiting the judicial ruling on the annulment of the reinstatement order concerning Oscar Romero when, in reality, the Executive Directorate of the Judiciary is preventing the case from progressing in order to avoid having to comply with the abovementioned reinstatement order, whilst the Government is failing to carry out the procedures established in the current collective agreement and in the country's legislation and Constitution, to ensure observance of Convention No. 87;

– the trade union official Mr. Isidro Ríos took legal action for reinstatement, but the Ministry of Labour, and specifically the Labour Inspectorate of Maracaibo, Zulia State, declared itself unable to receive his request, leaving him without any means of defending himself;

– the trade union official Mr. Mario Naspe Rudas has been persecuted for carrying out trade union activities, the most recent instance being the administrative proceedings brought in order to remove him from his work post (fortunately, the case was closed by the hearing officer when his trade union immunity was recognized).

204. In relation to these trade union officials, SUONTRAJ makes the following demands: as regards Mr. Oscar Romero, it requests the Executive Directorate of the Judiciary to desist from seeking annulment of the reinstatement order and to comply with the order issued by the Labour Inspectorate on 5 February 2002, requests the Government to urge the Executive Directorate of the Judiciary to observe the collective agreement as far as trade union immunity is concerned, and requests the Executive Directorate of the Judiciary and the national Government to take into account the ruling issued on 1 April 2005 by the presiding judge of the Criminal Circuit Court of Anzoátegui State, Bolivarian Republic of Venezuela, since it is expressly recognized that, in cases of trade union immunity, the Labour Inspectorate is the organ of the labour administration responsible for determining fault and addressing all matters pertaining to this mandate, as opposed to the claims by the Executive Directorate of the Judiciary that the reinstatement rulings handed down by this body are invalid. As regards Mr. Isidro Ríos, SUONTRAJ requests the Government to recognize the request for reinstatement submitted to the Labour Inspectorate of the City of Maracaibo, Zulia State, in 2000. As regards Mr. Mario Naspe, harassment against this trade union leader, which was apparent even during recent disciplinary proceedings against him, must cease.

205. SUONTRAJ adds that the Executive Directorate of the Judiciary initiated a campaign to exert pressure on the union following the announcement of trade union action to demand compliance with the second collective agreement (signed on 9 June 2005), these agreements being implemented directly by the employer and indirectly through the judges in various courts and geographical areas of the country. SUONTRAJ alleges the following violations of trade union rights:

– dismissal of the trade union official Ms. Gledys Judith Díaz Sánchez, records secretary of the Mérida section of SUONTRAJ, on 14 September 2005, by the judge of the First Court of the Municipalities of Libertador and Santos Michelena, judicial

district of Mérida State. This dismissal constitutes an infringement of the procedure established under the Labour Act and pursuant to the collective agreement, since it fails to recognize the jurisdiction of the labour administration (Labour Inspectorate) with respect to determining the facts surrounding the claimed misconduct on the part of the trade union official and authorizing the suspension of trade union immunity in order for an administrative investigation to be opened for the purpose of imposing disciplinary sanctions. Moreover, the judge in question is not competent to dismiss the trade union official, since this should in any case be a matter for the office of the chief judge of Mérida State if, and only if, it had authorization from the Labour Inspectorate;

– the judicial ruling preventing the exercise of freedom of association within the judicature: on 4 October 2005, judge Yanira Martínez, of the Second Labour Court of Puerto Ordaz, judicial district of Bolívar State, handed down a judgement ordering the Caroní section of the SUONTRAJ to refrain from "… holding its meetings on the stairs, in other words at the main entrance to the Palace of Justice buildings, between 8.30 a.m. and 3.00 p.m. inclusive on Monday, Tuesday, Wednesday, Thursday and Friday … Pursuant to the provisions of Article 29 of the Constitutional Rights and Guarantees Act … the instructions contained in this ruling shall be observed by all authorities and individuals within the Bolivarian Republic of Venezuela, failure to do so constituting the offence of disobedience of authority". This judicial ruling follows a request made by a group of five lawyers forming part of a current of political opinion known as the "Union of Bolivarian Lawyers", inspired by the Government (i.e. pro-government). This request was lodged on 19 September 2005, the date on which the workers were holding a general assembly, and the trade union was examining a proposal to submit a list of grievances in order to ensure observance of the second collective agreement;

– the administrative order from the employer and public threats against the trade union executive board, in violation of the right to freedom of association. Specifically, the circular issued by the director of security of the Executive Directorate of the Judiciary, lieutenant colonel Luis Viloria, dated 13 September 2005, extracts of which are reproduced here: "Pursuant to instructions issued by judge Luis Velasquey Alvaray of the Executive Directorate of the Judiciary, all presiding judges of the criminal and civil circuits, chief judges and national and regional DAR directors are informed that, on 16 September 2005, the various trade unions of workers of the Supreme Court of Justice intend to hold a work stoppage, involving activities with which you are all very familiar (…) and as such, your presence is required in the early morning for the following purposes: … if necessary on the day, to coordinate the state security forces, to ensure that all office managers communicate the names of those officials who are absent from work without good cause …" This circular, together with statements issued by the highest representatives of the Executive Directorate of the Judiciary and the Supreme Court of Justice on 16 and 20 September 2005, include a series of actions on the part of the employer aimed at preventing workers from exercising freedom of association to demand observance of the second collective agreement. Newspaper headlines give a clear idea of the management's intentions: "Strike and you're out", "We will not give in to workers' blackmail";

– the employer habitually resorts to anti-union practices and discriminate against SUONTRAJ, preferring to initiate discussions with only one of the signatory organizations of the second collective agreement (SINTRAT). Moreover, the SINTRAT union reflects the trade union parallelism imposed by the National Government through the Ministry of Labour and acts as the mouthpiece for pro-government groups within the Judicial Authority. Indeed, during discussions initiated on 21 September 2005, which give an idea of the nature of the dialogue between SINTRAT and the employer, the two parties pursued an accommodating conciliatory

procedure in order to prevent SUONTRAJ from engaging in dispute actions. This year, the employer established a criterion for actions seeking to institute conciliatory proceedings, in which all signatories to the collective agreement must participate. The complainant states that the Executive Directorate of the Judiciary negotiates with SINTRAT and does not call meetings with SUONTRAJ, which has a larger membership and is more representative of the sectors benefiting from the collective agreement.

206. In its communication of 23 March 2006, the Government provides the following information in relation to the new allegations presented by the complainant:

– Mr. Oscar Romero Machado. On 10 January 2000, this individual was removed from his post on the grounds that he had committed the disciplinary offence set out in section *(d)* of article 43 of the Statutes for Judicial Staff (three days' unjustified absence within a given month). In handing down this ruling, the procedure established in article 45 of the aforementioned Statutes for Judicial Staff was followed. It should be stressed that in the course of the disciplinary proceedings, the official in question was guaranteed the right to a defence and due process, as evidenced by the ruling handed down by the judge of the Ninth Family and Youth Court of First Instance of the judicial district of the Caracas Metropolitan Area, who acted in accordance with the mandate conferred by article 98 of the Judicial Power Act, in force at that time.

Following the decision to dismiss him, Mr. Oscar Romero Machado submitted a request to the Labour Inspectorate for the Eastern Caracas Metropolitan Area for reinstatement and the payment of wage arrears, calling for the application of the procedure provided for in article 454 of the Labour Act and alleging that he enjoyed immunity, pursuant to article 451 of the aforementioned Act. Once the procedure had been initiated, the Labour Inspector handed down an administrative decision declaring the request for reinstatement and payment of wage arrears admissible, on 5 February 2002.

However, on 22 March 2002, the Executive Directorate of the Judiciary, exercising the prerogative granted to it by the legal system, went before the Administrative Disputes Court to lodge an appeal for annulment, together with constitutional immunity *(amparo constitucional)*, against the abovementioned administrative decision, pursuant to the provisions of article 121 et seq. of the Supreme Court of Justice Act, in force at that time. On 17 March 2002, the Third Higher Civil and Administrative Court of the Judicial District of the Capital Region declared the preventative immunity *(amparo)* action to be admissible and ordered the suspension of the application of the administrative decision until such time as a ruling on the annulment appeal had been handed down.

On 27 July 2005, the Second Administrative Disputes Court, having received the file concerning the plea of incompetence submitted by the Third Higher Civil and Administrative Court of the Judicial District of the Capital Region, declared itself incompetent to hear the abovementioned appeal and ordered the file to be transferred to the Political/Administrative Chamber of the Supreme Court of Justice, in order for this chamber to rule on competency to hear annulment appeals against administrative decisions handed down by Labour Inspectorates, in the light of the declaration lodged by the Third Higher Civil and Administrative Court. Despite the above, the complainant continues to allege that the Executive Directorate of the Judiciary is preventing Mr. Romero Machado from returning to his post. However, as can be seen, the legal actions taken by the Executive Directorate of the Judiciary are legitimate and fall within the appropriate legal framework, and are in no way hindering the appeal

process. The complaint therefore lacks valid legal substance and should be disregarded.

The Committee takes note of the above information and of the lengthy and complex process that has unfolded since the dismissal of the trade union official on 10 January 2001. In this regard, bearing in mind that the Labour Inspectorate initially ordered his reinstatement (5 February 2002) and that in March 2003, the Committee requested the Government to mediate between the parties with a view to bringing about his reinstatement, the Committee requests the Government to take steps to ensure that the competent authorities examine the possibility of reinstating Mr. Romero Machado prior to a definitive ruling by the judicial authority. The Committee also requests the Government to keep it informed of the final ruling handed down in relation to this case.

– Mr. Isidro Ríos. On 17 November 1999, this individual was removed from his post as a Professional Analyst, Grade I, within the Administrative Department of Zulia State, on the grounds that he committed the disciplinary offence set out under article 5 of the Disciplinary Code for Officials of the Council of the Judicature, the text of which is as follows: “Article 5. The following constitute grounds for dismissal: … 4. Failure to attend work for three days in a given month.” This decision was taken by the highest authority within the former Council of the Judicature, after complete examination of the case had been undertaken in accordance with the provisions of articles 7 and 8 of the abovementioned Disciplinary Code, during which the official under investigation submitted all the allegations and evidence that he considered necessary to properly defend his rights and interests. Nevertheless, the disciplinary proceedings revealed clear evidence of unjustified absences from work on the part of Mr. Ríos, with the result that regardless of his status as a trade union member, he was guilty of disciplinary offences and was consequently sanctioned by being removed from his post. As can be seen his discharge from his post resulted solely from the provisions of the Disciplinary Code and took no account of his status as a trade union member. This Disciplinary Code should in no way be seen as an instrument for hindering the exercise of trade union-related activities, as the complainant has sought to suggest.

  However, following this ruling, Mr. Ríos applied to the Labour Inspectorate of Zulia State to request his reinstatement and the payment of wage arrears. The administrative labour authority stated that it was not competent to examine the dismissal of a public official. A complaint was thus made by members of the trade union to the effect that the abovementioned citizen had been left utterly defenceless as a result of this ruling.

  The Government states that whilst it considers that the ruling handed down by the Labour Inspectorate of Zulia State affected Mr. Rios’s rights or legitimate, personal and direct interests, it was necessary to institute proceedings against him, as permitted by the legal system, and to challenge him in the administrative dispute courts and request the annulment of the ruling, since according to the provisions of article 259 of the Constitution of the Bolivarian Republic of Venezuela, this is the only means of verifying that rulings issued by the public administration are legal in substance and form, as has been established in the jurisprudence of the highest court.

  The Committee notes this information.

– Ms. Gledys Judith Díaz Sánchez. Concerning the argument that the Office of the Chief Judge of Mérida State was the competent authority to “dismiss” Ms. Díaz Sánchez, the Government states that on 14 September 2005, the judge of the First Court of the Municipalities of Libertador and Santos Marquina, judicial district of Mérida State, removed Ms. Díaz Sánchez from her post, acting in accordance with the

mandate granted to it by article 71 of the Judicial Power Act, which provides the following: "secretaries, marshals and other court officials shall be appointed and discharged from service in accordance with the staff statutes, which regulate the employment relationship governing officials". This regulation refers matters of recruitment and discharge from service of officials to the Judicial Authority, with reference to the statutes regulating the functions of such officials, which stipulate, under article 121, that they should be enacted within 90 days of their entry into force. However, to date, such an instrument has not yet been established and as a result, the Judicial Staff Statutes of 27 March 1990 remain in force, as shown by the jurisprudence of the administrative dispute courts for the public service sector.

Applying these criteria to the present case, the administrative order removing Ms. Díaz Sánchez from her secretarial post was indeed handed down by an authority with the mandate to do so, given that it came from the highest judicial authority, i.e. the judge of the First Court of the Municipalities of Libertador and Santos Marquina, Judicial District of Mérida State.

As regards the allegation that Ms. Díaz Sánchez was "dismissed", the Government states, by way of clarification, that she was discharged, rather than "dismissed", from her secretarial post at the First Court of the Municipalities of Libertador and Santos Marquina, Judicial District of Mérida State. Whilst an administrative discharge order has the same effect as a dismissal order, they take different forms. As a secretary of the First Court of the Municipalities of Libertador and Santos Marquina, Judicial District of Mérida State, hers was deemed to be a post that could be freely filled or revoked by a judge and as a result, it was not necessary for a hearing to be initiated prior to the order for her removal. This approach entered national jurisprudence uncontested as a result of the ruling of the First Administrative Disputes Court dated 21 February 2001. Nevertheless, the Government points out that on 7 December 2005, Ms. Díaz Sánchez went before the Administrative Disputes Court to bring an appeal for annulment, together with preventative immunity *(amparo)*, against the administrative discharge order to which she had been subject, also requesting the court to reinstate her in her post as a secretary of the First Court of the Municipalities of Libertador and Santos Marquina, Judicial District of Mérida State. The appeal was declared admissible by the Higher Civil and Administrative Court of the Judicial District of the Los Andes Region on 14 December 2005 and notification from the Public Prosecutor of the Republic is still being awaited. As in any State governed by the rule of law, the worker would be reinstated in her post if she were to win her appeal.

The Committee notes this information and requests the Government to provide information on the ruling handed down in this regard.

– With regard to the allegations that the Executive Directorate of the Judiciary has initiated a campaign to exert pressure on SUONTRAJ, in the context of which it contested the ruling handed down by the Second Labour Court of First Instance of the Judicial District (Labour) of the State of Bolívar, territory of Puerto Ordaz, following the *amparo* action brought by lawyers freely practising their profession, in which they requested the court to impose preventative measures against the complainant's action, on the grounds that they had reason to fear being prevented from practising, the Government states that the *amparo* action in question was brought by independent lawyers, acting on their own behalf and freely practising their profession. They claimed to have been affected by the activities of members of the trade union who, on 19 September 2005, used their trade union immunity to claim authority to close and block access to the courts, both for members of the public and officials of the Judicial Authority working in the Palace of Justice of Puerto Ordaz. For this reason, the persons bringing the *amparo* action alleged violation of articles 87, 88 and 89 of the

Constitution of the Bolivarian Republic of Venezuela, which refer to the right to work.

Following examination, this action was declared admissible and proceedings initiated by the court on 20 September 2005, with preventative measures being imposed, in view of the strong grounds to suppose that the constitutional rights mentioned by the complainants had been infringed as a result of statements made to the press by the President of SUONTRAJ, Caroní. On 4 October 2005, once the *amparo* action had been declared admissible and the proceedings initiated, the court handed down a ruling in favour of the complainants, giving an immediate and effective guarantee of the right to a defence, due process and effective judicial protection, since it was clearly shown in the course of the hearings that the trade union members had engaged in behaviour intended to prevent free access to the courts, both for officials of the Judicial Authority and members of the public wanting access to justice. SUONTRAJ appealed against this ruling and on 11 January 2006, the First Higher Labour Court of the Bolívar State, with headquarters in Puerto Ordaz, overturned the appeal brought by the trade union's legal representatives.

The Committee notes this information and requests the Government to provide the appeal ruling.

– Allegations concerning anti-union practices by the Executive Directorate of the Judiciary, on the basis of a circular sent out by the Security Department of the Executive Directorate of the Judiciary on 13 September 2005. According to the Government, examination of the circular shows that it clearly provides information on "preventative" measures to be taken by administrative units such as the judiciary, in order to avoid the occurrence of events that might impede the normal activities of the judicial premises. There is nothing in the abovementioned text that might be interpreted as coercive or threatening towards the trade unions mentioned in the circular. It should also be borne in mind that on occasions where trade union officials have held assemblies or when stoppages of judicial services have been attempted or proposed, breaches of public order have been noted, with free access to the judicial offices blocked, with immediate effect, by the use of padlocks and chains, thus preventing free passage by court workers and members of the public. As a result, and in view of the announcement made to the media by the trade union that it intended to hold a work stoppage at the Judicial Authority, and given the previous behaviour by trade union members in similar situations, the unit responsible for security and protection of judicial premises issued this circular with a view to guaranteeing normal service and ensuring free access to the court premises.

  The Committee notes this information and requests the text of the circular, which has not yet been received, to be sent.

– Allegations that the Executive Directorate of the Judiciary is pursuing an accommodating conciliation procedure with another trade union. The Government states that according to the Executive Directorate of the Judiciary, Clause 3 of the second collective agreement covering workers of the Executive Directorate of the Judiciary and the Judicial Authority provides for a conciliatory procedure whose aim is to settle disputes arising in relation to the application or interpretation of the collective agreement in question. This procedure was agreed upon by the trade unions operating within the Judicial Authority, including SUONTRAJ. It must be allowed to run its course before the procedure provided for in the Labour Act, i.e. the stage corresponding to the examination of lists of grievances, can be initiated. In this regard, the Executive Directorate of the Judiciary considers it appropriate to point out that SUONTRAJ went before the Directorate General of Human Resources on 28 October 2005 to request that the abovementioned conciliation procedure be

initiated, as provided in the collective agreement. However, the Government adds that the trade union took steps to present a list of grievances to the Ministry of Labour during September 2005 and was still asserting its intention to present this list to the labour authorities in November of the same year. Thus, the actions of the trade union are contradictory, in that it called for conciliation by means of the procedure provided for in the collective agreement, whilst at the same time urging its members, in the course of general assemblies of its sections, to present a list of grievances. Clearly, this does not tally with the trade union's declared goal of reaching a conciliatory agreement with the Executive Directorate of the Judiciary.

The Committee notes this information and requests the Government to inform it as to whether a collective agreement has finally been concluded with the SUONTRAJ trade union.

207. *Lastly, the Committee requests the Government to provide information in relation to the alleged acts of anti-union persecution against the trade union official Mr. Mario Naspe Rudas. Furthermore, given the drawn-out nature of certain court proceedings for acts of anti-union discrimination, the Committee underlines the principle whereby "cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned" [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 749].*

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208. 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
1996 (Uganda)	June 1999	March 2006
2006 (Pakistan)	November 2000	November 2005
2084 (Costa Rica)	March 2001	March 2006
2086 (Paraguay)	June 2002	March 2006
2104 (Costa Rica)	March 2002	March 2006
2114 (Japan)	June 2002	March 2006
2126 (Turkey)	March 2002	June 2006
2153 (Algeria)	March 2005	March 2006
2156 (Brazil)	March 2002	March 2006
2160 (Bolivarian Republic of Venezuela)	June 2002	June 2006
2166 (Canada)	March 2003	March 2006
2173 (Canada)	March 2002	March 2006
2176 (Japan)	November 2002	–
2180 (Canada)	March 2003	March 2006
2188 (Bangladesh)	November 2002	March 2006
2196 (Canada)	March 2003	March 2006
2199 (Russian Federation)	June 2003	March 2006
2214 (El Salvador)	March 2005	March 2006
2217 (Chile)	November 2004	March 2006

Case	Last examination on the merits	Last follow-up examination
2227 (United States)	November 2003	March 2006
2234 (Mexico)	November 2003	November 2005
2242 (Pakistan)	November 2003	November 2005
2255 (Sri Lanka)	November 2003	March 2006
2257 (Canada)	November 2004	June 2006
2272 (Costa Rica)	March 2004	June 2006
2285 (Peru)	November 2004	November 2005
2286 (Peru)	June 2005	June 2006
2296 (Chile)	June 2004	June 2006
2302 (Argentina)	November 2005	June 2006
2303 (Turkey)	November 2004	June 2006
2304 (Japan)	November 2004	June 2006
2314 (Canada)	March 2006	–
2321 (Haiti)	June 2006	–
2326 (Australia)	November 2005	June 2006
2329 (Turkey)	November 2005	June 2006
2333 (Canada)	March 2006	–
2338 (Mexico)	March 2005	March 2006
2340 (Nepal)	March 2005	March 2006
2352 (Chile)	November 2005	June 2006
2366 (Turkey)	June 2006	–
2367 (Costa Rica)	June 2005	June 2006
2376 (Côte d'Ivoire)	November 2005	June 2006
2385 (Costa Rica)	November 2005	June 2006
2393 (Mexico)	March 2006	–
2394 (Nicaragua)	March 2006	–
2408 (Cape Verde)	June 2006	–
2411 (Bolivarian Republic of Venezuela)	March 2006	–
2412 (Nepal)	March 2006	–
2414 (Argentina)	March 2006	–
2415 (Serbia)	March 2006	–
2417 (Argentina)	March 2006	–
2428 (Bolivarian Republic of Venezuela)	March 2006	–
2431 (Equatorial Guinea)	March 2006	–
2441 (Indonesia)	June 2006	–
2444 (Mexico)	June 2006	–
2447 (Malta)	June 2006	–
2453 (Iraq)	June 2006	–

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

210. In addition, the Committee has just received information concerning the follow-up of Cases Nos. 1937 (Zimbabwe), 2027 (Zimbabwe), 2046 (Colombia), 2068 (Colombia), 2109 (Morocco), 2134 (Panama), 2148 (Togo), 2151 (Colombia), 2164 (Morocco), 2169 (Pakistan), 2171 (Sweden), 2192 (Togo), 2211 (Peru), 2214 (El Salvador), 2233

(France), 2234 (Mexico), 2242 (Pakistan), 2249 (Bolivarian Republic of Venezuela), 2256 (Argentina), 2270 (Uruguay), 2273 (Pakistan), 2279 (Peru), 2289 (Peru), 2291 (Poland), 2298 (Guatemala), 2299 (El Salvador), 2301 (Malaysia), 2328 (Zimbabwe), 2330 (Honduras), 2339 (Guatemala), 2344 (Argentina), 2350 (Republic of Moldova), 2351 (Turkey), 2363 (Colombia), 2364 (India), 2368 (El Salvador), 2371 (Bangladesh), 2380 (Sri Lanka), 2386 (Peru), 2388 (Ukraine), 2390 (Guatemala), 2395 (Poland), 2397 (Guatemala), 2399 (Pakistan), 2404 (Morocco), 2407 (Benin), 2418 (El Salvador), 2419 (Sri Lanka) and 2424 (Colombia), which it will examine at its next meeting.

CASE NO. 2438

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

Complaint against the Government of Argentina presented by the Education Workers' Union (SITRAED) supported by the Central of Argentinean Workers (CTA)

Allegations: The complainant organization alleges that the Ministry of Education authorities of Chubut Province turned down a request for trade union leave made by a number of its trade union officials and that the authorities then issued a decision cancelling the trade union leave of SITRAED

211. The complaint is contained in a communication of the Education Workers' Union (SITRAED), dated 23 May 2005. SITRAED sent new allegations in a communication of 27 December 2005. The Central of Argentinean Workers (CTA) supported the complaint in a communication of 27 May 2005.

212. The Government sent its observations in communications of 23 and 26 May 2006.

213. Argentina 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), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainant's allegations

214. In its communications of 23 May and 27 December 2005, the Education Workers' Union (SITRAED) states that, on 30 September 2003, it was granted trade union registration and legal personality. It was not granted trade union status because the Association of Education Workers of Chubut (ATECH) was already operating in Chubut Province. On obtaining trade union registration, SITRAED formalized its institutional status.

215. The complainant organization alleges that, on 14 October 2003, trade union officials Eduardo Norberto Heidel, Jerónimo Omar Retamal, Gerardo Enrique Carranza, María Cristina Alcalá and Laura Vilar were notified that their request for trade union leave was

refused by, the Ministry of Education of Chubut Province, which returned the forms with the supporting documentation proving they had taken trade union leave since 2000, when the trade union organization was founded. During the 2000-03 period, trade union officials Gerardo E. Carranza, María Cristina Alcalá and Jerónimo O. Retamal were members of the CTA Executive of Puerto Madryn, remaining in office from 2003 to 2006 after being re-elected. Since its foundation, SITRAED has been affiliated to the CTA. On 27 October 2003, the Ministry of Education also notified Provincial School No. 170 of its refusal to grant trade union leave to Hernández Luís Enrique, stating that “it could not be approved” because SITRAED had no legal representativity in the province.

216. The complainant organization points out that article 30(1) of the rules on leave for teaching staff of the Ministry of Education of Chubut Province, established by Decision No. 1040, states that “Paid leave shall be granted to the employees of the Ministry of Culture and Education in connection with trade union functions, in the following cases: (a) staff members elected to hold trade union office in the executive committee for their term of office, provided that they shall return to work within the 30 days following the end of the term of office for which they were elected.” The complainant organization states that the said trade union officials have been granted paid trade union leave in order to carry out trade union activities across Chubut Province since the establishment of SITRAED. SITRAED considers that, in refusing to grant trade union leave, the Ministry of Education authorities are seeking to favour the trade union organization with trade union status.

217. SITRAED states that, in September, October and November 2005, it carried out progressive direct action, culminating in an open-ended strike lasting from 20 October to 14 November, when it was suspended in order to create a climate conducive to dialogue and negotiation, which SITRAED had always been willing to conduct. SITRAED then requested that a bargaining committee be set up. The rejection of dialogue in favour of direct persecution became clear in pre-electoral statements made by the Governor and published in the print media, such as “cut off the heads of the trade union leaders” – a position manifested in the decision to abolish “trade union leave”. SITRAED alleges that, through the Ministry of Education and through Decision XIII, No. 550/2005, dated 29 November 2005, the provincial executive decided to cancel the trade union leave of SITRAED.

B. The Government’s reply

218. In its communication of 23 May 2006, the Government states that it should be pointed out that the allegations do not state that the members of the complainant organizations were prevented from exercising the right to freedom of association, since the allegations date back to 2003 and, as is clear from the decision of November 2005 issued by the Ministry of Education of Chubut Province, representatives of trade union organizations had, up to that date, fully exercised the trade union functions they claim. In fact, the rule adopted on 29 November 2005 stipulates that up to that date, the leave provided for under section 45 of Decision MCE No. 785/97 shall be granted, making it difficult to allege that such leave was refused in 2003, given that during those years the trade union representatives had taken trade union leave.

219. The Government of Chubut Province issued Decision XIII, No. 550/2005 following a specific request by the trade union with trade union status. This does not mean that, in adopting the decision of November 2005, the provincial administration was not acting in accordance with the law, since the granting of trade union leave to the representatives of organizations with trade union status is not contrary to the provisions of the Convention, given that, in article 3 of the ILO Constitution, the ILO recognizes the right to give preference to the most representative organizations, as is the case with regard to tripartite representation at the International Labour Conference.

220. With regard to this case, section 31 of Act No. 23551 establishes several rights for trade union organizations with trade union status, including the granting of the right to trade union leave to the representatives of those organizations with trade union status. The Government adds that it should be borne in mind that other organizations may claim the rights arising from the granting of trade union status, the matter being settled by comparing the representativity of the organizations to determine which of them has the largest membership in the geographical area and category of persons concerned, in accordance with section 25 of the said Act. This provision has never been questioned by the ILO supervisory bodies.

221. The complainant organization initiated the process of recognition of trade union status, which has now been suspended – on its own decision – owing to the bringing of an "action in respect of unconstitutionality" against Decision XIII, No. 550/2005, preceded by an *amparo* appeal (enforcement of constitutional rights), which was rejected by the Appeals Court of the City of Trelew. Consequently, the matter is now under examination by the courts, and the Government will report on the outcome in due course.

222. Lastly, the Government states that, without prejudice to the internal dispute between the trade union organizations, the matter is in the process of being resolved at the initiative of the Government, an agreement having been reached with the members of the provincial executive committee of the trade union to allow the possibility of granting leave to these persons in connection with meetings held to discuss and/or agree on matters related to teaching.

223. In its communication dated 26 May 2006, the Government states that Decision XIII, No. 550/2005 of the Ministry of Education of Chubut Province was appealed against by the complainant organization SITRAED, and that, in these circumstances and in the context of conciliation and negotiation, trade union leave for the officials of this organization is to be maintained until a definitive ruling has been issued on the matter.

C. The Committee's conclusions

224. *The Committee notes that in the present case, the complainant organization alleges that, against a background of persecution of the Education Workers' Union (SITRAED) of Chubut Province and with the aim of giving preference to the sector trade union organization with trade union status, in October 2003 the Ministry of Education authorities of Chubut Province turned down the requests for trade union leave of several SITRAED officials and that, in November 2005, the same authorities issued Decision XIII, No. 550/2005 cancelling the trade union leave of SITRAED.*

225. *In this regard, the Committee notes that the Government states that: (1) up until the moment when Decision XIII, No. 550/2005 was issued in November 2005, the representatives of SITRAED had fully exercised their right to trade union leave; (2) the Government of Chubut Province issued Decision XIII, No. 550/2005 in response to a specific request by the trade union with trade union status in the sector; (3) through the decision of November 2005, the provincial administration acted lawfully, since the granting of trade union leave to the representatives of organizations with trade union status is not contrary to the provisions of Convention No. 87, given that in article 3 of its Constitution, the ILO recognizes the right to give preference to the most representative organizations; (4) section 31 of Act No. 23551 establishes several rights for organizations with trade union status, including the granting of the right to trade union leave to the representatives of those organizations with trade union status; (5) the rights arising from the granting of trade union status may be claimed by other organizations, the matter being settled by comparing the representativity of the organizations to determine which of them has the largest membership in the geographical area and the category of persons*

concerned, in accordance with section 25 of the said Act; (6) the complaint organization initiated the process of recognition of trade union status, which has now been suspended – on its own decision – owing to the bringing of an "action in respect of unconstitutionality" against Decision XIII, No. 550/2005, preceded by an amparo *appeal (enforcement of constitutional rights), which was rejected by the Appeals Court of the City of Trelaw. Consequently, the matter is now under examination by the courts, and the Government will in due course report on the outcome; (7) without prejudice to the internal dispute between the trade union organizations, the matter is in the process of being resolved at the initiative of the Government, an agreement having been reached with the members of the provincial executive committee of the trade union to allow the complainant organization to grant leave to its representatives in connection with meetings held to discuss and/or agree on matters related to teaching; (8) Decision XIII, No. 550/2005 of the Ministry of Education of Chubut Province was appealed against by the complainant organization SITRAED and, in these circumstances, and in the context of conciliation and negotiation, trade union leave for the officials of this organization has been maintained until a definitive ruling has been issued on the matter.*

226. *The Committee notes that it has already examined complaints presented against the Government of Argentina containing allegations relating to rights granted to trade unions with trade union status but not organizations that are merely registered [see 320th Report, Case No. 2054, and 329th Report, Case No. 2157]. The Committee recalls that, on several occasions, and particularly during discussion on the draft of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the International Labour Conference referred to the question of the representative character of trade unions, and, to a certain extent, it agreed to the distinction that is sometimes made between the various unions concerned according to how representative they are. Article 3, paragraph 5, of the Constitution of the ILO includes the concept of "most representative" organizations. Accordingly, the Committee felt that the mere fact that the law of a country draws a distinction between the most representative trade union organizations and other trade union organizations is not in itself a matter for criticism. Such a distinction, however, should not result in the most representative organizations being granted privileges extending beyond that of priority in representation, on the ground of their having the largest membership, for such purposes as collective bargaining or consultation by governments, or for the purpose of nominating delegates to international bodies. In other words, this distinction should not have the effect of depriving trade union organizations that are not recognized as being among the most representative of the essential means for defending the occupational interests of their members, for organizing their administration and activities and formulating their programmes, as provided for in Convention No. 87 [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 1996, 4th edition, para. 309].*

227. *In any case, the Committee notes the Government's statement that the dispute between the trade union with trade union status and SITRAED over the granting of trade union leave is in the process of being resolved and that trade union leave for the officials of SITRAED is to be maintained until a definitive ruling has been issued regarding the appeal lodged against Decision XIII, No. 550/2005. The Committee trusts that the Government and the trade union organizations concerned will reach a definite agreement, and recalls the terms of Article 6 of Convention No. 151, ratified by Argentina, which provides that such facilities shall be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently, and trusts that the representatives of SITRAED will continue to enjoy such facilities.*

228. *Lastly, the Committee requests the Government to keep it informed as to the outcome of the appeal lodged against Decision XIII, No. 550/2005 of the Ministry of Education of Chubut Province.*

The Committee's recommendations

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

(a) The Committee trusts that the Government and the trade union organizations concerned will reach a definite agreement, and recalls the terms of Article 6 of Convention No. 151, ratified by Argentina, which provides that such facilities shall be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently, and trusts that the representatives of SITRAED will continue to enjoy such facilities.

(b) The Committee requests the Government to keep it informed as to the outcome of the appeal lodged against Decision XIII, No. 550/2005 of the Ministry of Education of Chubut Province.

CASE NO. 2440

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

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

Allegations: The complainant organizations allege that trade union leaders and members were arrested and tried as a result of protests held in the federal capital and the Province of Santa Cruz

230. The complaint is contained in a communication from the Association of State Workers (ATE) and the Central of Argentinean Workers (CTA) of July 2005. The complainants sent additional information and new allegations in July and August 2005.

231. The Government sent its observations in a communication dated 23 February 2006.

232. 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

233. In their communication of July 2005, the Central of Argentinean Workers (CTA) and the Association of State Workers (ATE) allege that on 29 June 2005 at approximately 1 p.m., the following ATE leaders were detained: Messrs. Fernando Rubén Cardozo, Secretary-General of the Internal Committee of the President's Office and Aldo Héctor Flores, a union steward. The events took place at the Government House, in the autonomous city of Buenos Aires at the address 50 *calle* Balcare, within the context of a plan of action by the

ATE calling for restoration of the purchasing power of wages. The Internal Trade Union Committee of the President's Office resolved to take action at that office, in the form of a protest consisting of "throwing propaganda leaflets in the palm court". The following demands were made: receipt of an additional 100 pesos that used to be paid in the office and 300 pesos in future increases in what are termed "non-wage components". This procedure was already current practice for employees of the Government House and had been used on a number of occasions during democratic government terms since 1983.

234. The complainants add that the Government decided to ban protests by state workers via A.S.I. Memorandum No. 1229/2005, dated 28 February 2005, which provides that: "by order of the Secretary-General of the President's Office, staff working at the Government House are informed that, for security reasons, demonstrations within the building are not permitted (signed, Lieutenant César Pablo Yague, Security Directorate, President's Barracks)". The complainant organizations state that having been arrested, the abovementioned trade union leaders were taken to federal police station No. 2 and charged with the offence of disobedience, pursuant to article 239 of the Penal Code, which expressly provides that: "any person who resists or disobeys a public servant in the legitimate exercise of his/her functions or a person providing assistance at the request of the aforementioned public servant or by virtue of a legal obligation, shall be punished by a prison term of between 15 days and one year".

235. The complainants indicate that police intervention in the workplace to restrict protest action constitutes a serious violation of Convention No. 87, and that this is even more serious given the fact that such restrictions were imposed at the headquarters of the national Government, which should guarantee fundamental rights through its dual role as head of state and head of public administration. The order issued in writing by the President's secretary prohibiting the demonstration points to a serious violation on the part of the Government, which ordered restrictions on the right of members of the ATE to demonstrate, supposedly for "security" reasons, without any indication of causes or effects; this is particularly serious given that such demonstrations were customary amongst workers in the offices concerned and had not been subject to any restrictions since 1983.

236. The unilateral decision by the State to repress those involved in this dispute and institute criminal proceedings against them leads to the inescapable conclusion that the State's true aim is to silence the voices of dissent, thereby stifling workers' freedom of expression, which is clearly unlawful in the light of the provisions of the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the ILO Constitution and Convention No. 87. Whatever aim the Government may invoke in an effort to justify a restriction on the right to hold demonstrations and protests, it is clear that criminal prosecution of those involved in strikes and other demonstrations is unlawful, disproportionate and contrary to universal human rights standards.

237. In their communication of July 2005, the complainants state that the trade union leaders, Messrs. Cardozo and Flores, were acquitted in the case brought against them by the national government secretariat. The preamble to the ruling refers to the alleged infringement of article 239 of the Penal Code by the accused on 29 June 2005, the date on which the ATE organized a demonstration within the Government House to call for a wage increase. The judicial authority considered that, on the basis of the evidence collected during the investigation, the gathering organized by the accused did indeed take place for the purpose of exercising a labour right, and hence criminal sanctions were ruled out, particularly given the fact that the demonstration had been peaceful and had not involved physical violence (the complainants enclose a copy of the ruling handed down).

238. In their communication of August 2005, the complainants allege that the Secretary-General of the ATE executive council for the Province of Santa Cruz, Mr. Gustavo Garzón, and the

union stewards for the municipality of Pico Truncado, Ms. Pilar Peralta and Messrs. David Esteré, Pedro Payaguala, Julio Pezolano and Belisario Seguel, were arrested on 24 June 2005 in Pico Truncado, Province of Santa Cruz. The complainants add that on 29 July 2005, the magistrates' court of Pico Truncado ordered the abovementioned trade union leaders to be brought to trial, along with more than 60 trade union members, for offences under the following articles of the Penal Code: article 194 of Chapter II on offences against transport and communications security, articles 237 and 238, clause 2, of Chapter I on offences against and resistance to authority and 149bis and ter, clause 2(a) of Chapter I on offences against individual freedom (the complainants enclose the ruling ordering the trials without preventive custody).

B. The Government's reply

239. In its communication dated 23 February 2006, the Government reports that, with regard to the allegations relating to the Province of Santa Cruz, the arrests were ordered by the local judicial authority, the body competent to do so, in the context of a case brought in response to several complaints lodged by various citizens and institutions (local students' centre, Distrigas SA, Bolland y Cía SA, Transportadora de Gas del Sur (TGS) SA, etc.), who were denied the right to move freely, exercise their trade, etc. On 10 May 2005, at 11 p.m., the ATE, which at that time was not accredited as the organization representing municipal workers, decided to initiate protest action (work to rule). The protest was held on 11, 12 and 13 May 2005, with the municipality being informed on 11 May, after the action had begun. The Government states that the decision to begin industrial action was taken as a result of the lack of a positive response to the workers' demands presented at the very end of the previous working day, allowing no time for the demands to be considered and discussed. Moreover, the industrial action was not as described in the communication, but was in fact held on a larger, more intensive scale, consisting of a stoppage at the workplace.

240. The Government points out that following a range of proposals made by the municipality within the bounds of budgetary and financial reality, which were all systematically rejected by the trade union, industrial action escalated to the point where the city was held to siege by roadblocks for over 30 days, provoking complaints from the residents who brought the legal action mentioned earlier. Finally, the Government adds that, at the time of the events, the workers Pilar Peralta, David Esteré, Pedro Payaguala, Julio Pezolano and Belisario Seguel were not acting in the capacity of union stewards for the municipality of Pico Truncado, since they were nominated as members of the local delegation on 27 June 2005, with the municipality being notified of this on 29 June 2005.

C. The Committee's conclusions

241. *The Committee observes that in the present case, the complainants allege the arrest of two Association of State Workers (ATE) trade union leaders on 29 June 2005 on charges of committing the offence of disobedience, following a protest at the Government House involving the distribution of propaganda leaflets, in addition to the arrest (on 24 June 2005) and trial of ATE trade union leaders and members in the Province of Santa Cruz.*

242. *With regard to the allegations concerning the arrest of the ATE trade union leaders Messrs. Fernando Rubén Cardozo and Aldo Héctor Flores on 29 June 2005 on charges of committing the offence of disobedience, following a protest at the Government House in the federal capital, the Committee regrets to note that the Government has not communicated its observations on this matter. However, the Committee notes that the complainants sent additional information with the text of the ruling, revealing that the judicial authorities had decided to acquit the trade union leaders in question, finding that*

the accused had organized the gathering to defend a labour right and that the demonstration had been peaceful. In this respect, the Committee recalls that "the arrest by the authorities of trade unionists concerning whom no grounds for conviction are found or charges made involves restrictions on trade union rights. Governments should take steps to ensure that the authorities concerned have appropriate instructions to eliminate the danger which arrest for trade union activities implies" [see ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 81]. In these circumstances, the Committee requests the Government to ensure that the abovementioned principle is observed.*

243. *With regard to the alleged arrest (on 24 June 2005) and trial of ATE trade union leaders and members in the Province of Santa Cruz, the Committee notes the Government's information to the effect that: (1) the arrests were ordered by the local judicial authorities within the context of a legal case brought in response to several complaints lodged by various citizens and institutions who had been denied the right to move freely and exercise their trade; (2) the ATE decided to initiate protest action at the same time as it informed the municipality of Pico Truncado, Province of Santa Cruz, of its status as the organization representing municipal workers; (3) the ATE decided to begin industrial action as a result of the lack of a positive response to its demands, without allowing time for the demands to be considered and discussed; (4) the trade union rejected various proposals by the municipality, stepping up the industrial action to the point where the city was held to siege by roadblocks for over 30 days, provoking complaints from the residents who brought the legal action; and (5) the union leaders mentioned by name by the complainants were not acting in the capacity of union stewards for the municipality of Pico Truncado, since notification of their nomination was given on 29 June 2005.*

244. *In this respect, the Committee observes that an initial decision by the magistrates' court of Pico Truncado, sent by the complainants, reveals that complaints were lodged concerning a picket organized by municipal and provincial public employees on the outskirts of Pico Truncado on Route 12 and their obstruction of transport from 23 May 2005 onwards. The Committee also observes that the judicial ruling called for a trial without preventive custody for a number of protest participants, ordering them to attend discussions, coordinated by the judicial authority, to reflect on the exercise of rights under article 14 and 14bis of the national Constitution, on pain of having their release or exemption from prison revoked.*

245. *Nevertheless, observing that the Government denies that the detainees held union steward status at the time the events took place, citing violations of citizens' right to movement and exercise of their trade and alleging an unwillingness on the part of the ATE organization in Santa Cruz to engage in dialogue and mentioning the severity and duration of the actions, involving roadblocks, undertaken by the organization, the Committee considers that in order to establish whether the events leading to the arrests and trials fall within the framework of the legitimate and peaceful exercise of trade union rights, as provided for in Article 8 of Convention No. 87, or whether these limits were transgressed, it must be informed of the ruling on the merits of this case handed down by the judicial authority.*

246. *In these circumstances, the Committee requests the Government to keep it informed of the outcome of the ruling on the merits of the cases against the ATE trade union leaders and members arrested and tried in the Province of Santa Cruz in June 2005 for the alleged offences.*

The Committee's recommendations

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

(a) With regard to the arrest of the Association of State Workers (ATE) trade union leaders Messrs. Fernando Rubén Cardozo and Aldo Héctor Flores on charges of committing the offence of disobedience for having organized a protest, which were subsequently dismissed by the judicial authority, the Committee recalls that the arrest by the authorities of trade unionists concerning whom no grounds for conviction are found or charges made involves restrictions on trade union rights and requests the Government to ensure that this principle is observed.

(b) The Committee considers that in order to establish whether the events leading to the arrests and trials fall within the framework of the legitimate and peaceful exercise of trade union rights, as provided for in Article 8 of Convention No. 87, or whether these limits were transgressed, it must be informed of the ruling on the merits of this case handed down by the judicial authority.

(c) The Committee requests the Government to keep it informed of the outcome of the ruling on the merits of the case against the ATE trade union leaders and members arrested and tried in the Province of Santa Cruz in June 2005 for the alleged offences.

CASE NO. 2425

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

Complaint against the Government of Burundi presented by the Union of Magistrates of Burundi (SYMABU)

Allegations: The complainant organization alleges that the Government still refuses to implement the collective agreements negotiated in 2003, which concern in particular magistrates' conditions of work

248. The complaint is contained in a communication from the Union of Magistrates of Burundi (SYMABU) dated 13 May 2005.

249. In the absence of any reply from the Government, the Committee has been obliged to defer examination of this case on three occasions. At its meeting in May-June 2006, the Committee made an urgent appeal to the Government, drawing its attention to the fact that in accordance with the procedural rule 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 its next meeting if the information and observations requested from the Government had not been received in due time [see 342nd Report, para. 10].

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

A. The complainant's allegations

251. In its communication of 13 May 2005, the complainant organization alleges that the Government refuses to implement a bipartite agreement signed on 29 September 2003, under the terms of which both parties agreed to set up a joint technical commission chaired by a neutral individual chosen by consensus, with the task of reviewing the position of the judiciary in relation to other authorities (in terms of independence, separation of powers and equality) and the practical application of the magistrates' statute (with regard to salaries, special payments and allowances) which had at that time been in force for five years.

252. The joint commission completed its work on the implementation of the magistrates' statute and submitted its report to the President of the Republic on 10 August 2004. The report sets out a number of specific and detailed claims regarding implementation of the statute, and makes a number of recommendations on matters including: salary scales; allowances (risk, accommodation, transport, representation); special payments (relating to productivity and function); family allowances; social security and other benefits.

253. Under the terms of the agreement of 29 September 2003, the principal elements of the report were supposed to be incorporated in the Budget Act of 2005 with a view to improving the situation of magistrates, but the Government has disregarded them.

B. The Committee's conclusions

254. *The Committee deeply regrets the fact that, despite the time that has elapsed since the presentation of the complaint, the Government has not supplied the observations and information requested in due time, although it has been invited to do so on several occasions, notably through an urgent appeal made at the Committee's meeting in May-June 2006. The Committee in particular expresses its concern that the Government has not formulated any observations in another case in which it is implicated (Case No. 2426) and which is reproduced in this report. Under these circumstances, and in accordance with the relevant rule of procedure [see the Committee's 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee must present a report on the substance of this case in the absence of the Government's observations, which it had hoped to receive in due time.*

255. *The Committee reminds the Government, first, that the purpose of the whole procedure concerning allegations of infringements of freedom of association is to ensure respect for freedom of association both in law and in fact. While this procedure protects governments against unreasonable accusations, the governments should in turn recognize the importance of supplying, for objective examination, detailed replies to the allegations made against them [see the Committee's First Report, para. 31].*

256. *The Committee notes that this complaint concerns failure to implement an agreement dating from September 2003 and signed by the Vice-President of the Republic, under the terms of which a joint technical commission comprising representatives of the Government and of the magistrates was entrusted with the task of "making specific proposals (regarding salary scales and other benefits) for implementing the magistrates' statute" (article 2 of the technical commission's standing orders). The commission submitted its report to the President of the Republic in August 2004; the report contained many recommendations on the pay and social benefits which should be available to magistrates. The Committee notes that SYMABU has received no specific reply since that time, and that the main elements of the report which, to a certain extent constitute the nucleus of a collective labour agreement, were not incorporated in the Budget Act of 2005. The*

Committee also notes that on the date on which the complaint was presented, the magistrates' statute had been in force for five years without being implemented.

257. *It is not for the Committee to express an opinion on the amount of remuneration paid, or on the justification for granting or not granting various benefits and special payments. This matter relates to negotiation between the parties concerned, the voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, is a fundamental aspect of the principles of freedom of association [**Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 844].*

258. *The Committee nevertheless recalls the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations [**Digest**, op. cit., para. 814]. It is therefore 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 [**Digest**, op. cit., para. 815].*

259. *Furthermore, 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 [**Digest**, op. cit., para. 816]. In addition, agreements should be binding on the parties [**Digest**, op. cit., para. 818].*

260. *Noting that these conditions have not been met in this case, due in particular to the considerable period that has elapsed between the adoption of the magistrates' statute and the report of the joint commission set up to make recommendations on their terms of remuneration and benefits, the Committee strongly urges the Government to resume genuine and constructive negotiations very quickly with the complainant organization within the framework of the joint commission – a body chosen by consensus – and to implement the latter's recommendations immediately. The Committee requests the Government to inform it promptly of any follow-up to its recommendation.*

The Committee's recommendations

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

(a) The Committee deeply regrets the fact that the Government has not supplied the observations and information requested in due time.

(b) The Committee strongly urges the Government to resume genuine and constructive negotiations very quickly with the complainant organization within the framework of the joint commission – a body chosen by consensus – and to implement the latter's recommendations immediately. The Committee requests the Government to inform it promptly of any follow-up to its recommendation.

CASE NO. 2426

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

Complaint against the Government of Burundi presented by the Confederation of Trade Unions of Burundi (COSYBU)

Allegations: The complainant organization alleges several violations of freedom of association: imprisonment of trade union leaders; seizure of computer equipment and confiscation of information belonging to the trade union; suspension of several trade union leaders simply for exercising their legitimate trade union activities; interference in the activities of workers' organizations, in particular in the trade union elections and during the Labour Day celebrations; favouritism of the authorities towards a trade union set up entirely by the Government; suspension of the right to strike during the electoral period

262. The complaint is contained in a communication from the Confederation of Trade Unions of Burundi (COSYBU) dated 16 May 2005.

263. In the absence of a reply from the Government, the Committee has had to defer the examination of this case on three occasions. At its May-June 2006 meeting, the Committee made an urgent appeal to the Government, drawing its attention 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 at its following meeting if the Government's information and observations have not been received in due time [see 342nd Report, para. 10]. To date, the Government has not sent its observations.

264. Burundi 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

265. In its communication of 16 May 2005, the complainant organization alleges that the Government imprisoned Mr. Pierre Claver Hajayandi and Mr. Célestin Nsavyimana, respectively the president and treasurer of the COSYBU, from 24 to 30 September 2004, due to an open letter written by the trade union leaders of Burundi to the President of the Republic, requesting him to make public the draft national Constitution and to allow the workers and all other citizens to give their views on the matter. These trade union leaders were only freed thanks to the firm intervention of the International Confederation of Free

Trade Unions (ICFTU) and of Belgian, French and Italian trade union organizations. The state secret services also confiscated all of the COSYBU's computer equipment, as well as the information it contained, for a period of three weeks.

266. On 6 January 2005, the director-general of the Bujumbura textile complex imposed a 15-day lay-off on Mr. Raphaël Horumpende, second secretary of the workers' trade union of the enterprise, for having denounced, during a meeting organized and chaired by the same director-general, the embezzlement and misappropriation of funds within the complex. In addition to the management, this meeting brought together the workers' representatives of the works council and the trade union representatives; on the agenda was the analysis of the enterprise's financial situation.

267. On 24 March 2005, the Minister for the Public Service suspended, for a period of three months, four members of the workers' trade union Committee of the Public Service who had been holding a strike since February 2005 to call for an improvement in their catastrophic pay situation (pay ranges from US$7 to $38 per month depending on professional category). The aim of the suspensions was to put an end to the strike and also to break the national trade union movement through repression. The workers affected by this sanction were: Mr. Denis Ngendakubwayo, Mr. Rémy Ciza, Ms. Violette Sindayihebura and Ms. Jacqueline Baransegeta. This measure was only cancelled when prior notification of a general strike was given by the COSYBU following this decision.

268. On 19 April 2005, Ms. Claire Kurubone, second secretary of the workers' trade union section of the para-governmental enterprise Laca (chemical analysis), was laid off for 15 days for having defended the pay interests of a colleague who had returned to Rwanda. This measure was only suspended once Ms. Kurubone had been forced to give up pursuing the issue in question.

269. On 19 April 2005, the director of the ISTEEBU (para-governmental establishment responsible for statistical studies) imposed on the secretary-general of the workers' union of that establishment, Mr. Jean-Marie Nkeshimana, a one-month suspension for having, in collaboration with his committee, denounced the director for embezzlement and poor management.

270. On 26 April 2005, the director of the ISTEEBU imposed, on all the other members of the trade union committee of the establishment, a one-month suspension for having protested in writing against the abusive sanction on their secretary-general. Those suspended were: Mr. Antoine Gahiro, Mr. Joachim Ntisinzira, Ms. Flora Bacanamwo, Mr. Marius Ngezahayo and Ms. Grégonie Nizigama. At the time of drafting this complaint, these people were still being punished. All the trade unions registered in Burundi planned to meet on 18 May 2005 to give prior notification of a general strike if the Head of State did not react positively to a request by the trade unions to put an end to this arbitrary measure.

271. Since the year 2000, the highest authorities in the Republic have been usurping the festivities of 1 May to the detriment of the workers to whom it traditionally belongs all over the world. In 2005, not only did the authorities refuse workers the opportunity to prepare the celebrations themselves, they also refused to allow the president of the COSYBU to make the speech following the workers' march. In his place, a so-called representative of a false employers' trade union confederation (CESEBU) spoke on behalf of the workers.

272. In order to hamper the activities of the COSYBU, and in total violation of the fundamental Conventions on freedom of association ratified by Burundi, the Ministry of Labour has just written a letter to the Vice-President of the Republic and to the

confederal committee of the COSYBU informing it that the mandate of the executive committee of the COSYBU expired on 29 April 2005. He orders that, from now on, the COSYBU will be managed by its confederal committee and that Mr. Pierre Claver Hajayandi may no longer legally lead it. Yet, the COSYBU congress had already been statutorily convened by the confederal committee on 6 April 2005 for 8 and 9 October 2005. The Ministry of Labour and Social Security assumes the right to dictate to the COSYBU how to organize itself and how it should be run. Rather than promoting legality, its principal concern is to interfere in the operations of employers' and workers' trade union organizations and to break up the emerging independent national trade union movement.

273. On his own initiative, the minister has established the Trade Union Confederation of Employers of Burundi (CESEBU). He has called it a trade union confederation although no trade unions belong to it. He gave a copy of his letter to a secretary-general of the Confederation of Free Trade Unions of Burundi (CSB), which ceased to exist following its break-up in 1993 and the departure of all the member trade unions, some to become independent, the others to establish the COSYBU. Established in 1991 by the 18 federations that constituted the Union of Workers of Burundi (UTB), which had pledged allegiance to the single party, the CSB did not hold any congresses, and its last legal secretary-general was elected on 30 December 1991. The current secretary-general, in fact, was a person unknown in trade union circles until the day in 1998 when his predecessor purely and simply called him to hand over the post to him, just when he had been appointed a member of Parliament. The CSB is therefore a fictive trade union confederation, invented and maintained by the Government of Burundi to serve it as needed, in other words, in the event of conflict with the true trade unions. Nevertheless, the minister, who claims to be concerned with the issue of legality, has never written to ask it to account for its legitimacy.

274. According to the COSYBU, this correspondence is a provocation to, on the one hand, justify the refusal to include the president of the COSYBU on the list of delegates to the International Labour Conference and, on the other, disrupt the COSYBU at a time when the President of the Republic has just signed, in violation of the national Constitution, a decree prohibiting any strikes during the electoral period (May-October). The COSYBU sees this decree as a violation of the national Constitution which expressly recognizes this right. The COSYBU also considers this to be a violation of fundamental human rights.

275. On 8 March 2005, Mr. Serge Barahinduka, manager and workers' representative at the works council of the Commercial Bank of Burundi, was suspended for 15 days for having written to the chief executive the day after a meeting between this authority and the staff representatives concerning new staff regulations; the staff representatives had not been involved in the preparation of these regulations. In this letter, containing arguments put forward during the meeting, the staff representative asked the chief executive not to apply the new regulations and proposed jointly drafting enterprise regulations responding to current requirements. He was subsequently accused of having insulted the higher authorities. The COSYBU denounces this excess of power and asks that the person involved have his rights re-established and that the Government respect and ensure respect for the Conventions it has ratified.

B. The Committee's conclusions

276. *The Committee deeply regrets the fact that, despite the time that has passed since the complaint was submitted, the Government has not provided in due time the observations and information requested, although it has been invited to do so on a number of occasions, in particular in the form of an urgent appeal made at its May-June 2006*

meeting. The Committee expresses in particular its concern that the Government has not formulated its observations in another case concerning it either (Case No. 2425), mentioned in this report. This being the case, and in accordance with the applicable procedural rule [see 127th Report of the Committee, para. 17, approved by the Governing Body at its 184th Session], the Committee must submit a report on the substance of this case in the absence of the Government's observations, which it had hoped to receive in due time.

277. *The Committee reminds the Government, first, that the purpose of the whole procedure established by the International Labour Organization for the examination of allegations concerning violations of freedom of association is to promote respect for trade union rights in law and in fact. If this procedure protects governments against unreasonable accusations, governments on their side should recognize the importance of formulating, for objective examination, detailed factual replies concerning the substance of the allegations brought against them [see First Report of the Committee, para. 31].*

278. *The Committee notes that the complainant organization formulates the following allegations: imprisonment of trade union leaders; seizure of computer equipment and confiscation of information belonging to the trade union; suspension and lay-off of several trade union leaders who had only exercised their legitimate trade union activities; interference in the activities of workers' organizations, in particular in the trade union elections and during the Labour Day celebrations; favouritism by the authorities towards a trade union set up entirely by the Government; suspension of the right to strike during the electoral period.*

279. *Concerning the first set of allegations, the Committee notes that the imprisonments in question date back to 2004 and that the trade union leaders concerned appear to owe their release solely to the firm intervention of the ICFTU and other trade union organizations. The Committee expresses its concern at the nature of these allegations, and takes it that they are now a thing of the past. In this regard, the Committee reminds the Government that the arrest, even if only briefly, of trade union leaders and trade unionists for exercising legitimate trade union activities constitutes a violation of the principles of freedom of association and that the arrest of trade unionists may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, paras. 70 and 76].*

280. *As regards the allegations concerning the seizure of computer equipment from the COSYBU for three weeks, as well as the information it contained, the Committee considers, if these allegations prove to be true, that they constitute serious interference by the authorities in trade union activities. The Committee draws the Government's attention to the resolution on trade union rights and their relation to civil liberties, adopted by the International Labour Conference at its 54th Session (1970), which states that the right to adequate protection of trade union property is one of those civil liberties which are essential for the normal exercise of trade union rights [see* ***Digest****, op. cit., para. 184.] The Committee asks the Government to send its observations on this matter as soon as possible and requests it to indicate the concrete reasons for this seizure of trade union property and whether it took place with a legal warrant.*

281. *As regards the allegations concerning the suspension and lay-off of several trade union leaders simply for exercising their legitimate trade union activities, some of whom, at the time the complaint was drafted, were still being punished, the Committee, in the absence of any comments by the Government, can but deplore the large number of cases reported and recall that this type of measure seriously infringes the exercise of trade union rights. The Committee furthermore draws the Government's attention to the provisions of the*

Workers' Representatives' Convention, 1971 (No. 135), ratified by Burundi, and the Workers' Representatives' Recommendation, 1971 (No. 143), in which it is expressly established that workers' representatives 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]. The Committee asks the Government to expedite an independent inquiry into the allegations concerning, in particular, the lay-off or suspension of: Mr. Raphaël Horumpende, Mr. Denis Ngendakubwayo, Mr. Rémy Ciza, Ms. Violette Sindayihebura, Ms. Jacqueline Barasegeta, Ms. Claire Kurubone, Mr. Jean-Marie Nkeshimana, Mr. Antoine Gahiro, Mr. Joachim Ntisinzira, Mr. Marius Ngezahayo, Ms. Flora Bacanamwo, Ms. Grégonie Nizigama and Mr. Serge Barahinduka. If it is established that acts of anti-union discrimination have been committed, the Committee requests the Government to take the necessary compensatory measures, including ensuring the reinstatement of the workers concerned without loss of pay. The Committee requests the Government to keep it informed of the measures taken in this regard.*

282. *As regards interference in the activities of workers' organizations, in particular in the trade union elections and on the occasion of the Labour Day celebrations, which resulted in the difficulties encountered by Mr. Hajayandi and the executive committee of the COSYBU, the Committee has already had to remind the Government (Case No. 2276) that it is the prerogative of workers' organizations to determine the conditions for electing their leaders and the authorities should refrain from any undue interference in the exercise of the right of workers' and employers' organizations freely to elect their representatives, which is guaranteed by Convention No. 87 [see* ***Digest****, op. cit., para. 351]. The fundamental idea of Article 3 of this Convention is that workers and employers may decide for themselves the rules which should govern the administration of their organizations and the elections which are held therein [see* ***Digest****, op. cit., para. 354]. With regard to the allegations relating particularly to the appointment of workers' representatives to the Conference, these were addressed by the Credentials Committee at the 93rd Session (June 2005) of the International Labour Conference (see* Provisional Record *No. 4D, paras. 9-12). The Committee also notes that, during the last session of the Conference (June 2006), the Credentials Committee noted an improvement in the matter (see* Provisional Record *No. 5C, para. 9). This being the case, the Committee considers that this matter does not require a more in-depth examination.*

283. *As regards the allegations of favouritism towards the Confederation of Free Trade Unions of Burundi (CSB), which was allegedly set up entirely by the Government, the Committee, while regretting the absence of a reply from the Government on this subject, reminds it that by putting an organization at an advantage or a disadvantage vis-à-vis other organizations, it could influence workers' choices regarding the organization to which they intend to belong. Furthermore, a government which, knowingly, acted in this way would also be infringing the principle established in Convention No. 87, whereby public authorities must refrain from any involvement which could restrict the rights established by this instrument or hinder their legal exercise. The Committee trusts that the Government will take full account of these principles in future.*

284. *Lastly, in respect of the decree prohibiting the exercise of the right to strike during the electoral period, the Committee considers that such a prohibition could considerably restrict the means available to trade unions to promote and defend the interests of their members, as well as the right to organize activities and their programme of action, as established in Article 3 of Convention No. 87. The Committee stresses in this connection that a general prohibition of strikes can only be justified in the event of an acute national emergency and for a limited period of time [see* ***Digest****, op. cit., para. 527]. The*

Committee regrets not having any information on the exact circumstances that gave rise to this prohibition nor on its exact nature. It requests the Government to confirm that the text in question is no longer in force, given that the electoral period to which the complainant organization refers has now passed.

The Committee's recommendations

285. ***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, although it has been invited to do so on a number of occasions, including in the form of an urgent appeal and requests it to reply as soon as possible.***

(b) ***The Committee asks the Government to send its observations on the subject of the seizure of computer equipment from the COSYBU as soon as possible and requests it to indicate the concrete grounds for this seizure of trade union property and whether it took place with a legal warrant.***

(c) ***The Committee requests the Government to expedite an independent inquiry into the allegations concerning, in particular, the lay-off or suspension of: Mr. Raphaël Horumpende, Mr. Denis Ngendakubwayo, Mr. Rémy Ciza, Ms. Violette Sindayihebura, Ms. Jacqueline Barasegeta, Ms. Claire Kurubone, Mr. Jean-Marie Nkeshimana, Mr. Antoine Gahiro, Mr. Joachim Ntisinzira, Mr. Marius Ngezahayo, Ms. Flora Bacanamwo, Ms. Grégonie Nizigama and Mr. Serge Barahinduka. If it is established that acts of anti-union discrimination have been committed, the Committee requests the Government to take the necessary compensatory measures, including ensuring the reinstatement of the workers concerned without loss of pay. The Committee requests the Government to keep it informed of the measures taken in this regard.***

(d) ***Lastly, as regards the decree prohibiting the exercise of the right to strike during the electoral period, the Committee regrets the Government's action and requests the Government to confirm that the text in question is no longer in force, given that the electoral period to which the complainant organization refers has now passed.***

CASE NO. 2443

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

Complaint against the Government of Cambodia presented by the International Confederation of Free Trade Unions (ICFTU) supported by the International Textile, Garment and Leather Workers' Federation (ITGLWF)

Allegations: The complainant alleges that Fortune Garment Co. has denied its workers the right to bargain collectively, has discriminated against union leaders, in particular by filing civil and criminal lawsuits against them for taking legitimate collective action, in order to prevent them from organizing and bargaining. The complainant further alleges that the company has a documented poor record on workers' rights and states that there is a growing tendency for Cambodian employers to sue workers or to bring criminal charges against them, to deal with what are essentially industrial issues

286. The complaint is set out in communications by the International Confederation of Free Trade Unions (ICFTU) dated 31 August 2005 and 2 March 2006. In a communication dated 7 September 2005, the International Textile, Garment and Leather Workers' Federation (ITGLWF) associated itself with the complaint.

287. The Government forwarded its observations in communications dated 14 November 2005 and 17 October 2006.

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

A. The complainants' allegations

289. In its communication dated 31 August 2005, the International Confederation of Free Trade Unions (ICFTU) states that the employer in the present case, the Fortune Garment and Woollen Knitting Factory (Fortune Garment Co.) possessed a poor record with respect to worker rights. In 2002 the ILO conducted a monitoring exercise involving 65 factories, including the Fortune Garment Co. The monitors examined such issues as wages, working hours, health and safety, and labour relations. The review brought to light a number of violations, and appropriate recommendations were made. The Fortune Garment Co. was among those enterprises with the most violations. Furthermore, the 2004 Eighth ILO project report indicated that, of the 51 recommendations made to the company, only six

had been implemented; four recommendations were partly implemented and 41 had not been implemented.

290. According to the complainant, on 30 May 2004 over 1,000 of the 2,700 workers of the Fortune Garment Co. signed with their thumbprints a petition addressed to the management of the company requesting a pay increase. The petition stated that, unless the workers' demands were met, they would go on strike. The workers were not unionised at the time; they selected as their representative Mr. Sok Vy, a worker who spoke Chinese and would therefore be able to communicate more easily with the Chinese-speaking managing director.

291. On 2 June 2004, the management rejected the demands and a strike commenced. In retaliation, Mr. Sok Vy was suspended and then dismissed. On 5 June 2004 Mr. Sok Vy was summoned by the Kandal Provincial Court under charges filed by the Fortune Garment Co., according to which he allegedly violated criminal law by inciting other workers to "commit criminal acts" and "damage property". Mr Sok Vy was the only person named in the summons. Later that day, Mr. Sok Vy and four other workers met with management, who told them that, if they agreed to speak to the other workers about stopping the strike, the company would drop the charges. On 6 June 2004 the workers ended their strike action and returned to work.

292. However, the next day the company suspended Mr. Sok Vy, without having obtained prior permission from the provincial labour office, as required by Ministry of Labour regulations. And, on July 8, 2004, in spite of the fact that management had said the charges would be dropped, Mr. Sok Vy received another summons to appear before the court. Upon receiving the summons, Mr. Sok Vy brought it to the manager and asked for an explanation. The manager then produced a letter and said that if Mr. Sok Vy would sign it, the company would drop the charges and he could remain at his job. The letter stated that Mr. Sok Vy had made "unreasonable demands" and that he would not press any more demands on the company in the future. Anxious to keep his job, Mr. Sok Vy signed the letter, which he was told to copy out in his own handwriting.

293. On 8 August 2004, the Coalition of Cambodian Apparel Workers' Democratic Union (CCAWDU) organized a union at Fortune Garment Co. Mr. Sok Vy was elected president.

294. On 19 December 2004, after the company had introduced some pattern design changes that made it difficult for workers to maintain their level of earnings, the union requested an increase in the piece rate. No agreement was reached and the matter was submitted to the National Arbitration Council. On 20 December 2004 a meeting was held between the CCAWDU branch union and management; the union demanded the reinstatement of Mr. Sok Vy, who had again been suspended on 13 December, for an indefinite period, as well as an end to discrimination against union leaders and activists.

295. On 23 December 2004 another union called a strike at Fortune Garment Co. The stoppage, which was not supported by CCAWDU, only lasted for about ten minutes. Management, however, blamed CCAWDU for the strike: it suspended ten executive committee members and filed charges against them for $50,000.

296. On 27 December 2004, Mr. Sok Vy received a summons ordering him to appear before the court on 31 December 2004 to face charges related to the strike that had occurred in June.

297. On 31 January 2005, the company dismissed 20 CCAWDU activists. Seventeen of them accepted their severance pay; the other three are challenging their termination on the grounds that it constitutes anti-union discrimination.

298. According to the complainant, on 7 February 2005, Mr. Sok Vy stood trial at the Kandal Provincial Court. On that day, in breach of the right of freedom of assembly, police prevented some 200 workers who planned to attend the trial from boarding the trucks that would take them to the courthouse. During the trial, the company failed to present a credible case: no witnesses testified that they had seen Mr. Sok Vy incite other workers or damage company property and, although one manager stated that a windowpane and water hose were damaged during the strike, he had not seen Mr. Sok Vy do any damage. Also, another witness who had earlier submitted a written deposition to the court later retracted his statement and said that nobody had coerced him into going on strike. For the defence, witnesses testified that there was no strike leader, that the workers had simply walked out when their demands were rejected, and that the company had locked the gates after the strike began, preventing anyone from going back to work even if they had wished to. Finally, other witnesses were prevented from entering the court compound, and so were not able to testify in Mr. Sok Vy's defence.

299. The complainant adds that on 10 February 2005 Mr. Sok Vy was found guilty of "incitement to commit criminal acts" under article 60 of the Criminal Code, and given a one-year suspended sentence. The judge also imposed a two month suspended sentence for "damaging company property", in spite of the fact that, in his written verdict, he had concluded that there was no evidence presented at the trial to find Mr. Sok Vy guilty of the charge. Moreover, the judge left open the possibility that Fortune Garment Co. may wish to sue Mr. Sok Vy in Civil Court for the losses incurred during the June strike; the company's lawyer claimed at trial that the damages amounted to $300,000, but offered no evidence to support this claim. The ICFTU alleges that Mr. Sok Vy's conviction, together with the legal actions brought against the ten members of the CCAWDU's executive committee mentioned above, constitute a pattern of punishing workers for engaging in legitimate collective action by suing them for damages.

300. The ICFTU indicates that, in the meantime, the Fortune Garment Co. continued to dismiss union activists. Mr. Yern Channy and Mr. Ly Lay were dismissed on 4 May 2005, and Ms. Keo Leakena was dismissed on 18 May 2005.

301. The ICFTU states that the procedures to be followed before being able to legally strike are very long. When disputes arise, arbitration by the Ministry of Labour, followed by arbitration under the auspices of the Arbitration Council must first be pursued before a strike may legally be declared. Given that many strikes break out over immediate issues, such as dismissals of worker representatives, harassment by security guards, and non-payment of wages – issues for which no grievance mechanisms exist – it is not surprising that workers engage in irregular forms of action such as wildcat strikes rather than waiting for up to 37 days to take legal strike action. The ICFTU alleges that over 60 strikes took place over the past three years, none of which were held in accordance with applicable rules and procedures.

302. In a communication dated 2 March 2006, the complainant refers to a 21 April 2005 Arbitration Council award concerning both Mr. Ly Lay and Mr. Sok Vy. The complainant states that the matter of the lay-offs of Mr. Ly Lay, Mr. Sok Vy and several other workers in the Fortune Garment Co. was brought before the Arbitration Council. All of the workers concerned, most of whom were trade unionists, accepted compensation for the lay-offs, except Mr. Ly Lay, who refused to accept the redundancy compensation given the fact that the lay-offs were due to the workers taking industrial action on four occasions, and also in his case due to his union activity. The company refused reinstatement but offered $302 in compensation. In view of this offer, the Arbitration Council found that Mr. Ly Lay should accept the compensation, and therefore rejected the call for reinstatement. However, no proper assessment was made as to whether his dismissal was lawful; nor was it clear from the award why Mr. Ly Lay's reinstatement was rejected.

303. With respect to Mr. Sok Vy, the complainant states that it was established in the award that he was dismissed in December 2004 for serious misconduct. The letter of dismissal was forwarded to the Labour Office in the province of Kandal, which on 21 December 2004 accepted the dismissal. On 22 December 2004 the CCAWDU appealed this decision, and the Ministry of Labour did not respond, implying approval of the Kandal Labour Office's decision to uphold Mr. Sok Vy's dismissal. According to Fortune Garment Co. he had falsified the information on his identification card (ID) just before he was elected union president, so as to appear three years older than he was, namely 25 years old, in order to obtain election; under section 286 of the Labour Law union officers must be at least 25 years old. According to the Arbitration Council, Mr. Sok Vy indicated that he had changed his ID to correct the birth date, which was wrong. The Arbitration Council found that, regardless of whether the birth date was wrong on the first ID, Mr. Sok Vy had supplied wrong information to his employer, whether when he was hired or at the time of the union election, and this amounted to serious misconduct. The Arbitration Council therefore deemed the dismissal legitimate and rejected his demand for reinstatement.

304. According to the complainant, the Arbitration Council did not properly address the many aspects of the relationship between Mr. Sok Vy and Fortune Garment Co., especially with regard to the harassment he had endured prior to his election as union president, including his suspensions. Furthermore, deeming the change in birth date on the ID to be "serious misconduct" was unjustified: Mr. Sok Vy was not looking to gain anything from the employer in changing the birth date, and in any event the said act in no way affected the work he performed for the employer. The ICFTU also indicated that the dismissal of Mr. Sok Vy did not immediately follow the changing of the ID, as he was elected union president in August 2004, but dismissed in December 2004. The Arbitration Council, in summation, failed to thoroughly consider all of the aspects of his case. The ICFTU also adds that the legal age requirement of 25 years for trade union office bearers runs contrary to the right of workers to freely choose their own representatives.

305. Finally, in its 2 March 2006 communication the complainant states that the Government has not provided information with respect to the Fortune Garment Co.'s dismissals of Mr. Yern Channy, Mr. Ly Lay and Ms. Keo Leakena.

B. The Government's reply

306. In communications dated 14 November 2005 and 17 October 2006, the Government states that the Arbitration Council issued an award to reject the complaint of the Coalition of Cambodian Apparel Workers' Democratic Union (CCAWDU), which demanded that Fortune Garment Co. reinstate Mr. Sok Vy. It further transmitted a Khmer copy of the Arbitration Council award regarding Mr. Sok Vy and Mr. Ly Lay.

307. The Government also indicates that Mr. Sok Vy was brought up on criminal charges in Kandal Provincial Court, and on 10 February 2005 was found guilty and sentenced to 14 months' imprisonment. That same verdict also indicated that Fortune Garment Co. could bring civil charges against Mr. Sok Vy for damages.

C. The Committee's conclusions

308. *The Committee notes that the allegations concern violations of the right to collective bargaining and the suspension and dismissal of trade union members for engaging in trade union activity. In addition to Mr. Sok Vy, ten members of the Coalition of Cambodian Apparel Workers' Democratic Union's (CCAWDU) executive committee were suspended on 20 December 2004, and 20 CCAWDU activists were dismissed on 31 January 2005.*

309. *The Committee notes from the information supplied by the complainant that, following a strike taken by workers of the Fortune Garment Co. on 2 June 2004, the management of Fortune Garment Co. dismissed worker representative Mr. Sok Vy and filed criminal charges against him in Kandal Provincial Court. On 8 July 2004, Mr. Sok Vy was also forced, under pain of legal action and dismissal, to sign a letter stating that he would not press any more demands on the company in the future. On 13 December 2004 Mr. Sok Vy – by then president of the CCAWDU – was dismissed by the Fortune Garment Co.*

310. *The Committee notes the Government's indication that the Arbitration Council had issued an award rejecting Mr. Sok Vy's claim for reinstatement. According to the complainant and a translated version of the arbitration award, the Arbitration Council upheld Mr. Sok Vy's dismissal for serious misconduct as he had falsified his ID, listing his age as 25 years old in order to fulfil the requirement, as set forth in section 286 of the Cambodian Labour Law, that trade union office bearers be at least 25 years old. In this regard, the Committee recalls that the right of workers' organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining conditions of eligibility of leaders or in the conduct of the elections themselves [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 1996, 4th edition, para. 353]. The Committee therefore considers that the Arbitration Council's finding of serious misconduct is based on a legal requirement that is incompatible with the principles of freedom of association. Accordingly, the Committee asks the Government to amend section 286 of the Labour Law so as to remove the age restriction on the right of workers to elect their own representatives in full freedom, and to keep it informed of developments in this regard.*

311. *The Committee regrets that the Government otherwise does not respond to the serious allegations concerning Mr. Sok Vy's treatment at the hands of his employer. Given that the Arbitration Council's rejection of Mr. Sok Vy's request for reinstatement is based on a legislative provision that is incompatible with the principles of freedom of association, the Committee considers reinstatement to be the most appropriate course of action, and requests the Government to take the necessary measures to ensure that Mr. Sok Vy is fully reinstated in his previous position. The Committee asks the Government to keep it informed of developments in this regard.*

312. *With regard to Mr. Sok Vy's criminal conviction for incitement to commit criminal acts and damaging company property, the Committee notes with concern the allegations of the imposition of a 14-month suspended sentence despite the conclusions in the judgement that there was insufficient evidence to find Mr. Sok Vy guilty of the charges, as well as the doubts raised over the due process guarantees provided during the trial. The Committee regrets that the Government has not submitted any information with respect to this allegation; it asks the Government to reply to these allegations and to supply a copy of the court decision without delay. It further requests the Government to indicate whether Mr. Sok Vy enjoys the right of appeal with respect to this judgement and if so whether any appeal has been made.*

313. *The Committee notes that Mr. Sok Vy's conviction is also of particular concern given that section 269(3) of the Labour Law disqualifies persons convicted of any crime from being elected to administrative and managerial posts in a professional organization. On this matter the Committee recalls that a law which generally prohibits access to trade union office because of any conviction is incompatible with the principles of freedom of association, when the activity condemned is not prejudicial to the aptitude and integrity required to exercise trade union office [see* ***Digest****, op. cit., para. 383]. The Committee*

therefore asks the Government to amend section 269(3) so as to bring it into conformity with the principles of freedom of association.

314. *The Committee notes that, according to the complainant and the arbitration award, the Arbitration Council rejected Mr. Ly Lay's demand for reinstatement. The Arbitration Council instead upheld the offered compensation, in the amount of US$302, but made no determination as to whether his dismissal was lawful or provide justification for rejecting his reinstatement. The Committee regrets that the Government, aside from supplying a Khmer copy of the Arbitration Council award relating to Mr. Ly Lay, has not provided any other information with respect to this allegation. It further regrets that the Government has not submitted any information on the alleged suspensions and dismissals of the other trade unionists mentioned in the complaint. The Committee does note, however, from the arbitration award that some 100 workers had been dismissed (most of them union members) without reason (a fact acknowledged by the employer) and that the award found that, in such cases, it was sufficient to pay the compensation provided for in the law, which had been done. Under these circumstances, and considering the seriousness of these allegations involving the dismissal of a significant number of trade union officials and activists without any review as to the possible anti-union nature of the motives behind this act, the Committee requests the Government promptly to carry out an independent inquiry into these allegations of anti-union discrimination. It asks the Government to ensure that, if it is found that the workers were dismissed as a result of their legitimate trade union activities, they are reinstated in their posts without loss of wages 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 beyond that provided in the law for simple unmotivated dismissal, but rather such compensation as to represent a sufficient dissuasive sanction for anti-union dismissal. The Committee asks the Government to keep it informed of developments in this regard.*

315. *The Committee underscores that these allegations concern the suspension or dismissal of a significant number of trade unionists, on separate occasions. In this connection, the Committee emphasizes that the Government is responsible for preventing all acts of anti-union discrimination, and furthermore that the legislation must make express provision for appeals and establish sufficiently dissuasive sanctions against acts of anti-union discrimination to ensure the practical application of Articles 1 and 2 of Convention No. 98 [**Digest**, op. cit., para. 743]. Noting additionally that, according to the complainants, of the 20 CCAWDU activists allegedly dismissed on 31 January 2005, 17 had accepted their severance pay, whereas the other three were challenging their termination (according to the arbitration award some 100, mostly union members, were dismissed), the Committee is compelled to recall that it would not appear that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is granted by legislation in cases where employers can, in practice, on condition that they pay the compensation prescribed by law for cases of unjustified dismissal, dismiss any worker, if the true reason is the worker's trade union membership or activities [**Digest**, op. cit., para. 707]. The Committee requests the Government to take the appropriate steps without delay to ensure that these principles are fully applied and to keep it informed of developments in this respect.*

316. *Finally, the Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*

The Committee's recommendations

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

(a) The Committee asks the Government to amend section 286 of the Labour Law by eliminating the minimum age requirement of 25 years for holding trade union office, thereby giving effect to the right of workers' organizations to choose their representatives in full freedom.

(b) Concerning the dismissal of Mr. Sok Vy by the Fortune Garment Co., the Committee requests the Government to take the necessary measures to ensure that Mr. Sok Vy is fully reinstated in his previous position and to keep it informed of developments in this regard.

(c) Concerning the conviction of Mr. Sok Vy, the Committee asks the Government to supply a copy of the said court decision without delay and to reply to the complainant's allegation that a 14-month suspended sentence was imposed despite the fact that the judgement had concluded that there was insufficient evidence to find him guilty and to the concerns raised in respect of the due process guarantees provided during the trial. It further requests the Government to indicate whether Mr. Sok Vy enjoys the right to appeal his conviction and, if so, whether an appeal has been made.

(d) The Committee asks the Government to amend section 269(3) of the Labour Law so as to prohibit access to trade union office only for convictions wherein the activity condemned is prejudicial to the aptitude and integrity required to exercise trade union office.

(e) With respect to the dismissals of Mr. Ly Lay and other trade unionists from the Fortune Garment Co., the Committee requests the Government promptly to undertake an independent inquiry into these allegations, with a view to the full reinstatement of or, should that not be possible, the payment of adequate compensation, such as to represent a sufficient dissuasive sanction for anti-union dismissal, to those workers found to have been dismissed for engaging in legitimate trade union activity.

(f) The Committee requests the Government to take appropriate measures without delay to ensure that workers enjoy effective protection against acts of anti-union discrimination, including the establishment of sufficiently dissuasive sanctions.

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

CASE NO. 2405

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

Complaint against the Government of Canada concerning the Province of British Columbia presented by
— Education International (EI)
on behalf of
— the Canadian Teachers' Federation (CTF) and
— the British Columbia Teachers' Federation (BCTF)

Allegations: The complainant organization alleges that the Government has further violated international principles of freedom of association and free collective bargaining with the enactment of Bill No. 12 (the Teachers' Collective Agreement Act 2005), which unilaterally extended the collective agreement and ensured that the teachers could not bargain a wage increase or any other working conditions through the appropriate mechanism, ended the partial strike engaged in by members of the BCTF and prevented the Labour Relations Board from issuing its ruling on essential services that would have permitted teachers to engage in some form of withdrawal of educational services

318. The Committee last examined this case at its March 2006 meeting, where it issued an interim report, approved by the Governing Body at its 295th Session [see 340th Report, paras. 433-457].

319. The Government of Canada transmitted the observations of the Government of British Colombia in a communication dated 21 May 2006.

320. 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. Previous examination of the case

321. At its March 2006 meeting, the Committee made the following recommendations in relation to this case [see 340th Report, para. 457]:

(a) Noting that, following the decision of the Supreme Court, full and frank consultations should have been held with the British Columbia Teachers' Federation (BCTF), the Committee firmly requests the Government of British Columbia to amend the impugned legislation, in line with freedom of association principles; the Committee once again requests the Government to refrain in future from having recourse to retroactive

legislative intervention in the collective bargaining process and to keep it informed of developments as regards the collective bargaining situation in the education sector.

(b) The Committee requests the Government to provide its observations on the additional allegations contained in the communication of 7 February 2006 from EI and the BCTF.

B. The complainant's additional allegations

322. In a communication of 7 February 2006, the complainant organization, Education International, provided additional information in connection with alleged further violations of freedom of association and collective bargaining. The complainant summarized the issue as follows (a detailed chronology of events specifically related to this new development is attached as annex to the present document).

323. On 6 October 2005, the British Columbia Government appointed a new commission to inquire into labour relations matters between the BCFTU and the employer as requested by the Committee on Freedom of Association. The commission's mandate is to make recommendations to the Minister of Labour regarding: (i) determining which matters, if any, should be concluded at local bargaining; (ii) methods and costs associated with the harmonization of compensation structures within the financial mandate established by the Government from time to time; (iii) establishment of a provincial master collective agreement; (iv) bargaining processes for provincial negotiations that are timely, structured, provide for public accountability, promote settlement at the bargaining table and foster effective and productive union/management relations, and to provide the Commissioner's "thoughts on the viability of a local bargaining system, the structures and strategies that would support such a system and the related accountabilities necessary to ensure a local bargaining structure".

324. On 7 October 2005, the British Columbia Government passed the Teachers' Collective Agreement Act, (Bill 12/2005). This legislation contravenes previous recommendations and the fundamental principles of free collective bargaining and freedom of association. Bill 12/2005 was introduced in the British Columbia Legislature on 3 October 2005. The Bill went from first to third reading in four days. Bill 12/2005 was passed on 7 October 2005 and received Royal Assent that same day. By extending the collective agreement that expired on 30 June 2004 to 30 June 2006, Bill 12/2005 accomplished three British Columbia objectives: (1) the Government ended the partial strike engaged in by members of the BCTF; (2) the Government prevented the Labour Relations Board from issuing its ruling on essential services that would have permitted teachers to engage in some form of full-scale withdrawal of educational services; and (3) the Government ensured that the teachers could not bargain a wage increase or any other working conditions through the appropriate mechanism, free collective bargaining. Bill 12/2005 resulted in five years of imposed conditions of employment, no improvement in students' learning conditions, and a freeze on teachers' salaries. It also resulted in teachers exercising their right to strike outside of the structure of the British Columbia Labour Relations Code.

325. The complainant recalls that the Committee has already condemned the British Columbia Government for enacting Bill 18/2001 (the Skills Development and Labour Statutes Amendment Act) which extended the concept of "essential services" to include the provision of educational programmes), Bill 27/2002 and Bill 28/2002. Despite the Committee's condemnation, teachers are still governed by essential services legislation, restricting their right to strike. In addition, Bills 27/2002 and 28/2002 have never been repealed or amended to reflect the needs or rights of teachers. Consequently, the British Columbia Government continues to violate international standards. The British Columbia Government sets the framework for teacher collective bargaining through legislation. Despite being governed by the Labour Relations Code which permits free collective bargaining (with some restrictions such as essential services), teachers have been

arbitrarily excluded from the rights to collective bargaining under the Code for two successive rounds of bargaining. In both 2002 and 2005, the British Columbia Government imposed a collective agreement; ended the strike before teachers had an opportunity to withdraw instructional services for a single day; and did not attempt to duplicate, in any fashion, the results of collective bargaining, such as occurs in an interest arbitration structure.

326. As in 2002, in 2005 teachers attempted to follow the rules that the Government itself had established under the Labour Relations Code. They participated in hearings to set the essential service levels prior to engaging in their job action. The first part of those hearings addressed what duties were essential in the context of a partial strike. The second part of the hearings addressed the extent to which teachers could withdraw instructional services. The teachers engaged their limited right to strike by following essential services orders with respect to their partial strike. Just at the point that the British Columbia Labour Relations Board was to rule on the permissibility of teachers withdrawing instruction, the British Columbia Government imposed a contract on the teachers to end the strike. This meant that teachers were unable to exercise even their limited right to withdraw instructional services under essential services legislation. In both 2002 and 2005, the British Columbia Government ensured that teachers were not permitted to withdraw *any* instructional services. When the British Columbia Government announced that it would deny even this most trivial interference with employer operations and moved swiftly to end bargaining, any vestige of free collective bargaining was shattered. The teachers were forced to respond outside of the legal framework. The BCTF was penalized for this: the employer enforced the Labour Relations Board Order in the British Columbia Supreme Court, resulting in a $500,000 penalty on the BCTF.

327. In enacting Bill 12/2005, the British Columbia Government imposed terms and conditions of employment on teachers without discussion or consultation, contrary to the Committee's recommendations. By its actions, the British Columbia Government deprived teachers in British Columbia of any lawful means to promote and defend their occupational interests. It also undermined the institutional right of the BCTF to act as the bargaining agent for its members.

328. The complainant further refers to the following statement of the Vice-Chairperson and Registrar of the British Columbia Labour Relations Board regarding the British Columbia Government's propensity to impose collective agreements on working people:

> … having established this public policy and statutory framework, governments have reacted to public pressure and imposed collective agreement terms by legislation to end several disputes. While the legislation may end a dispute, it cannot force cooperation, it cannot force creative and innovative thinking to find long-term solutions to problems and it cannot force the necessary dialogue to create productive, flexible and adaptable workplaces. *Imposing terms of a collective agreement by legislative intervention has a chilling effect on the long-term collective bargaining relationship.* Parties may not be motivated to find collaborative solutions and will let government make the tough choices; or, parties may reach a short-term strategic solution in order to avoid the legislative "hammer", but the long-term relationship may not be improved.

In his view, governments should establish public policy, establish the statutory framework and then "let the community operate within the established framework". Without commenting on the current framework, he considered that a re-evaluation of collective bargaining in some sectors may be necessary. He pointed out that collective bargaining in the K to 12 education sector had been reviewed under the auspices of the Wright Commission Report, released in December 2004. With regard to this report, the complainant states that the British Columbia Government has not acted on the

recommendations contained therein and has instead imposed another collective agreement and appointed another commissioner.

329. The complainant feels that the British Columbia Government has demonstrated an utter disregard for its own rules and the rights of working people in British Columbia. The abrogation of the collective bargaining process through legislative intervention is inconsistent with and contrary to the whole system of free collective bargaining and freedom of association. The actions of the British Columbia Government undermine the democratic collective bargaining system in British Columbia, contrary to international standards developed and adopted by the ILO to which Canada is a signatory. Not only has the British Columbia Government refused to follow the recommendations adopted by the Governing Body and ignored the ILO's fundamental principles, it has again unilaterally imposed legislation contrary to the Committee's recommendations as adopted by the Governing Body.

C. The Government's reply

330. In its communication of 21 May 2006, the Government of Canada provides the observations of the British Columbia Government on the additional allegations of the complainants contained in the communication of 7 February 2006. In keeping with its previous observations on this case, the Government disagrees with the allegations made by the Canadian Teachers' Federation (CTF) and the British Columbia Teachers' Federation (BCTF). In the Government's opinion, the Teachers' Collective Agreement Act (TCAA) does not violate ILO Convention No. 87, as it does not restrict workers' rights to establish or form organizations of their own choosing, draw up their own constitutions and rules, elect their representatives, organize their administration or formulate their programmes. Nor does it dissolve or suspend workers' organizations, infringe on workers' organizations' right to join federations, impede their legal personality, or contravene the law of the land.

331. The Government explains that the TCAA was intended to extend a collective agreement so that children would have full access to their education throughout the school year and to ensure that the Government could proceed with plans to find effective ways to resolve the existing failing bargaining system before resuming negotiations.

332. As for the Industrial Inquiry Commission, the Government explains that it was appointed by the British Columbia Government to examine effective ways to resolve the failing bargaining system currently in place with the BCTF. The Commission was charged with reporting to the Government by 31 March 2006. The report has been received and the Government is currently considering the recommendations of the Commission.

D. The Committee's conclusions

333. *The Committee recalls that this case concerns allegations of legislative intervention in the collective bargaining process in the education sector in the Province of British Columbia. In its previous examination, the Committee had examined allegations that the Government, in order to re-impose an arbitration decision that had been overturned by the British Columbia Supreme Court, had adopted unilaterally and without any consultation with social partners, retroactive legislation (Bill 19/2004, amending the Education Services Collective Agreement Act and the Schools Act) that modified or eliminated numerous provisions from freely negotiated collective agreements in the education sector. The Committee had firmly requested that the Government of British Columbia amend this legislation and refrain in future from having recourse to retroactive legislative intervention in the collective bargaining process. The Committee had also recalled that it*

examined this case in the context of its previous decisions in Cases Nos. 2166 and 2180 (all relating to legislative interventions in collective bargaining), and more particularly Case No. 2173, which involved closely related legislation: the Education Services Collective Agreement (Bill 27/2002) and the Public Education Flexibility and Choice Act (Bill 28/2002).

334. *In their latest communication dated 7 February 2006, the complainants averred that the British Columbia Government has further violated international principles of freedom of association and free collective bargaining with the enactment of Bill 12 (the Teachers' Collective Agreement Act, 2005). The complainants summarized the issue as follows: Bill 12/2005 was passed on 7 October 2005 and received Royal Assent that same day; by extending the collective agreement that expired on 30 June 2004 to 30 June 2006, Bill 12/2005 accomplished three British Columbia Government objectives: (1) it ended the partial strike engaged in by members of the BCTF; (2) it prevented the Labour Relations Board from issuing its ruling on essential services that would have permitted teachers to engage in some form of withdrawal of educational services; and (3) ensured that the teachers could not bargain a wage increase or any other working conditions through the appropriate mechanism. Bill 12/2005 resulted in five years of imposed conditions of employment, no improvement in students' learning conditions, a freeze on teachers' salaries and in teachers exercising their right to strike outside of the structure of the British Columbia Labour Relations Code. According to the complainants, the latest government action further confirmed and expanded the British Columbia Government's disturbing pattern of disregard for the basic principles of freedom of association and free collective bargaining. Although the British Columbia Government may recognize collective bargaining for teachers on paper, teachers have been "effectively" deprived of any lawful means of exercising their right to strike. The British Columbia Government had shown disrespect both for its own rules and the decisions of the ILO.*

335. *The Committee deeply regrets the allegations of the Government's continuing interference in collective bargaining through legislation aimed at stripping the BCTF of its collective bargaining rights. While taking due note of the Government's indication that the Teachers' Collective Agreement Act (Bill 12/2005) was intended to extend a collective agreement so that children would have full access to their education throughout the school year and to ensure that the Government could proceed with plans to find effective ways to resolve the existing failing bargaining system before resuming negotiations, the Committee is particularly concerned at this latest unilateral intervention on the part of the Government despite previous recommendations of the Committee to avoid doing so. Noting that all the acts complained of in these recent cases against the Government of British Columbia involve legislative intervention by the Government in the bargaining process, either to put an end to a legal strike, to impose wage rates and working conditions, to circumscribe the scope of collective bargaining, or to restructure the bargaining process, the Committee once again reiterates what it had previously stressed.*

> *Recalling that the voluntary negotiation of collective agreements, and therefore the autonomy of bargaining partners, is a fundamental aspect of freedom of association principles [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 1996, 4th edition, para. 844] …, the Committee regrets that the Government felt compelled to resort to such measures and trusts that it will avoid doing so in future rounds of negotiations. The Committee also points out that repeated recourse to legislative restrictions on collective bargaining can only, in the long term, prejudice and destabilize the labour relations climate if the legislator frequently intervenes to suspend or terminate the exercise of rights recognized for unions and their members. Moreover, this may have a detrimental effect on workers' interests in unionization, since members and potential members could consider it useless to join an organization the main objective of which is to represent its members in collective bargaining, if the results of bargaining are constantly cancelled by law [see 330th and 340th Reports, paras. 304 and 452 respectively].*

336. *Emphasizing once again the utmost importance attached to the voluntary nature of collective bargaining and to the autonomy of bargaining partners, the Committee urges the Government to refrain in future from having recourse to such legislative intervention in the collective bargaining process. Noting that the Government is currently considering the recommendations of the Industrial Inquiry Commission, appointed by the British Columbia Government to examine effective ways to resolve the failing bargaining system currently in place with the BCTF, the Committee expects that these recommendations will assist in resolving the difficulties encountered in the collective bargaining system in British Columbia in a manner fully consistent with the principles of freedom of association. The Committee urges the Government to review these recommendations in full consultation with the social partners concerned and requests the Government to keep it informed of developments in this regard. The Committee suggests that the Government avail itself of the technical assistance of the Office with respect to the matters raised in this case.*

337. *Deeply regretting further that the Government's reply does not indicate the measures taken or envisaged to implement the Committee's previous recommendation to amend Bill 19/2004 (amending the Education Services Collective Agreement Act and the Schools Act), which unilaterally modified or eliminated hundreds of provisions from negotiated collective agreements, the Committee requests the Government of British Columbia to amend the impugned legislation in line with freedom of association principles.*

The Committee's recommendations

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

(a) The Committee suggests that the Government avail itself of the technical assistance of the Office with respect to the matters raised in this case.

(b) The Committee urges the Government of British Columbia to amend Bill 19/2004 and Bill 12/2005 in line with freedom of association principles and the international commitments made by the Government of Canada.

(c) The Committee urges the Government to refrain in future from having recourse to retroactive legislative intervention in the collective bargaining process and expects that the recommendations made in the recent report of the Industrial Inquiry Commission will assist in resolving the recent difficulties encountered in the collective bargaining system in British Columbia in a manner fully consistent with the principles of freedom of association. It urges the Government to keep it informed of developments in this regard.

Annex

April 2004	The parties began the process of collective bargaining for a new collective agreement.
30 June 2004	The collective agreement between the parties expired.
19-26 September 2005	Essential services hearing as the Labour Relations Board were held to determine to what extent teachers could fully withdraw educational services in the context of essential services legislation.

20-22 September 2005	The BCTF held a strike vote; teachers voted 88.5 per cent in favour of a strike.
28 September 2005	Phase (a) of the teachers' job action plan began, which was a withdrawal of non-instructional (administrative) duties (the "partial strike").
3 October 2005	The British Columbia Government introduced Bill 12/2005, intended to end the partial strike and impose another collective agreement on the parties.
5 October 2005	Teachers voted to withdraw their services on 7 October to protest Bill 12/2005 because it imposed another collective agreement.
6 October 2005	The employer applied to the British Columbia Labour Relations Board for an order that an anticipated withdrawal of services on 7 October would constitute an illegal strike. The Labour Relations Board granted the order.
6 October 2005	The British Columbia Government announced Vince Ready as Industrial Inquiry Commissioner.
7 October 2005	Bill 12/2005 was passed and received Royal Assent. Teachers withdrew their services.
9 October 2005	The Employer sought to enforce the Labour Relations Board order in the British Columbia Supreme Court. The employer asked for a declaration of contempt of court and a fine against the BCTF.
13 October 2005	The British Columbia Supreme Court found the BCTF to be in contempt of court, imposed an injunction against the BCTF, and prevented the BCTF from making any expenditure in furtherance of the contempt.
18-19 October 2005	Vince Ready (as a mediator) began discussions between the BCTF and the British Columbia Government.
21 October 2005	The British Columbia Supreme Court imposed a $500,000 penalty on the BCTF for its contempt of court.
20-23 October 2005	Vince Ready issued recommendations which both the BCTF and the British Columbia Government accepted. Teachers voted 77.7 per cent to return to work on 24 October.
24 October 2005	Teachers ended their withdrawal of services and returned to the classroom.

CASE NO. 2430

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

Complaint against the Government of Canada concerning the Province of Ontario presented by
— the National Union of Public and General Employees (NUPGE)
on behalf of
— the Ontario Public Service Employees' Union (OPSEU)
supported by
— the Canadian Labour Congress (CLC) and
— Public Services International (PSI)

Allegations: The complainant organizations challenge the provisions of a statute (Colleges Collective Bargaining Act, R.S.O. 1990, c.15) that denies all public colleges part-time employees the right to join a union and engage in collective bargaining

339. The complaint is contained in a communication dated 7 June 2005 from the National Union of Public and General Employees (NUPGE), on behalf of the Ontario Public Service Employees' Union (OPSEU). Public Services International (PSI) and the Canadian Labour Congress (CLC) expressed their support to the complaint in communications dated 17 June and 8 November 2005, respectively.

340. In a communication of 10 April 2006, the Government of Canada transmitted the replies of the Government of Ontario dated 12 December 2005 and 31 March 2006.

341. 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), nor the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainants' allegations

342. In its communication of 7 June 2005, the complainant organization alleges that the Colleges Collective Bargaining Act ("the CCBA") violates the ILO Constitution and Conventions Nos. 87 and 98. Under the CCBA, only "employees" can participate in collective bargaining, and "employees" are those persons who are in two statutorily prescribed bargaining units.

343. The academic bargaining unit excludes: "teachers who teach for six hours or less per week; counsellors and librarians employed on a part-time basis; teachers, counsellors or librarians who are appointed for one or more sessions and who are employed for not more than twelve months in any twenty-four month period". The support staff bargaining unit excludes "persons regularly employed for not more than twenty-four hours a week". As a result, part-time employees do not have the right to participate in collective bargaining under the CCBA (see Annex 1).

344. In addition, those employees cannot unionize under the Ontario Labour Relations Act (OLRA) as that Act does not apply to community colleges, under section 4 and section 29 of the OLRA, as well as section 1 of the Ontario Public Service Act (Annex 1).

345. The complainant organization explains that this part-timer exclusion is an antiquated holdover from the introduction of the CCBA in 1975. In the 1960s and early 1970s, it was not unusual to have bargaining units restricted to full-time employees, and no part-time units. That was the situation in the community colleges. Then, the CCBA statutorily fixed the existing full-time bargaining units and their bargaining unit descriptions. At the same time, the CCBA effectively barred any union attempt to organize part-time employees. The result was that full-timer units, and an exclusion of part-timers, were statutorily frozen into place. The situation remains unchanged almost 30 years later.

346. Part-time employees are a particularly vulnerable class of workers. They have an ongoing employment relationship but are treated as second-class workplace citizens in respect of salaries, working conditions and job security.

Part-time faculty workloads

347. The definition of a part-time teacher in a community college is a teacher who teaches six hours or less per week on a regular basis. When this definition was created in the 1970s, this teaching workload was approximately one-fourth of the teaching workload of a full-time teacher. This definition was not changed when the workload formula was introduced in the 1980s and the maximum teaching workload for full-time post-secondary teachers was capped at 18 hours per week. The maximum workload of a full-time teacher, without overtime, is 44 workload hours per week. A teacher's workload includes the hours for teaching, plus preparation, evaluation and other professional functions. Thus, one-fourth of a full-time teacher's workload is 11 workload hours. The absolute cap on workload hours including overtime is 47 hours per week. The most recent survey of faculty workload indicates that teachers are actually assigned an average of 41 workload hours per week. Since the definition of a part-time teacher only takes into account teaching hours, the Ontario Public Service Employees' Union (OPSEU) suspects the colleges had used their ability to increase class sizes without limits in order to exploit these workers by increasing their workload well beyond one-fourth the workload of a full-time professor. The maximum rate paid to part-time teachers tends to be $40 per hour and they are only paid for teaching hours. This compares to the maximum hourly rate of pay for partial-load teachers. Partial-load teachers are paid on an hourly basis based on the number of teaching hours. They are not denied the right to unionize.

Part-time support staff working full-time hours

348. Schedule II of the CCBA states that: "The support staff bargaining unit … does not include, (vi) persons regularly employed for not more than twenty-four hours per week." The OPSEU has historically monitored the situation regarding hours worked by part-time support employees. In so-called "peak periods" of work (e.g. at registration time in September), certain OPSEU locals have allowed the colleges to extend part-timers' hours beyond the maximum 24 – usually for only three weeks or so. At the present time, most colleges give the locals a copy of the list of part-time employees and the hours they have worked, usually on a biweekly basis. From the discussion with one group of employees, it is clear that the college is abusing this practice. There were reports of people working 35 hours for up to four or five months at a time. In one example, a part-time employee said she would have applied for the job if she had known it would be full-time hours. According to one college policy, part-time employees get the same rate of pay as full-time workers, "as if covered by the collective agreement". However, even here, it seems the

college is getting around this language. One employee, employed as an electrical technologist, is working side by side with a full-time person doing the same job but at a higher rate of pay. The part-time employee has worked there for two years and is only getting about 60 per cent of what the full-time employee is being paid.

349. The complainant organization points out that the vast majority of Ontario's part-time workforce has some opportunity to address their working conditions by participating in collective bargaining. Part-timers at universities, public schools and high schools, at hospitals and the broader public sector, can all form part of combined units or certify part-time units. There is no good justification for treating community college part-timers differently. The complainant organization refers to the long-established principles of the Committee as regards the rights of workers to establish and join trade unions and to bargain collectively, in particular Case No. 1900 (Ontario) where the Committee reached similar conclusions, and states that the exclusion of part-time employees of community colleges is equally unjust.

350. The complainant organization requests that the Committee recommend the Government to amend the CCBA so that all employees of the public colleges system are able to exercise their freedom of association rights in a meaningful way.

B. The Government's reply

351. In its communication of 12 December 2005, the Government of Canada transmitted the observations of the Ontario Government which state that the College Collective Bargaining Act is a statute under the authority of the Ontario Ministry of Training, Colleges and Universities (MTCU) whose advice has been sought. The MTCU emphasizes that an understanding of the complex and diverse role of Ontario's 24 active colleges of applied arts and technology is crucial to understanding the exclusion of certain part-time academic and support staff from the bargaining regime under the Act.

352. The Ontario Colleges of Applied Arts and Technology Act, 2000 (the OCAAT Act), the legislation governing colleges, provides that:

> The objects of the colleges are: to offer a comprehensive program of career-oriented, post-secondary education and training to assist individuals in finding and keeping employment; to meet the needs of employers and the changing work environment; and to support the economic and social development of their local and diverse communities.

In carrying out these objects, colleges offer a broad range of degree, diploma and certificate postsecondary education programmes, which are directed at providing state-of-the art knowledge and skills that will enable their graduates to be employed in increasingly complex and rapidly changing workplaces. Additionally, they enter into partnerships with business, industry and other educational institutions, provide adult vocational education and training, basic skills and literacy training, apprenticeship in-school training and applied research (section 2(3) of the OCAAT Act). Programmes are offered on a full-time and part-time basis. Adult continuing education is a significant and vital element of college services to their communities. One of the indices of the scope of the college system, and its importance to Ontario, is reflected in the province's transfer payments to the system: $1.076 billion in 2005-06.

353. The central collective bargaining regime established by the Act is unique in Ontario's public sector. There is a single bargaining agent which acts on behalf of all college employers, a single collective agreement for each of the two designated bargaining units (academic and support), and a "one strike, all strike" provision. The diversity in, and scope

of, college activities and the centralized bargaining structure are important factors leading to the employment of college part-time staff.

354. College programmes and activities are required to be responsive to the immediate, and frequently changing, needs of employers and workforce. Additionally, colleges offer a multitude of sophisticated, specialized, state-of-the-art educational programmes and other services that require unique or scarce expertise that is in high demand in the private sector. People with such skills are often working full time in their field of expertise and work for the college sector on a part-time basis only. These individuals usually have a limited community of interest with full-time staff and the MTCU understands that a substantial proportion of these individuals, whether because they have other employment or for professional reasons, are unwilling or reluctant to accept college employment if they are required to or could potentially become part of a bargaining unit.

355. An analogous situation is found in the context of college continuing education courses, e.g. general interest courses offered usually in the evening. A significant proportion of these courses are delivered by instructors, often for limited time periods, with the express intent of supplementing their other interests or out of general interest in teaching a unique or specialized subject. The ability of colleges to offer the current number and range of the courses would be jeopardized without access to a pool of individuals willing to provide such part-time services to colleges.

356. Ontario has a vital interest in maintaining not only a viable college system but one which has the capacity to provide the highest standards in teaching, research and student learning experience, and thereby contributes to the economic well-being of Ontario and, arguably, Canada. It is for this reason that the Government is increasing the operating funding provided to the colleges by $133.5 million from 2004-05 levels, for the specific purpose of increasing access to the system by underrepresented groups and increasing the quality of the system.

357. The MTCU is confident that colleges have always been committed to ensuring that they have high-quality employees, dedicated to the success of the colleges and their students, and that achieving this is in large part dependent on a fair, robust and relevant collective bargaining regime. At the same time, the MTCU recognizes the connection between the current college bargaining unit definitions and the ability of the colleges to attract and retain the part-time academic and support staff who ensure that the colleges can fully meet their mandate. The MTCU believes that it must give priority to the needs of the province and to take all reasonable steps to provide the support that will facilitate the continuance of a viable, high-quality college system that can meet its complex mandate.

358. In its communication of 31 March 2006, in view of the concern expressed by the Committee in the context of Case No. 2305 [see 338th Report, para. 37], the Government points out that the differences between the present case, on the one hand, and Cases Nos. 2025 and 2305, on the other. The Government points out in this respect that the education partnership tables in these two latter cases, facilitating an atmosphere of engaged dialogue between unions and the Government, are a tailored response to issues bringing together teachers, unions, parents, local school boards and the Government in the primary and secondary education sectors. In this sector, a full collective bargaining regime exists with the nexus of collective bargaining being at the local school board level. The collective bargaining legislation impugned in the present case, on the other hand, does not cover employees in primary or secondary schools, or, for that matter, universities in Ontario. Moreover, the Act applies exclusively to community colleges in the province and establishes a centralized province-wide collective bargaining regime that is unique in Ontario's public sector.

C. The Committee's conclusions

359. *The Committee notes that this case concerns the denial of collective bargaining to part-time academic and support staff of colleges of applied arts and technology in Ontario listed in Annex 1.*

360. *While taking due note of the explanations given by the Government on the specific circumstances of college programmes and activities, on the particular expertise required from these instructors, and on their limited community of interests with full-time staff, the Committee recalls that all workers, without distinction whatsoever, with the sole possible exception of police and armed forces, should have the right to establish and join organizations of their own choosing to further and defend the interests of their members [**Digest of decisions and principles of the Freedom of Association Committee,** 1996, 4th edition, paras. 205-206]. The Committee further recalls that all workers, without distinction whatsoever, whether they are employed on a permanent basis, for a fixed-term or as contract employees, should have the right to establish and join organizations of their own choosing [**Digest**, op. cit., para. 236].*

361. *The Committee also points out that all public service workers, other than those engaged in the administration of the State, should enjoy collective bargaining rights [**Digest**, op. cit., para. 793] and that no provision of Convention No. 98 authorizes the exclusion of staff having the status of contract employee from its scope [**Digest**, op. cit., para. 802].*

362. *While the particular circumstances of the part-time employees concerned here may call for differentiated treatment and adjustments as regards the definition of bargaining units, the rules for certification, etc., as well as specific negotiations taking their status and work requirements into account, the Committee fails to see any reason why the principles above on the basic rights of association and collective bargaining afforded to all workers should not also apply to part-time employees. The Committee therefore requests the Government rapidly to take legislative measures, in consultation with the social partners, to ensure that academic and support part-time staff in colleges of applied arts and technology fully enjoy the rights to organize and to bargain collectively, as any other workers. The Committee requests the Government to keep it informed of developments in this respect.*

The Committee's recommendation

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

> ***The Committee requests the Government rapidly to take legislative measures, in consultation with the social partners, to ensure that academic and part-time support staff in colleges of applied arts and technology in Ontario fully enjoy the rights to organize and to bargain collectively, as any other workers. The Committee requests the Government to keep it informed of developments in this respect.***

Annex 1

1. Colleges Collective Bargaining Act, R.S.O. 1990, Chapter C.15

1. In this Act and in the schedules, “employee” means a person employed by a board of governors of a college of applied arts and technology in a position or classification that is within the academic staff bargaining unit or the support staff bargaining unit set out in schedules 1 and 2.
2. (1) This Act applies to all collective negotiations concerning terms and conditions of employment of employees.

   (2) No such collective negotiations shall be carried on except in accordance with this Act.

Schedule 1

The academic staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology who are employed as teachers, counsellors or librarians but does not include:

(vi) teachers who teach for six hours or less per week;

(vii) counsellors and librarians employed on a part-time basis;

(viii) teachers, counsellors or librarians who are appointed for one or more sessions and who are employed for not more than twelve months in any twenty four-month period.

Schedule 2

The support staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology employed in positions or classifications in the officer, clerical, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff but does not include:

(vi) persons regularly employed for not more than twenty-four hours a week.

2. Labour Relations Act, 1995

S.O. 1995, Chapter 1, Schedule A

s.4 (1) This Act binds agencies of the Crown other than:

(b) those that are designated under clause 29.1(1)(a) of the Public Service Act.

(2) Except as provided in subsection (1), this Act does not bind the Crown.

Public Service Act

R.S.O. 1990, Chapter p. 47

s.29.1 (1) The Lieutenant Governor in Council may make regulations,

(a) designating agencies of the Crown for the purpose of the definition of “Crown employee”;

Regulation 57/95

1. The following are designated agencies of the Crown for the purposes of the definition of “Crown employee” in section 1 of the Act:

   (1) Colleges of applied arts and technology established under the Ministry of Colleges and Universities Act.

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 complainant alleges various anti-union practices by the Television Corporation of the Pontifical Catholic University of Chile, including discrimination against the general secretary of the complainant trade union, the dismissal of trade union members, violations of the right to collective bargaining and the fact that it is impossible for the union to recruit members contracted through external enterprises

364. The Committee examined this case at its meeting in November 2005 and presented an interim report to the Governing Body [see 338th Report, paras. 645-681, approved by the Governing Body at its 294th Session (November 2005)].

365. The Government sent new observations in a communication dated 6 January 2006.

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

A. Previous examination of the case

367. In its previous examination of the case in November 2005, the Committee made the following recommendations [see 338th Report, para. 681]:

(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.

B. The Government's reply

368. In its communication dated 6 January 2006, the Government reiterates its previous statements and updates the information supplied previously to the Committee on Freedom of Association concerning the status of the anti-union and other actions brought against the Television Corporation of the Pontifical Catholic University of Chile.

369. Specifically, the Government states that:

– the actions for alleged anti-union practises, Nos. 3546-04 and 2561-04, brought by the Labour Directorate before the Fourth Court of Labour Law of Santiago, were dismissed by the initial ruling. Appeals were lodged in both cases (under Nos. 8392-2004 and 7065-2004) and the Appeals Court of Santiago upheld the rulings handed down by the court of first instance;

– the other anti-union action, No. 1677-05, was brought by the complainant trade union and is being heard by the Third Court of Labour Law of Santiago. After the order to produce evidence had been issued on 22 December 2005, the Trade Union of the Television Corporation of the Pontifical Catholic University of Chile lodged an agreement, the final recorded action pertaining to the abovementioned case file;

– actions Nos. 3716-04, 4392-03 and 4391-03 were heard by the First, Second and Fourth Courts of Labour Law of Santiago respectively, with these courts being requested to pronounce on the allegations of anti-union practices disputed by the parties through the legal actions;

– as regards the other legal actions on which information was sent, relating to fines for infringements, which are being heard by the Third Court of Labour Law of Santiago, it is possible to report that in Case No. 3716-04, the parties have been summoned to attend the court for the pronouncement of the ruling, whilst in Case Nos. 3717-04 and 3718-04, measures of enquiry involving the submission of documents have been ordered;

– as regards the case concerning simulated contracting (No. 3855-03) being heard by the Sixth Court of Labour Law of Santiago, the information supplied to the Committee in official document No. 640 of 9 February 2005 still applies.

C. The Committee's conclusions

370. *The Committee observes that in this case, the complainants alleged the replacement of workers involved in a legal strike in 2004 at the Television Corporation of the Pontifical Catholic University of Chile; the use of labour-sourcing 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.

371. *The Committee notes the statements from the Government to the effect that in one of the legal actions concerning anti-union practices, the complainant trade union lodged an agreement; in another case, the Appeals Court of Santiago upheld the decisions of the court of first instance, which had ruled against the trade union; in two other cases, the Government has requested information from the judicial authorities or is awaiting a ruling. The Committee requests the Government to send the texts of any rulings that have been or may be pronounced.*

372. *The Committee notes that from the statements by the Government, it appears that the legal actions (brought by the enterprise) to challenge fines for infringements have not yet been concluded. The Committee requests the Government to keep it informed in this regard.*

373. *Lastly, the Committee notes that with respect to the proceedings relating to simulated contracting (contracting of workers through third parties, in this case external enterprises), the Government states that the information previously supplied to the Committee on the status of the case still applies (the enterprise had lodged a legal appeal against the administrative fine and a verdict on the case is still being awaited). The Committee requests the Government to keep it informed in this regard.*

The Committee's recommendations

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

(a) The Committee requests the Government to send the texts of any rulings that have been or may be pronounced in relation to the actions concerning anti-union practices brought against the Television Corporation of the Pontifical Catholic University of Chile.

(b) The Committee requests the Government to keep it informed of developments in the actions brought by the enterprise with the aim of challenging the administrative fines imposed for infringements of labour legislation and simulation (of labour contracts through third parties, in this case external enterprises).

CASE NO. 1787

INTERIM REPORT

Complaint against the Government of Colombia presented by
— the International Confederation of Free Trade Unions (ICFTU)
— the Latin American Central of Workers (CLAT)
— the World Federation of Trade Unions (WFTU)
— the Single Confederation of Workers of Colombia (CUT)
— the General Confederation of Democratic Workers (CGTD)
— the Confederation of Workers of Colombia (CTC)

— the Trade Union Association of Civil Servants of the Ministry of Defence, Armed Forces, National Police and Related Bodies (ASODEFENSA)
— the Petroleum Industry Workers' Trade Union (USO) and
— the World Confederation of Labour (WCL) and others

Allegations: Murders, kidnappings, disappearances, bombings, threats, detentions, harassment against trade unionists and trade union leaders and a serious situation of impunity

375. The Committee last examined this case at its meeting in March 2006 [see 340th Report, paras. 458-620]. The Committee recalls that, since 1995, it has examined the present case on its merits on 18 previous occasions [see 297th Report, paras. 465-483; 304th Report, paras. 159-178; 306th Report, paras. 248-294; 309th Report, paras. 69-91; 311th Report, paras. 272-292; 314th Report, paras. 4-41; 319th Report, paras. 5-116; 322nd Report, paras. 5-37; 324th Report, paras. 247-289; 327th Report, paras. 327-344; 328th Report, paras. 84-124; 329th Report, paras. 357-384; 330th Report, paras. 468-506; 331st Report, paras. 212-254; 333rd Report, paras. 388-464; 335th Report, paras. 680-731; 337th Report, paras. 489-551; and 340th Report, paras. 458-620]. The International Confederation of Free Trade Unions (ICFTU) sent new allegations in communications dated 11 April, 15 May and 27 September 2006. The National Union of Public Employees of the National Service for Training (SINDESENA) and the World Federation of Trade Unions (WFTU) sent new allegations in communications dated 9 and 30 June 2006, respectively. The Trade Union of Workers of the Bogotá Telecommunications Enterprise (SINTRATELEFONOS) sent new allegations in a communication dated 13 July 2006. The Petroleum Industry Workers' Trade Union (USO) sent new allegations in a communication of 21 September 2006.

376. The Government sent its observations in communications dated 6 February, 20 March, 16 June and 15 July 2006.

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

A. Previous examination of the case

378. At its meeting in March 2006, the Committee made the following recommendations on the allegations that were still pending, which for the most part related to acts of violence against trade union members [see 340th Report, para. 620]:

(a) The Committee wishes to express its appreciation for the invitation extended to its Chairperson. It notes with interest the report of the high-level tripartite visit and the full cooperation shown by the Government to ensure that the members of the visit had access to the fullest and most candid information on the trade union situation. The Committee acknowledges the efforts made by the Government to improve protection for trade union officials, members and organizations and to move the investigations of the cases forward. The Committee agrees on the importance of tripartite dialogue for ensuring that these efforts continue and supports not only the tripartite visit members' recommendation to reactivate the Inter-institutional Committee – a process which the Committee asks to be kept informed about – but the reactivation of the Standing Negotiation Committee on Labour and Wage Policies and the Special Committee for the Handling of Conflicts Referred to the ILO. The Committee also urges, as the members of

the visit suggest, that consideration be given very seriously to the possibility of setting up an ILO office in Colombia in order to facilitate dialogue between the Government, social partners and the Committee on Freedom of Association on the steps to be taken to continue to combat and ultimately eliminate the existing situation of impunity as well as ensuring more effective implementation of freedom of association, tripartite dialogue and the STCP objectives.

(b) The Committee urges the Government to take all possible measures to put an end to the acts of violence against trade union officials and members and to continue to keep it informed of the protection measures and of the security schemes implemented, as well as those adopted in the future for other trade unions and other departments or regions.

(c) The Committee requests the Government to keep it informed of the progress made by the specialized sub-unit within the National Public Prosecutor's Office which deals with cases of human rights violations involving trade unionists.

(d) Taking note of the information provided by the Government regarding the judicial procedures and the convictions handed down for crimes committed against trade unionists as well as definitive sentences that have been issued against the perpetrators of such crimes, the Committee once again urges the Government to take the necessary steps to investigate all the new alleged acts of violence and to continue vigorously the investigations that have already begun so as to put an end to the intolerable situation of impunity, punishing effectively all those responsible.

(e) The Committee requests the Government to keep it informed of the entry into force of the Law on Justice and Peace and the manner in which it is applied, the final outcome of the appeals initiated before the Constitutional Court and any impact that this Law might have on the various cases of murder and violence that are pending.

(f) As regards the allegations submitted by the workers' trade union of the municipal enterprises of Cali (SINTRAEMCALI) relating to the existence of a plan, named "Operation Dragon", to eliminate several trade union officials, and, observing that the allegations involved are of the utmost gravity and seriously affect the free exercise of both trade union rights and fundamental human rights, the Committee requests the Government to provide the Procurator-General's Office with all the necessary means to carry out an independent and exhaustive investigation, to report on the results of that investigation and to ensure fully the safety and physical integrity of all the people threatened, guaranteeing them protection that they can rely on.

B. New allegations

379. In its communications dated 11 April, 15 May, 9 and 30 June, 13 July and 27 September 2006, the ICFTU, the SINDESENA, the WFTU, the SINTRATELEFONOS and the USO reported the following acts of violence committed against officials and members of different trade union organizations.

Murders

1. Orlando Ariza, a member of the Meta Independent Agricultural Workers' Union (SINTRAGRIM), on 26 February 2005, in Meta.

2. Efrén Ramírez, member of the Meta Independent Agricultural Workers' Union (SINTRAGRIM), on 26 February 2005, in Meta.

3. Mauricio Burbano, member of the Electricity Workers' Union of Colombia (SINTRAELECOL), on 3 March 2005, in the Department of Huila.

4. Alonso José Diomédez Subiera, member of the National Association of Workers and Employees in Hospitals and Clinics (ANTHOC), on 25 March 2005, in Arauca.

5. Susana Nazareth, member of the National Association of Civil Servants and Employees in the Judicial Branch (ASONAL JUDICIAL), on 1 April 2005, in Putumayo.

6. Maicol Steven Alberico, member of the El Valle Single Education Worker's Trade Union (SUTEV), on 16 April 2005, in Valle del Cauca.

7. Claudia Bedoya, member of the National Association of Civil Servants and Employees in the Judicial Branch (ASONAL JUDICIAL), on 6 April 2005, in the Department of Antioquia.

8. Iris del Carmen Benítez, member of the Córdoba Teachers' Association (ADEMACOR), on 10 April 2005, in Montería, Córdoba.

9. Fanny Robles, member of the National Food Workers' Union (SINTRAINAL), on 20 April 2005, in Bucaramanga, Department of Santander.

10. Robinsón Robles, member of the National Food Workers' Union (SINTRAINAL), on 20 April 2005, in Bucaramanga, Department of Santander.

11. Benjamín Arrigui Díaz, member of the Caquetá Teachers' Association (AICA), on 22 April 2005, in the Department of Caquetá.

12. Héctor Verbel Paternita, member of the Caja Agraria Trade Union, on 2 May 2005, in Barranquilla, Department of Atlántico.

13. Wilfredo Sánchez García, member of the Employees' Association of the National Penitentiary and Prison Institute (ASEINPEC).

14. José Adán Cárdenas Pallares, member of the North Santander Teachers' Association (ASINORT), on 16 May 2005, in North Santander.

15. Jaime Moreno Chiquita, member of the Meta Independent Agricultural Workers' Union (SINTRAGRIM), on 30 May 2005, in the Department of Meta.

16. Gilberto Agudelo, president of SINTRAUNICOL, whose remains where identified on 2 June 2005, in the Department of Santander.

17. Alberto Tapias García, member of the Meta Independent Agricultural Workers' Union (SINTRAGRIM), on 5 June 2005, in the Department of Meta.

18. Beatriz Morena Rocha, member of the Casanay Teachers' Union (SIMAC), on 6 June 2005, in Casanare.

19. Dorance de Jesús, Parra Vélez, member of the Caquetá Teachers' Association, on 23 June 2005, in the Department of Caquetá.

20. Julio César Toro Gómez, member of the Antioquia Teachers' Associacion (ADIDA), on 23 June 2005, in Medellín, Department of Antioquia.

21. William Edison Medina, member of the Nariño Teachers' Union (SIMANA), on 28 June 2005, in Nariño.

22. Júlio César Pasto Larrañaga, member of the Nariño Teachers' Union (SIMANA), on 8 July 2005, in Nariño.

23. Rosabeth López Amezquita, member of the Caquetá Teachers' Asoociation (AICA), on 11 July 2005, in San Vicente del Caguán, Caquetá.

24. Germán Gómez Gómez, member of the Antioquia Teachers' Association (ADIDA), on 24 July 2005, in Carmen del Viboral, Antioquia.

25. Juan Guillermo Ríos, member of the Trade Union of the Sugar Cane Industry (SINTRACAÑAZUCOL), on 28 July 2005, in Valle del Cauca.

26. Jairo González, member of the Union of Small Farmers of Bolívar (SINPABOL), on 29 July 2005, in Bolívar.

27. Tomás Rubén Serge, member of the Association of Workers of the Office of the Controller-General (ASOCONTROL), on 3 August 2005, in Barranquilla, Department of Atlántico.

28. Belén Hincapié Patiño, member of the Antioquia Teachers' Association (ADIDA), on 9 August 2005, in Antioquia.

29. Omar Dorado Renteria, member of the Caquetá Teachers' Association.

30. Jesús Adrián Sánchez Bedoya, member of the Trade Union of Teachers of Tolima (SIMATOLI), on 18 August 2005, in the Department of Tolima.

31. Robin Rodrigo Díaz Acosta, member of the Córdoba Teachers' Association (ADEMACOR), on 19 August 2005, in Puerto Libertador, Department of Córdoba.

32. Domingo Orlando Cortes Quiñonés, member of the Nariño Teachers' Union (SIMANA), on 20 August 2005, in the Department of Nariño.

33. Luis Alfredo Corzo Sarmiento, member of the César Teachers' Association (ADUCESAR), on 16 September 2005.

34. Jesús Olmedo Arango Ocampo, member of the El Valle Single Education Worker's Trade Union (SUTEV), on 21 September 2005, in Cali, Valle del Cauca.

35. Napoleón Galván Cheveriche, member of the Santander Teachers' Union (SES), on 22 September 2005, in San Onofre, Santander.

36. Alejandro López Garcés, member of the Antioquia Teachers' Association (ADIDA), on 1 October 2005, in Yarumal, Antioquia.

37. Pedro Pérez Orozco, member of the Single Confederation of Workers of Colombia (CUT), on 3 October 2005, in Barranquilla, Atlántico.

38. Luis Ignacio Aristizábal Botero, member of ASONAL JUDICAL, on 21 October 2005, in Medellín.

39. Martha Cecilia Gasco Claros, member of the Caquetá Teachers' Association (AICA), on 22 October 2005, in Cartagena del Chairá, Caquetá.

40. Adriana Francisca Padilla Echeverría, member of the Magdalena Teachers' Union (EDUMAG), on 30 October 2005, in Santa Marta, Magdalena.

41. Erial Ferro, member of the El Valle Single Education Workers' Trade Union (SUTEV), on 25 November 2005, in Cali, Valle del Cauca.

42. Benjamín Araujo Montero, member of the Guajira Teachers' Association (ASODEGUA), on 12 December 2005, in Riohacha, Guajira.

43. Arturo Díaz García, member of the Tolima Farm Workers' Union (SINTRAGRITOL), on 21 December 2005, in Ibagué, Tolima.

44. Nabonazar Antonia Ojeda Almanza, member of the Córdoba Teachers' Association (ADEMACOR), on 27 December 2005, in Montería, Córdoba.

45. Guillermo Zemante Bermeo, member of the Cauca Teachers' Association (ASOINCA), on 23 February 2006, in Popayán.

46. Héctor Díaz Serrano, member of the Workers' Trade Union (USO), on 2 March 2006, in Campo Casabe.

47. Daniel Cortez Cortez, member of the Electricity Workers' Union of Colombia (SINTRAELECOL), on 2 March 2006, in Santander.

48. Jaime Enrique Gómez Velásquez, former president of the Trade Union of Workers of the Bogotá Telecommunications Enterprise (SINTRATELEFONOS), who disappeared on 21 March 2006 and was found dead a few days later.

49. Nelson Martínez, member of the National Union of Workers in the Construction Industry (SINDICONS), on 29 April 2006, in Las Palmeras.

50. Luis Antonio Arismendi, president of the Manuela Beltran Union of Food and Beverage Workers of the marketplace of the San Francisco quarter of the city of Bolivar (SINDIMANUELA), missing as of May 2006 and found dead on 6 June 2006 in the municipality of Zipacon.

51. Jorge Guillen Leal, affiliated with SINTRAINQUIGAS, on 23 July 2006, in Cobiva.

52. Jaime Garcia, affiliated with the Municipal Association of Peasant Usufructuaries of Tame, on 9 August 2006.

53. Carlos Arturo Bonilla, secretary-general of the National Union of Workers in the Gastronomy, Hotel and Other Industries (HOCAR), in Barrancabermeja on 17 August 2006.

54. German Eduardo Solando Andrade, affiliated with ASEDAR, on 6 September 2006.

55. Jose Gregorio Izquierdo, president of the Union of Public Enterprise Workers of Arauca (SINTRAEMSERPA), on 13 September 2006.

56. Alejandro Uribe, director of the Association of Miners of Bolivador, on 19 September 2006, in Bagra.

57. Jose Ignacio Amaya Ruiz, director of the Colombian Association of Bank Employees (ACEB), on 12 September 2006.

Threats

1. Plutarco Vargas Roldán, an official of the National Food Workers' Union (SINTRAINAL) was threatened on 4 February 2006.

2. The Single Confederation of Workers of Colombia (CUT) received a threatening letter on 8 March 2006.

3. Porfirio Rivas Moreno and Eder Montes Alvarez, president and press secretary of the Postal Workers' Union (STPC) have requested state protection but have not yet received it.

4. Rodolfo Vecino Acevedo, human rights secretary of the USO, has been the subject of threats since 6 May 2006.

5. Rodrigo Hernán Acosta Barrios, treasurer of the Bogotá Telecommunications Enterprise (SINTRATELEFONOS).

6. Threats against Fernando Ramírez, president of the trade union of SUMAPAX farm workes, Heber Ballesteros, vice-president of the Federation and Eberto Díaz Montes.

7. Persecution and threats against Juan Efraín Mendoza Gamba, general secretary of FENSUAGRO, who was detained in 2003 and 2005.

Detentions

1. Rolando Contreras García, Edgar Botero Cardenas and Javier Ricardo Guedez, officials of the Electricity Workers' Union of Colombia (SINTRAELECOL), were detained on 3 May 2006;

2. Miguel Angel Bobadilla, a member of FENSUAGRO, and Nieves Mayusa, his partner, were detained on 11 May 2006 by prosecutor's office No. 6 of the National Kidnapping, Terrorism and Extortion Prevention Unit.

3. Victor Oime, member of the Peasants' Association of Coqueto (ASOAGRICAO), on 6 August 2006.

380. The ICFTU also refers to complaints lodged by a former IT director at the Administrative Department for Security, who reported that a plan was being formulated by the Department with a view to eliminating trade union members. Among the trade union members who have already fallen victim to this plan are Mr. César Augusto, Mr. Rafael Fonseca and Mr. Ramón Fonseca who are included in the present case [see 333rd Report, para. 392].

Unauthorized searches

1. Of the premises of the organization SINTRAINAL in Bogota, on 3 August 2006, by the police authorities without a judicial warrant.

Assaults on persons and personal dignity

1. Threats of death, violence and ill-treatment by the negotiators of the list of claims against the Drummond enterprise.

2. The attempted assassination of Mr. Alvaro Mercado, director of the National Union of Workers in Mining Enterprises and the Energy Sector (SINTRAMINERGETICA), on 13 June 2006, in the department of César.

3. Estivenson Avila, member of SINTRAMINERGETICA, on 13 June 2006.

Harassment

1. Against Mr. Adalberto Carvajal Saludo, legal counsel to the USO.

C. The Government's reply

381. In its communications dated 6 February, 20 March, 16 June and 15 July 2006, the Government states that, with regard to progress with and examination of the cases of violation of the human rights of trade union members on the part of the Public Prosecutor's Office, the Government of Colombia and the Public Prosecutor's Office, in order to honour the commitment to the International Labour Organization and the trade unions, are promoting a project to streamline and improve the effectiveness of investigations concerning threats to the rights of trade union members, through timely and definitive rulings. The national Government has earmarked 4,000 million pesos (US$1,737,135) for this purpose.

382. The aim of the project is to implement systems to promote and follow up ILO cases through: (i) an optimized investigative process; (ii) clearing of the backlog of cases and a reduction in office bureaucracy; and (iii) qualitative analysis of information and classification of offences, with enhanced national human rights and terrorism units and strengthening of the sectional directorates for each of these units.

383. The Human Rights Unit of the Office of the Attorney-General set up a special investigation group, with five specially trained officers, supported by the Human Rights Investigation Group, who will be responsible for investigations into 102 cases pertaining exclusively to trade union members. Furthermore, pursuant to the agreement concluded with the trade union federations at the International Labour Conference, approximately 100 cases will be selected for particular attention, on the basis of the following guidelines laid down by the trade unions themselves:

– The 100 cases selected must reflect the overall situation of anti-union violence. Furthermore, where a situation of impunity is overcome in one particular case, this should serve as a source of outcomes and recommendations on methods for achieving justice in all cases of anti-union violence.

– Bearing the above in mind, the selected cases must be clear-cut, i.e. there should be no doubt as to the victim's status as a trade union member. The relationship between the crime and the victim's trade union status should be as clear as possible. For example, it should be established whether the act was committed in the course of bargaining over labour rights.

– There should be abundant information on the selected cases, including information available to the public, and this should be reliable and verifiable. It is desirable for cases to be brought by trade union members, the families of the victims or the victims themselves.

– Together, the selected cases must provide a demonstration of the systematic and widespread perpetration of rights violations. In other words, they should show that such violations have occurred over a long period (there should be cases spanning the entire period covered by Case No. 1787) and throughout national territory (there should be cases from all or most regions of the country). Patterns of similarities across attacks could also be studied.

– Cases should be selected to reflect the current human rights situation of trade unionists and the impact on them of the application of the democratic security policy,

including an increase in rights violations directly attributable to the police (cases such as Arauco, or cases of arbitrary detention and subsequent murder).

– By the same token, cases of acts committed by paramilitary groups following the declaration of the cessation of hostilities (i.e. after December 2002) should be included.

– Crimes committed by guerrilla and paramilitary groups and state agents should be included.

– Cases in which the victims are women, even where they are the indirect victims of violence (daughters, wives, family members), should be included.

– The majority of cases should relate to violations of the right to life, although certain instances of threats to freedom and personal integrity should also be examined. Cases of threats in which the application of justice could immediately result in protection might also be borne in mind.

384. The Ministry of Social Protection's Human Rights Group is also working jointly with trade unions to verify the status of victims in cases reported to the International Labour Organization within the context of Case No. 1787, since it has been revealed, in the light of a series of meetings, that a large number of persons have been reported as being trade union members when this was not the case. This work is intended to provide the Public Prosecutor's Office with the tools needed to pursue investigations effectively and obtain a unified database of information on acts of violence perpetrated against trade union members.

385. It is hoped that the project will enable inroads into the investigations to be moved forward, thereby enabling the perpetrators to be punished. Moreover, the Government reiterates that any act of violence committed against any citizen, whether or not that person is a trade union official or member, is officially investigated by the Public Prosecutor's Office. Thus, once an act of violence against a member of a trade union has come to light, the Ministry transfers the case to the Public Prosecutor's Office so that it can initiate the appropriate investigation, in accordance with its mandate.

386. In addition, it was decided to pursue legal actions in connection with threats made against the following individual:

1. Juan Carlos Galvis; file No. 182415; investigating authority: Barrabanca No. 9; offence: threats; committed on: 27 May 2003; stage of proceedings: preliminary – evidence.

2. Yolanda Becerra; file No. 210409; prosecutor's office: Barrancabermeja No. 3; stage of proceedings: suspended.

3. Yolanda Beccerra; file No. 255820; prosecutor's office: No. 6, Barrancabermeja branch; offence: threats: committed on: 24 December 2004; most recent action: suspension.

4. Pablo Javier Arenales; file No. 18627; offence: threats; prosecutor's office: No. 5, Barrancabermeja branch; most recent action: combined with file No. 27462.

5. David Ravelo; file No. 262194; offence: threats; committed on: 31 May 2005; stage of proceedings: preliminary.

6. Regulo Madero; file No. 191196; prosecutor's office: No. 6, Barrancabermeja branch; offence: threats; most recent action: refusal order.

7. Duban Antonio Vélez; file No. 977082; prosecutor's office: No. 63, Medellín branch; offence: threats; stage of proceedings: preliminary.

8. Rafael Cabarcas Cabarcas; file No. 168941; prosecutor's office: No. 4, Cartagena branch; offence: terrorism; committed on: 3 February 2005; stage of proceedings: preliminary.

9. Duban Vélez; file No. 211679; prosecutor's office: No. 16, Medellín; offence: threats; stage of proceedings: preliminary

10. Jesús Tovar and Evelio Mancera; file No. 211679; prosecutor's office: No. 16, Barranquilla; offence: threats; committed on: 28 March 2005; stage of proceedings: preliminary.

11. Domingo Tovar Arrieta; file No. 54125; prosecutor's office: No. 240, Bogotá branch; offence: threats; stage of proceedings: preliminary.

12. Ariel Díaz; file No. 796189; prosecutor's office: No. 240, Bogotá branch; offence: threats; stage of proceedings: preliminary.

13. Domingo Tovar Arrieta; file No. 54262; offence: threats; stage of proceedings: preliminary.

387. At the same time, the protection programme has granted the following measures to the trade union members below:

1. Domingo Tovar: high-level protection scheme in place.

2. Evelio Mancera: collective protection scheme.

3. Pedro Barón: collective protection scheme.

4. Carlos Ariel: high-level personal protection scheme.

5. Juan Carlos Galvis: high-level protection scheme.

6. Yolanda Becerra (not a trade union member but a member of an NGO): high-level protection scheme.

7. Regulo Madera (not a trade union member but a member of an NGO): communication device, collective transport support.

8. Duban Antonio Vélez: high-level protection scheme.

388. With regard to the death threats against members of the national executive board of the Trade Union of Workers, the Government reports that the protection programme has granted the following measures to the officials of that organization:

– security perimeters around the headquarters of the organization in Barrancabermeja, Arauca, Cantagallo, Casabe, Bucaramanga, Neiva, Cartagena and Apiay;

– communications network comprising 256 devices: 63 mobile telephones and 193 Avantel radios for USO officials.

1. Personal measures

Personal protection schemes comprising two bodyguards, one vehicle, Avantel radios, arms and bullet-proof jackets, for:

1. Gabriel Alvis Ulloque – armoured vehicle.
2. Hernando Hernández Pardo – armoured vehicle.
3. Julio Carrascal.
4. Hernando Meneses.
5. Daniel Rico.
6. Juan Ramón Ríos Monsalve.
7. Edgar Mojica Vanegas.
8. Oscar García Granados – armoured vehicle.
9. German Alfredo Osman Mantilla.
10. José Cristo Sanchez.
11. Fredys de Jesús Rueda.
12. Alirio Rueda Gómez – armoured vehicle.
13. Jorge Gamboa Caballero – armoured vehicle.
14. Nelson Diaz – armoured vehicle.
15. Rafael Cabarcas Cabarcas – armoured vehicle.

Collective protection schemes comprising four bodyguards, a normal vehicle, Avantel radios, arms and bullet-proof jackets, for:

1. Refinery executive board – Barrancabermeja.
2. El Centro executive board.
3. Casabe executive board.
4. Cartagena executive board.
5. Suo executive board – Puerto Salgar.
6. Orito executive board.
7. Apiay executive board.
8. National executive board.
9. Human Rights Commission.
10. Bogotá executive board – reinforced, with two additional bodyguards.

Three-month temporary relocation support, equivalent per month to three times the current minimum legal wage, for Mr. Oscar Ovidio Martínez Morales, social security secretary of the Orito executive board, Putumayo, in November 2004.

Mobile telephones: in March 2005, mobile telephones were given to the following members of the Orito executive board: Mr. José Alcides Pepinosa, Mr. Orlando Cubillos, Mr. Raúl Tamayo and Mr.Trinidad Royero.

389. The Government reiterates what it has stated on a number of occasions concerning the need to implement measures to enhance the protection programme for trade union officials. The Government refers in detail to the complete range of protection measures granted, as well as the budget earmarked for these measures and the persons covered.

Additional budget (in thousands of Colombian pesos)

Period	National budget	USAID International cooperation*	Total
1999	4 520 000		4 520 000
2000	3 605 015		3 605 015
2001	17 828 455	2 103 312	19 931 767
2002	26 064 000	5 811 597	31 875 597
2003	29 000 000	4 955 910	33 955 910
2004	30 740 000	3 329 362	34 069 362
2005	48 223 300	6 059 270	54 282 570
2006	50 393 400		50 393 400
Total	**210 374 170**	**22 259 451**	**232 633 621**

*Source: USAID – MSD – Final Consolidated Report, 31 Dec. 2005.

Target population

Target group	Number							
	1999	2000	2001	2002	2003	2004	2005	2006
Trade unions	84	375	1 043	1 566	1 424	1 615	1 493	1 226
Town councillors	0	0	0	404	1 120	832	1 195	1 437
NGOs	50	224	537	1 007	1 215	733	554	411
UP-PCC	0	77	378	775	423	1 158	1 402	435
Leaders	43	190	327	699	456	545	611	453
Mayors	0	0	0	212	344	214	87	112
Journalists	0	14	69	168	71	125	46	69
Representatives	0	0	0	26	125	65	45	66
Members of Parliament	0	0	0	0	43	45	33	42
Former mayors	0	0	0	0	0	114	41	1
Total	**177**	**880**	**2 354**	**4 857**	**5 221**	**5 446**	**5 507**	**4 252**

Protection programme for trade union members (period of implementation: January-30 June 2006)

Protection measure	Number	Cost
		Colombian pesos
Mobile protection schemes – operation	220	9 723 300 005
Avantel radios – operation	614	275 924 232
Transport support	41	184 420 000
Mobile telephones – operation	682	166 851 300
Domestic air tickets	104	41 230 854
Temporary relocation support	25	28 072 000
International air tickets	4	5 231 681
Bullet-proof jackets	3	2 111 100
Total		**10 427 141 172**

Mobile protection schemes

Target group	Schemes involving a vehicle							
	2000	2001	2002	2003	2004	2005	2006	Total
Trade unions	31	60	70	40	13	6		**220**
Other groups	20	11	22	24	46	26	24	**173**
Total	**51**	**71**	**92**	**64**	**59**	**32**	**24**	**393**

Installation of security perimeters

Target group	2000	2001	2002	2003	2004	2005	2006	Total
Trade unions	40	1	27	30	25	19		**142**
Other groups	51	9	14	22	7	3	3	**109**
Total	**91**	**10**	**41**	**52**	**32**	**22**	**3**	**251**

Operational communications devices

Target group	Avantel	Mobile telephone	Via satellite	Total
Trade unions	604	698		**1 302**
Other groups	816	2 109	23	**2 948**
Total	**1 420**	**2 807**	**23**	**4 250**

390. In addition to the measures already in place, the Government is seeking to reduce the risk faced by trade union members and officials by means of the following projects:

– *Training in preventative safety:* Recipients of protection are to be taught self-defence strategies to complement the measures put in place as part of the protection programme and, to date, approximately 1,077 individuals have received training in the Departments of Atlántico, Arauca, Valle, Santander, Cauca, Nariño, Huila, Caquetá, Cundinamarca, Tolima and Bogotá (in this last case, training was imparted to leaders of the displaced population).

– *Enhanced public protection policy and human rights guarantees:* The aim is to strengthen public protection policy and safeguard the right to life, integrity, freedom

and personal safety, in accordance with international human rights law and with UNHCHR recommendations. With this in mind, a book entitled *The right to life, personal integrity, freedom and personal safety: Scope, content and obligations on the part of the State* has been published.

– *Communications strategy for the protection of defenders of human rights:* This strategy seeks to legitimize the work of defenders of human rights on a large scale and raise awareness of the importance of reporting threats and violence against them. To this end, the following campaigns have been conducted:

  (1) three television commercials (one exclusively for trade union members);

  (2) three different advertising posters;

  (3) twenty-five radio programmes.

391. As regards the holding of three members of the SINTRAELECOL, Mr. Henry Moreno, Mr. Pablo E. Peña and Mr. Teódulo Muñoz by the FARC, the Government reports that a decision was taken not to proceed with the inquiry due to lack of evidence on 27 October 2005.

392. Regarding the threats against Mr. Miguel Alberto Fernández Orozco, the Government reports that, in November 2005, Mr. Miguel Alberto Fernández Orozco, president of the CUT in Cauca, was arrested on charges of fraud, making a false complaint and making aggravated threats. The legal proceedings have currently reached the stage of appeals against the remand ruling.

393. The Government also reports that, with regard to the 42 cases afforded priority treatment during 2005, 11 are being pursued in the National Human Rights and International Humanitarian Law Unit of the Office of the Attorney-General and 31 are being dealt with by different prosecutors’ offices around the country. The Government sends a detailed report on each of the cases currently being processed.

394. As regards the allegations relating to threats against Mr. Porfirio Rivas, the Government states that the Ministry of Social Protection has established a protection programme in coordination with the Ministry of the Interior and Justice.

395. The Government also encloses the following information concerning the alleged murders of:

1. Guillermo Zemante Bermeo – the investigation pursued by Popayán prosecutor’s office No. 3, under file No. 135618, resulted in a decision not to proceed with inquiries, since the post-mortem revealed this to be a case of suicide.

2. Héctor Díaz Serrano – investigating authority: prosecutor’s office No. 8, Barrancabermeja branch; file No. 680816000135200600199; stage of proceedings: preliminary inquiry.

3. Daniel Cortés Cortés – investigating authority: prosecutor’s office No. 2, Barrancabermeja branch; file No. 380016000135200600327; stage of proceedings: preliminary.

396. As regards the disappearance and subsequent murder of Mr. Jaime Enrique Gómez Velásquez, the Government reports on all measures taken, initially to secure his release, and later to investigate his murder.

397. The National Human Rights Department is pursuing an investigation into the death of Mr. Jaime Enrique Gómez Velásquez and this is currently at the preliminary stage. The Government makes clear that Mr. Jaime Enrique Gómez Velásquez had not been involved in trade union activities for 17 years and, for that reason, the motive for his death has not yet been established.

398. The Government also states that periodic meetings of the National Commission on Wages and Labour Policy have taken place within the framework of the tripartite agreement between the Government, employers and workers on the right to organize and the right to democracy, and also with a view to establishing an enhanced forum for dialogue.

399. According to the Government, the main objective of these meetings is to provide opportunities for social dialogue and détente between stakeholders from the world of work in those regions experiencing the most acute social conflict, thereby contributing to a fall in the number of violations of the human rights of trade union members and leaders and encouraging a reduction in labour and social disputes.

400. Following a short awareness-raising and participation exercise involving the national, local and regional authorities, employers and trade union federations, and offering an introduction to methodologies, the trade unions which participated in the discussion sessions mentioned above supplied reports and analysis and put forward their concerns and recommendations in relation to problems specific to their region, the result of which has been the development of mechanisms that have helped solve the problems brought to light (copies of the minutes of these discussions are enclosed).

401. At the same time, with a view to continuing efforts to create enhanced forums for dialogue and engaging in joint actions with trade unions on human rights issues, the first National HIV/AIDS Seminar was held in Bogotá on 27 April, with participation by the International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM), the Ministry of Social Protection and UNAIDS.

402. The Government encloses detailed information on the outcome of the actions initiated against Act No. 975 of 2005.

403. As regards the allegations submitted by the SINTRAEMCALI relating to the existence of a plan named "Operation Dragon", the Government reports that the Ministry of Social Protection, via a communication dated 31 March 2006 sent to the Procurator General, put at the disposal of the Procurator General's Office any resources that might be required in order for it to carry out this investigation. Both the Procurator General's Office and the Public Prosecutor's Office are conducting investigations into the allegations made by the SINTRAEMCALI.

404. The Procurator General's Office is tasked with ensuring the proper functioning of the civil service, in order to safeguard the rights and interests of citizens, guarantee protection of human rights and intervene on behalf of the population to defend public resources. By virtue of the above, the Procurator General's Office, through the office of the National Special Investigations Director, ordered the opening of a preliminary inquiry to identify the responsible parties on 26 October 2004. Once this had come to an end, Decision No. 1392 of 11 August 2005 was issued, ordering the opening of a disciplinary investigation of civil servants connected with official bodies such as the municipal enterprises of Cali (EMCALI EICE ESP) of the administrator for the contract concluded between the aforementioned enterprise and the Energy Financing Agency (FEN), the manager of FEN, a retired army official, directors of Regional Military Intelligence Headquarters No. 3, and civil servants within the Valle de Cauca branch of the Department of Security (DAS), who apparently

committed disciplinary offences, in some cases by giving out confidential information and in others by committing acts of omission in the course of their duties.

405. In the course of verification of the evidence, other civil servants were linked to the events under investigation through their actions or omissions, with the result that a decision was issued on 3 February 2006, ordering the opening of an additional disciplinary investigation in connection with civil servants at the Superintendency for Domestic Public Services, who administered the signing of an irreversible trust management agreement between ESP, EMCALI EICE ESP and the National Financing Agency, to which the Consultoría Integral Latinoamericana Limitada also became a party.

406. The proceedings are currently at the evaluation stage, the purpose of which is to establish whether to press charges or shelve the case, pursuant to the provisions of article 161 of Act No. 734 of 2002.

407. The Public Prosecutor's Office is responsible for investigating offences, assessing the proceedings and bringing charges before the competent judges and courts against persons alleged to have broken criminal law, either on its own initiative or following complaints. An investigation is currently under way based on a complaint lodged by a member of Congress with prosecutor's office No. 287, CTI national directorate, on 25 August 2005. The complainant refers to an alleged plan to assassinate him, along with other members of Congress whose names he did not reveal, and Ms. Berenice Celeyta Alayon, a human rights campaigner and member of NOMADESC (a human rights organization), members of the CUT in Valle del Cauca and EMCALI trade union officials, including Mr. Luis Hernández. According to the complainant, his informant indicated that these facts were confidential and were being compiled at two apartments, one in the City of Cali and the other in Medellín, and that the person overseeing this work in Cali was a retired army lieutenant colonel, whilst in Medellín, a lawyer, who also works for the Vivan los Niños Foundation, which rescues and protects street children, was responsible.

408. On receiving the complaint, branch No. 287 of the prosecutor's office, attached to the CTI national directorate, ordered a preliminary investigation and raids on the buildings in Cali and Medellín mentioned by the complainant.

409. In the course of the raids, various documents of importance to the investigation were uncovered, including some which provide anonymous evidence for the existence of multiple irregularities within the SINTRAEMCALI. Some of its members appear to be connected with acts of vandalism suffered by the EMCALI (municipal enterprises of Cali), amongst others. During the raids, Lt. Col. Julián Villate Leal (employed by the SERASYS enterprise) stated that the collection of the information and documents in question fell within the mandate set out in the consultancy contract concluded between the enterprise Consultoría Integral Latinoamericana (CIL), together with SERASYS, its associate enterprise, and EMCALI, and that these activities had been endorsed by the management of EMCALI, the Superintendency for Domestic Public Services and the FEN and were known to the Bogotá office of the DAS.

410. The investigating authority (prosecutor's office No. 287, attached to the CTI national directorate) subsequently ordered the case to be transferred to the National Unit for Human Rights and International Humanitarian Rights, arguing that office No. 8 was pursuing a preliminary investigation into the same allegations. However, it was stipulated that the first investigation should not be appended to the second preliminary one, since the allegations to which the former refers are different from those made by the Honourable Member of Congress, and that it should therefore be reclassified.

411. The investigation was thus assigned to office No. 8 of the National Unit for Human Rights and International Humanitarian Rights and Judicial Inspections, statements and other forms of evidence were called for. Various reports collected by the CTI computer-related crime group have contributed to the investigation, with information extracted from computers seized during the raids in Cali and Medellín, in addition to statements from members of the FEN, the enterprise CIL Ltd., SERASYS Ltd., the Superintendent for Domestic Public Services, the administrator in the liquidation of the EMCALI enterprise, workers at EMCALI, Ms. Berenice Celeyta Alayon and member of Congress, Mr. Alexander López Maya. A statement was also taken from Lt. Col. Julián Villate Leal.

412. As regards the current status of the investigation, it is still at the preliminary stage. It was assigned to office No. 22, attached to the National Unit for Human Rights and International Humanitarian Rights, pursuant to resolution No. 000293 of 28 October 2005, which ordered the examination of the case and the gathering of evidence, including additional statements from Ms. Berenice Celeyta Alayon (to date, she has not appeared to give evidence). The above notwithstanding, a range of evidence is still being sought.

413. As regards "Operation Dragon", investigations have also been conducted into its existence and, throughout the inquiry, efforts have been focused on uncovering any previous records of "Operation Dragon".

414. At the same time, with a view to protecting persons under threat, currently Berenice Celeyta Alayon, Luis Hernández, Domingo Angulo, Harold Viafara, Luis Enrique Imbachi, Oscar Figueroa, Robinson Emilio Masso, Alexander López Maya, Luis Hernández Monrroy, César Martínez, Milena Olave Hurtado, Ricardo Herrera and Alexander Barrios, the Ministry of the Interior and Justice is applying protection measures through the protection programme (Avantel radio).

D. The Committee's conclusions

415. *The Committee notes the new allegations and the Government's observations, which comprise information on acts of violence committed against trade union members and officials and on security measures adopted to protect members of certain trade unions. The Committee also notes the tripartite agreement on the right to organize and the right to democracy, concluded during the International Labour Conference between representatives of the CUT, the CGT, representatives of the National Association of Industrialists (ANDI) and the Government, whereby the parties agreed, among other matters, to enhance the ILO's visibility by giving it a permanent presence, as well as agreeing to ensure careful follow-up of the findings of the Office of Public Prosecutor's special investigation group to combat impunity, and to promote and give effect to principles expressed by the ILO concerning fundamental rights at work. With regard to this last question, the parties commit to calling a meeting of the Consultation Committee on Labour and Wage Policies, with a permanent agenda. The Committee notes the Government's information stating that several meetings of the National Consultation Committee have been held.*

416. *As regards the acts of violence in particular, the Committee notes that the trade unions report 49 murders, 44 of which occurred in 2005 and the rest in 2006. They also mention one disappearance, seven cases of threats and the detention of trade union members. The ICFTU also refers to statements by a former civil servant at the Administrative Department for Security, concerning the existence of a plan formulated by the Department to eliminate trade union officials.*

417. *The Committee also notes that the Government, for its part, refers to the security measures adopted with a view to protecting certain threatened trade union members, and to the*

status of the investigations instituted in relation to these threats and to other acts of violence. In particular, the Committee notes the detailed information supplied by the Government concerning the 42 investigations into alleged acts of violence covered by the present case, which it has accorded special priority. Of these investigations, 11 are being pursued in the National Unit for Human Rights and International Humanitarian Rights and 31 within different branches of the Public Prosecutor's Office. The Committee notes that 100 additional cases have been earmarked for priority treatment within the framework of the tripartite agreement mentioned above.

418. *In general, the Committee observes that, despite the efforts made by the Government to conduct investigations and bring the guilty to justice, bearing in mind the new allegations relating to murders, disappearances and threats suffered by trade union officials and members, there is still an extremely serious problem of violence in Colombia. The Committee recalls that the rights of workers' and employers' organizations can only be exercised in a climate free from violence, pressure and threats of all kinds against officials and members of such organizations, and that it is the responsibility of governments to guarantee respect for this principle [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 47]. In this regard, the Committee, whilst noting the protection measures being put in place by the Government, requests it to continue taking all possible steps to provide effective protection for all trade union members, enabling them to exercise their trade union rights freely and without fear. The Committee stresses the need for the interested parties to be able to rely on this protection, and requests the Government to indicate the reasons why the unions have not benefited from the mobile protection and security perimeter installation schemes in 2006.*

419. *As regards the status of the investigations, the Committee, whilst noting that some progress has been made and that sentence has been passed in some cases, also notes the significant number of cases concerning acts of violence and threats against trade unions in which an investigation is required in order to identify and punish the perpetrators. With respect to the 42 investigations afforded priority treatment by the Government, in connection with which it has supplied detailed information on the complete range of measures being applied, the Committee observes that, in relation to the 11 investigations currently being processed by the Office of the Public Prosecutor's National Unit for Human Rights:*

– *four are at the evidence-collection stage;*

– *one has been partially closed;*

– *the criminal action has been halted in one case in view of the death in combat of the defendant;*

– *one case has reached the trial stage;*

– *the perpetrators have been sentenced in two cases;*

– *there was a resolution of accusation in one case;*

– *the defendants were remanded in custody in one case.*

420. *The Committee observes that, with regard to the 31 other investigations being processed by the various public prosecutors' offices:*

– *eight led to criminal convictions;*

– *one was shelved;*

– *three are at the evidence-collection stage;*

– *two cases have been dismissed;*

– *charges have been formulated in two case;*

– *four cases were transferred to other bodies;*

– *one case concluded with an acquittal;*

– *the Government does not provide any information on recent actions concerning the remaining cases.*

421. *The Committee recognizes the ongoing climate of violence that prevails. The Committee notes with interest some recent efforts to improve the situation and the substantive budgetary investment into protection programmes made by the Government and implores the Government to continue with and increase its efforts in this regard.*

422. *Whilst noting with interest that plans are in place to increase the number of investigations by 100, within the framework of the tripartite agreement, the Committee stresses the importance of ensuring that all instances of violence against trade union members, whether these be murders, disappearances or threats, are properly investigated, and underlines that the mere fact of initiating an investigation does not mark the end of the Government's work; rather, the Government must do all within its power to ensure that such investigations lead to the identification and punishment of the perpetrators. The Committee cannot but conclude that the current situation, in which a large number of acts of violence against trade union members are not investigated, or that the investigations were not fully carried out, is clear evidence of the impunity that still persists, on the one hand, preventing the free exercise of trade union rights and, on the other, adding to the conditions of violence. The Committee once again urges the Government, in the strongest possible terms, to take the necessary steps to pursue the investigations that have been initiated and to put an end to the intolerable impunity that currently exists, in order that all responsible parties can be effectively punished.*

423. *At the same time, the Committee firmly expects that the tripartite agreement signed in June 2006 between the Government and the social partners, which includes plans for permanent representation of the International Labour Organization and provides for careful follow-up of the findings of the Office of the Public Prosecutor's special investigation group to combat impunity will yield tangible results in the near future.*

424. *The Committee notes the information sent by the Government concerning the appeal actions brought before the Constitutional Court against the Justice and Peace Act, No. 975, of 2005. The Committee requests the Government to keep it informed with respect to the entry into force and the mode of application of the Act and its effect on the cases of violence still pending.*

425. *As regards the allegations concerning the existence of a plan known as "Operation Dragon", the Committee notes the information supplied by the Government in relation to the investigations being conducted by the Procurator General's Office and the Public Prosecutor's Office. The Committee firmly expects that, in light of the extremely serious nature of the allegations presented, the investigations can be properly concluded, and requests the Government to send information on developments in these investigations.*

426. *As regards the allegations by the ICFTU concerning accusations made by a former member of the Administrative Department for Security, in relation to the elimination of trade union members by that Department, the Committee notes that the Government has*

not supplied detailed information on this matter. Stressing the serious nature of the accusations, the Committee requests the Government to carry out an independent investigation as a matter of urgency and to inform it of the outcome.

The Committee's recommendations

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

(a) In general, the Committee observes that, bearing in mind the new allegations relating to murders, disappearances, threats, detentions and harassment suffered by trade union officials and members, there is still an extremely serious problem of violence in Colombia.

(b) The Committee, whilst noting the protection measures being put in place by the Government, requests it to continue taking all possible steps to provide effective protection for all trade union members, enabling them to exercise their trade union rights freely and without fear. The Committee stresses the need for the interested parties to be able to rely on this protection, and requests the Government to indicate the reasons why the unions have not benefited from the mobile protection and security perimeter installation schemes in 2006.

(c) The Committee once again urges the Government, in the strongest possible terms, to take the necessary steps to pursue the investigations that have been initiated and to put an end to the intolerable impunity that currently exists, in order that all responsible parties can be effectively punished.

(d) The Committee firmly expects that the tripartite agreement signed in June 2006 between the Government and the social partners, which includes plans for permanent representation of the International Labour Organization and provides for careful follow-up of the findings of the Office of the Public Prosecutor's special investigation group to combat impunity, will yield tangible results in the near future.

(e) The Committee requests the Government to keep it informed regarding the entry into force and the mode of application of the Justice and Peace Act, No. 975, of 2005, and its effect on the cases of violence still pending.

(f) As regards the allegations concerning the existence of a plan, known as "Operation Dragon", to eliminate various trade union officials, the Committee firmly expects that, in light of the extremely serious nature of the allegations presented, the investigations can be properly concluded, and requests the Government to send information on developments in these investigations.

(g) As regards the allegations presented by the ICFTU concerning accusations made by a former member of the Administrative Department for Security, the Committee, stressing the serious nature of the accusations, requests the Government to carry out an independent investigation as a matter of urgency and to inform it of the outcome.

CASE NO. 2355

INTERIM REPORT

Complaint against the Government of Colombia presented by
— the Single Confederation of Workers of Colombia (CUT)
— the General Confederation of Democratic Workers (CGTD)
— the Confederation of Workers of Colombia (CTC)
— the Petroleum Industry Workers' Trade Union (USO)
— the Association of Managers and Technical Staff of the Colombian Petroleum Industry (ADECO)
— the National Trade Union of Workers of Petroleum, Petrochemical and Related Contractors, Services Subcontractors and Activities (SINDISPETROL)
— the International Confederation of Free Trade Unions (ICFTU) and
— the World Federation of Trade Unions (WFTU)

Allegations: The complainants allege that after four months of meetings to negotiate a list of claims with the ECOPETROL S.A. enterprise, the administrative authority convened a compulsory arbitration tribunal; subsequently a strike began and was declared illegal by the administrative authority; in this context, the company dismissed more than 200 workers including many trade union officials. Furthermore, the National Trade Union of Workers of Petroleum, Petrochemical and Related Contractors, Services Subcontractors and Activities (SINDISPETROL) alleges the dismissal of a number of workers two days after the declaration of the establishment of the trade union

428. The Committee last examined this case at its meeting in May-June 2005 [see 337th Report, paras. 596-636].

429. The Petroleum Industry Workers' Trade Union (USO) presented new allegations in communications dated 26 October and 1 November 2005, and 10 May 2006. In a communication dated 1 March 2006, the World Federation of Trade Unions (WFTU) associated itself with this complaint. The National Trade Union of Workers of Petroleum, Petrochemical and Related Contractors, Services Subcontractors and Activities (SINDISPETROL) presented its allegations in a communication dated 14 February 2006.

430. The Government sent its observations in communications dated 14 September 2005, 4 May 2006 and 4 October 2006.

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

1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151) and the Collective Bargaining Convention, 1981 (No. 154).

A. Previous examination of the case

432. In its previous examination of the case, the Committee made the following recommendations [see 337th Report, para. 636]:

(a) The Committee requests the Government to take steps to make the necessary amendments to legislation (in particular section 430(h) of the Substantive Labour Code) so as to allow strikes in the petroleum sector with the possibility of providing for the establishment of a negotiated minimum service with the participation of the trade unions, the employers and the public authorities concerned. The Committee requests the Government to keep it informed of any measure adopted in this regard.

(b) Recalling that responsibility for declaring a strike illegal should not lie with the government, but with an independent body which has the confidence of the parties involved, the Committee requests the Government to take steps to amend section 451 of the Substantive Labour Code in line with this principle.

(c) As regards the dismissal of 248 workers following the declaration that the strike at ECOPETROL S.A. was illegal, the Committee requests the Government to ensure compliance with the terms of the agreement of 26 May 2004 to end the strike, in particular with regard to the commitment by ECOPETROL to cancel the administrative measures initiated against workers who had not been notified. Moreover, taking into account the fact that the sanction of dismissal as applied to the workers is based on legislation which raises certain problems of conformity with the principles of freedom of association, the Committee requests the Government to take steps to ensure that, if the situation of the dismissed workers is re-examined (following the reinstatement of some by order of the voluntary arbitration tribunal), account is taken of the principles referred to in the context of this case and sanctions are not applied for the mere fact of participation in the strike.

(d) The Committee also requests the Government to inform it whether there are other judicial proceedings under way concerning the other 11 trade union officials dismissed (according to the Government there were only seven).

(e) As regards the allegations relating to criminal proceedings against seven USO officials (mentioned by name in the complaint) for participating in the strike, the Committee requests the Government to inform it of the specific accusations brought against the officials in question, the status of proceedings against them and whether they are detained. Moreover, the Committee requests the Government to provide information on state of the proceedings concerning Hermes Suárez and Edwin Palma (who according to the complainants were detained on 3 and 11 June 2004 on charges of conspiracy to commit offences and terrorism).

B. New allegations

433. In its communications of 26 October and 1 November 2005 and 10 May 2006, the Workers' Trade Union (USO) recalls that on 26 May 2004, in order to bring to an end the collective dispute that had arisen between the trade union and ECOPETROL S.A., an agreement was signed to set up a voluntary arbitration tribunal for the purposes of settling the question of the dismissals. This tribunal handed down its final ruling in January 2005 and ordered the reinstatement of 106 workers, compensation without reinstatement for 22 workers, voluntary retirement for 87 workers and dismissal of 33 workers.

434. On 4 February 2005, the enterprise lodged an action for annulment of the ruling, despite the fact that it had been expressly agreed by the parties that this ruling would not be open to appeal and that the disciplinary labour measures against those involved in the strike

would not be continued. The tribunal found no grounds for the annulment action and rejected it. Nevertheless, the enterprise stated in a communication that its interpretation of the ruling led it to understand that the ruling "simply entails payment of compensation and reinstatement, with the sole purpose of observing the appropriate procedure for establishing whether the circumstances were such as to enable the enterprise to terminate the employment contracts […] in other words, involvement in the collective work stoppage declared illegal, after which the employer may stand by his/her decision to terminate the employment relationship." In his statements, the Chairperson of ECOPETROL S.A. sends out a clear message as to his intention to reinstate workers in order to recommence disciplinary actions and proceed to carry out dismissals.

435. The trade union adds that despite the existence of a statutory Single Disciplinary Code (Act No. 734 of 2002) applicable to all public servants (workers at the Empresa Colombiana de Petróleos hold this status), the chairperson of the enterprise ordered the application of an inappropriate disciplinary procedure that has been repealed by law, with the aim of swiftly dismissing workers and in so doing, disregarding due process. In this case, the dismissed workers, whom the tribunal recognized as having been denied due process, are once again the subject of disciplinary action on the same grounds (participation in the strike), despite the agreement of 26 May, the aim of which is to dismiss them again, an act which the complainant considers unacceptable. Dismissal in this instance carries with it an additional sanction, whereby the individual is forbidden from occupying another post in the public service for ten years, effectively destroying his/her employment prospects. Workers may make a second and final appeal for their cases to be reviewed, although this is made to the chairperson of the company himself, by whom they have already been prejudged.

436. The USO adds that on 15 September 2005, it presented a request in writing, under the "right of petition", to the Ministry of Social Protection, the Ministry of Mines and Energy and the President of the Republic, requesting that effect be given to the recommendations of the Committee on Freedom of Association of the Governing Body.

437. On 7 October 2005, the Minister for Social Protection informed the USO in writing that "the recommendation made by the Committee on Freedom of Association in its 337th Report of June 2005 on Case No. 2355, is part of a report that is expressly described as interim. In the light of this, and pursuant to Ruling No. T-979/04 of the Constitutional Court, 'interim recommendations of the Committee on Freedom of Association of the International Labour Organization are not considered binding by the Colombian State until they have been approved by the Governing Body, as provided for under the ILO Constitution …'. By virtue of the above, the recommendation is not binding and there is thus no obligation to comply with it."

438. According to the complainant, the Government of Colombia is refusing to comply with the recommendations of the Committee on Freedom of Association, arguing that they have not been approved by the Governing Body, despite the fact that a member of the Government was present during the June 2005 session, at which these recommendations were reviewed and approved with no amendments.

439. In its communication, the Government adds that the legality of actions undertaken by the administration (in reference to the declaration of illegality of the strike, resolution No. 01116 of 22 April 2004) is monitored by the administrative court, which is mandated to cancel any administrative measures that it considers to be incompatible with the law and the Political Constitution.

440. As regards the plea of unconstitutionality, the Government, in its communication to the trade union, indicates that this is not appropriate in the present case, since it considers that

resolution No. 01116 of 22 April 2004 complies with current legislation and hence does not run counter to the Political Constitution, derived from article 430, paragraph (h) of the Substantive Labour Code, declared applicable by Ruling No. C-450 of 4 October 1995, in which activities relating to the extraction, refining and transport of oil are recognized as essential public services.

441. As a consequence of the above, the complainant alleges that ECOPETROL S.A., pursuant to the ruling handed down by the arbitration tribunal, reinstated 104 of the dismissed workers but instituted disciplinary proceedings against all of these individuals, with the intention of once again dismissing them for participation in the strike. To date, the enterprise has dismissed 11 of the workers and has imposed an additional sanction blacklisting them from working in the public sector for between ten and 15 years. These sanctions not only pose a grave threat to the employment conditions of the individual workers in question, but also deal a serious blow to the structure of the trade union, since these openly anti-union measures prevent the legitimate exercise of the fundamental right to strike.

442. The trade union fears that a decision will soon be taken to dismiss the 104 reinstated workers, especially bearing in mind that the second stage of the decision-making process is once again the responsibility of the chairperson of the state-run enterprise.

443. In addition, the complainant reports that on 1 December 2005, it presented a list of claims with a view to initiating negotiations on employment conditions. The enterprise was notified of the list of claims and proceeded to communicate with the trade union for the purpose of submitting counterclaims. However, on 9 December 2005, ECOPETROL S.A. sent a document to the trade union in which it refused to initiate discussions of the list of claims, interpreting the law in a broad sense and denying knowledge of the collective agreement concerning the presentation of lists of claims that had been established by the parties, thus implying that they were not aware of the substantive right to collective bargaining.

444. In its communication dated 14 February 2006, SINDISPETROL, and also pursuant to the provisions of article 34 of Decree No. 1469 of 1978, the Colombian administrative labour authorities were requested to the Sectional Prosecutor's Unit of Barrancabermeja immediately, this being the competent authority to undertake criminal investigations into persons who, as representatives or agents of enterprise employers, committed the reported violations of the freedom to work and the right to freedom of association, to impose sanction or fines on the offenders, as provided for in law, and to instruct the employers to reinstate the founders and members of the SINDISPETROL trade union to their posts and functions, following the dismissal, on 8 December 2005, of the founding members of the trade union of the enterprise ECOPETROL S.A. and various subcontracting enterprises, who were covered by trade union immunity, despite the fact that on 6 December 2005, the enterprise had been notified by the SINDISPETROL trade union of the fact that the dismissed workers were founding members and that also on 6 December 2005, the SINDISPETROL founding document had been registered and deposited with the special Territorial Directorate of Barrancabermeja of the Ministry for Social Protection.

445. Indeed at the constituent and founding assembly of the SINDISPETROL first-level branch trade union, held in Barrancabermeja on 3 December 2005, the trade union was established, its by-laws were approved and the central executive body was elected. On 6 December 2005, the final SINDISPETROL founding document was deposited with the Territorial Labour Directorate of the special office of the Ministry of Social Protection, together with a request for the trade union to be added to the union register, and the list of the members of the executive body and founding members was communicated to the enterprise.

446. On 8 December 2005, ECOPETROL S.A. and its contractors ordered the dismissal of the workers who had founded the SINDISPETROL trade union, after pressure had been exerted on workers to withdraw their membership.

447. The trade union also alleges pressure and slander against union leaders and members by the USO, with the aim of persuading them to withdraw their membership of SINDISPETROL or not to join it.

448. SINDISPETROL adds that on 3 December 2005, as a result of the pressure, threats and interference by the enterprise and by the USO, two members of the SINDISPETROL executive body relinquished their trade union duties, not in the presence of the other members of the SINDISPETROL trade union executive body, as required by law, but rather in the presence of the employer, ECOPETROL S.A. Once the SINDISPETROL founding document had been deposited with the labour administration authority, together with the documentation required by law, such as the trade union by-laws, the list of founding members and elected trade union leaders, and their respective identity documents, for inclusion in the trade union register, the administrative authority issued Order No. 0001, dated 23 December 2005. The enterprise lodged an annulment and appeal action, citing the fact that members of the executive body had relinquished their duties.

449. The trade union also alleges that the enterprise refused to engage in collective bargaining, despite the fact that every trade union present at the enterprise had demanded a collective agreement and presented a list of claims in December 2005, and when ECOPETROL S.A. refused to negotiate lists of claims, each of the trade unions within ECOPETROL S.A. instituted an administrative labour dispute.

C. The Government's reply

450. In its communications of 14 September 2005, 4 May 2006 and 4 October 2006, the Government supplies the following observations.

451. As regards paragraph (a) of the recommendations, the Government wishes to point out that Colombian legislation, in considering activities involving the extraction, refining and transport of oil and its derivatives as an essential public service, was taking the public interest into account, in that it sought to safeguard the rights of citizens, particularly users of essential public services, who could be adversely affected by any interruption to those services. The State must ensure continual availability of essential public services, since any interruption to these could seriously affect the rights of citizens, which are considered to be fundamental. Moreover, the Government believes that the adoption of the concept of an essential service by the supervisory organs runs counter to the spirit of the ILO Constitution with regard to the regulation of working conditions and the need for the special circumstances of countries to be taken into account, as stipulated in article 19, paragraph 3. In the case of Colombia, the Government considers that account must taken of the fact that ECOPETROL S.A. is the only oil-refining enterprise in the country and that any disruption to its operation, depriving the country of fuel, could lead to circumstances in which the safety, and even the health, of the population are put at risk. Furthermore, according to the Government, the supervisory organs have not set out precisely the scope of the term "safety", employed in their definition of an essential service. The Government is of the opinion that there is no valid reason why the situation of persons deprived, because of a strike in the oil industry, of the transport and living conditions that societies generally enjoy thanks to oil, should not be included in the scope of this term.

452. As regards paragraph (b), the Government concurs with the Committee in considering that impartiality and independence when ruling that a strike is illegal are essential to the exercise of freedom of association. Nevertheless, the Government observes that there are

no provisions within Conventions Nos. 87 and 98 preventing the legality of a work stoppage being determined by a competent government agency. It believes that since the Government is answerable for the application of the Conventions, there cannot be a requirement for decisions on the legality or illegality of a strike to fall to another party. Moreover, it should be stressed that appeals against rulings by the Ministry may be brought before the administrative court which is competent to pass judgement on the legality of such rulings.

453. As regards paragraph (c) of the recommendations, concerning compliance with the terms of the agreement of 26 May 2004, the Government reports that according to ECOPETROL S.A., the commitments covered in the agreement have been fully observed, including cancellation of the administrative labour measures initiated, which at the time of the abovementioned agreement had not been notified. Furthermore, the enterprise, with a view to settling this dispute, decided to suspend the conventional administrative measures that had been instituted, with the result that the individual employment contracts of those workers who had not been notified by the day of the agreement were not terminated The enterprise did not engage in disciplinary procedures, as it is an issue of public employees having to respect the requirements of the Constitution. The State exercises disciplinary authority over public employees. In this framework, employees of the State bound by a work contract are in a position of subordination with regards to the State. These workers are subject to a disciplinary regime unilaterally imposed by the State, which does not take into account the worker's union affiliation but rather takes into account only the quality of the public employee, as is demonstrated in the present case.

454. At the same time, the Government points out that according to information from ECOPETROL S.A., the second part of paragraph (c), concerning possible sanctions against workers once they have been reinstated, may be incompatible with constitutional and legal regulations such as articles 6 and 123 of the Political Constitution and Act No. 734 of 2002, disregard of which, on the part of public servants responsible for enforcing state discipline within ECOPETROL S.A., would constitute a dereliction of duties and responsibilities, with the attendant legal consequences. The Government stresses that ECOPETROL S.A. cannot be unfamiliar with current legal standards and edicts, since these served as the basis not only for the dismissal of workers, but also for measures to give effect to the orders handed down by the ad hoc arbitration tribunal. Indeed, according to national legislation and case law, the activity being performed by ECOPETROL S.A. is deemed to be an essential public service, pursuant to Constitutional Court Ruling No. C 450 of 1995, meaning that strikes by persons performing this activity are outlawed.

455. According to the Government, on the basis of information from ECOPETROL S.A., the actions of the enterprise complied fully with internal procedure and the relevant criteria dictated by the high courts.

456. According to the Government, its obligations pursuant to the agreement signed on 26 May 2006 are twofold:

- the establishment of a voluntary arbitration tribunal to rule on the claims of the former workers on the basis of law and regulations in force (substantive and procedural matters);
- the cessation of actions and cancellation of the justified termination of employment contracts that arose from the events of 22 April 2004, thereby cancelling any administrative labour measures that had, as at the date the agreement was signed, already been initiated but of which no notice had been given.

457. The voluntary arbitration tribunal set up to examine the dispute was established on 12 August 2004. The arbitration ruling was handed down on 21 January 2005 and commitments complied with. The tribunal concluded that: (1) the public officials at ECOPETROL S.A. fall into the category of "public servants" and as such, are subject to the Single Disciplinary Code (CDU), which regulates the conduct of public servants; (2) article 86 of the current collective labour agreement between ECOPETROL S.A. and the USO provides that the enterprise must notify the worker personally, and in writing, of his/her right to be heard during proceedings, and that this can be understood as being equivalent in real terms to the notification of the initiation of an investigation, covered in article 101 of the CDU; (3) workers bound by a contract of indefinite duration who received notification (personally or through an intermediary) of the action being brought and who did not admit to their involvement in the work stoppage declared illegal or who requested that the CDU be applied, workers who were not notified of the action, and those who could not be notified, should be reinstated, after which the CDU should be applied.

458. The Government underlines the fact that the arbitration tribunal ordered the reinstatement of a group of workers with the aim of applying the CDU and observing due process. Following the reinstatements, it is now clearly necessary to comply with the second part of the ruling ("apply the CDU and observe due process"), which in the Government's view does not run counter to the *non bis in idem* principle, since such a claim would be tantamount to suggesting that the tribunal had ordered the same offence to be punished twice over.

459. As regards the commitments concerning cessation of actions and the justified termination of employment contracts arising out of the events of 22 April 2004, as well as the cancellation of any administrative labour measures initiated as at the date the agreement was signed but of which no notice had been given, the Government states that these were duly complied with, as recorded in the ECP report of 17 September 2004, held at the Ministry under No. 17723 of 23 September 2004, and signed by the Chairperson of ECOPETROL S.A. ECOPETROL S.A. therefore complied both with the contents of the agreement and the arbitration ruling handed down by the compulsory arbitration tribunal.

460. As regards the second part of the Committee's recommendation, concerning the adoption of measures to re-examine the situation of the dismissed workers following their reinstatement and to ensure that they are not sanctioned for the mere fact of having participated in the strike, the Government states that since article 450 of the Substantive Labour Code entitles the employer to dismiss anyone who has participated in a work stoppage that has been declared illegal, the employer may indeed terminate the workers' contracts without breaking the law. Such a decision can only be modified if the State Council nullifies the resolution of the Ministry of Social Protection declaring the work stoppage illegal, since according to section 62 of the Administrative Disputes Code, administrative measures are presumed to be lawful.

461. A regards paragraph (d), concerning the alleged dismissal of 11 other union leaders at the start of the dispute in November 2002, the Government states that on 29 November 2002, a decision was adopted to proceed to the unilateral and justified termination of the individual employment contracts of 11 workers at the Cartagena Refinery Administration Centre enterprise, in accordance with the established procedure in place for this purpose, of whom only seven held the status of members of the USO executive committee for Cartagena, not all, as erroneously stated in the Committee's recommendation. The Government reports that the trade union leaders brought legal proceedings: (1) three are currently being processed; (2) the judicial authority has confirmed one dismissal, owing to the involvement by the worker (Mr. Nelson Enrique Quijano) in the illegal work stoppage; (3) in one case, trade union protection was ordered; (4) in another case, the worker took retirement; and (5)

in a further case, since the worker's involvement in the illegal work stoppage could not be corroborated, his reinstatement was ordered and has already come into effect.

462. As regards paragraph (e) of the recommendations, concerning the allegations relating to criminal proceedings brought against seven USO officials for participating in the strike and the Committee's request for the Government to inform it of the specific accusations brought against the officials in question, the status of proceedings against them and whether they are being detained, the Government states that the criminal justice system does not classify trade union protests or participation in a strike as offences. It also reports that Mr. Hermes Suárez does not appear as an employee of the enterprise and that the only report sent by the Office of the Attorney General of the Nation to the Barrancabermeja Refinery Administration Centre relates to the detention of the worker Mr. Jamer Suárez Sierra, who is in custody in that city. The Office of the Attorney General of the Nation also reported the detention of Mr. Edwin Palma. As for the status of the cases of Mr. Suárez and Mr. Palma, the Government indicates that it has made a request to the Office of the Attorney General of the Nation and that once a reply has been received, it will be communicated to the Committee.

463. As regards the new allegations presented by the USO, concerning the right to petition the President of the Republic, the Minister for Mines and Energy and the Minister for Social Protection, the Government reiterates the arguments given earlier concerning the essential nature of the activities performed by ECOPETROL S.A.

464. As regards the application of the CDU, the Government points out that pursuant to the Code itself and to articles 6 and 123 of the Constitution, the administrative authority shall, as established by law, be responsible for determining whether disciplinary misconduct attributable to public servants has taken place, in accordance with the regulations set out in the abovementioned CDU. The Government considers that the exercise of a disciplinary mandate does not fall within the scope of Convention No. 87, nor should it be interpreted as an act of anti-union discrimination, provided that those subject to such measures can be guaranteed due process, as was indeed the case in this instance.

465. As regards the right of petition and the reply from the Ministry of Social Protection, the Government states that once the Constitutional Court has exercised its mandate and ruled on the constitutionality of a law, it is impossible for officials to refuse to apply this regulation. Resolution No. 01116 of 22 April 2004 was based on section 430(h) of the Substantive Labour Code, declared applicable by the Constitutional Court in Ruling No. C-450 of 4 October 1995, as explained earlier, meaning that the Ministry cannot circumvent the application of this article by revoking the abovementioned resolution, as suggested by the trade union. The Government rejects the request for application of the plea of unconstitutionality in relation to resolution No. 01116, which declared the strike illegal, since this resolution has both a legal and constitutional basis.

466. Finally, the Government indicates that, due to the efforts and participation of the Ministry of Social Protection, through the Vice-Minister of Industrial Relations and the Inspection, Vigilance and Control Unit, on 10 July 2006, the USO and ECOPETROL concluded a collective agreement after 19 days of negotiations. The validity of the new agreement is for three years, from and including 19 June 2006 to 8 June 2009.

D. The Committee's conclusions

467. *The Committee notes the new allegations presented by the USO and the SINDISPETROL. The Committee also notes the Government's observations on the recommendations made by the Committee during its last examination of the case and, in part the new allegations presented by the trade unions.*

468. *As regards paragraph (a) of the Committee's recommendations, in which it requests the Government to take steps to make the necessary amendments to legislation (in particular section 430(h) of the Substantive Labour Code) so as to allow strikes in the petroleum sector with the possibility of providing for the establishment of a negotiated minimum service with the participation of the trade unions, the employers and the public authorities concerned, the Committee notes the information from the Government to the effect that national legislation considers activities involving the extraction, refining and transport of oil and its derivatives as constituting an essential service of general interest. The Committee also notes the Government's view that the failure to class petroleum supply as an essential service does not take into account "the special circumstances of countries", as stipulated in article 19, paragraph 3 of the ILO Constitution, and that in the case of Colombia, ECOPETROL S.A. is the country's only oil-refining enterprise, such that any disruption to its operation, depriving the country of fuel, could lead to circumstances in which the safety, and even the health, of the population are put at risk. The Committee notes that according to the Government, the notion of "safety", employed in the definition of an essential service, extends to the situation of persons deprived, because of a strike in the oil industry, of the transport and living conditions that societies generally enjoy thanks to oil.*

469. *In this regard, the Committee reiterates that in accordance with the principles it has set out on a number of occasions, strikes may only be banned in cases where there exists "a clear and imminent threat to life, personal safety or health of the whole or part of the population", i.e. in services considered essential in the strict sense of the term. Moreover, the Committee has decided on many occasions that the petroleum sector does not display the characteristics necessary for it to be considered as an essential service in the strict sense of the term [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, paras. 540 and 544]. The above does not prevent a minimum service being imposed, given that this is a strategic service, of vital importance to the economic development of the country. In this regard, the Committee reiterates that "the establishment of minimum services in the case of strike action should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health)of the whole or part of the population (essential services in the strict sense of the term); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and (3) in public services of fundamental importance" [see* ***Digest****, op. cit., para. 556]. The Committee is of the opinion that some of the abovementioned scenarios could apply to the petroleum sector. Under these circumstances, the Committee once again requests the Government to take steps to make the necessary amendments to legislation (in particular section 430(h) of the Substantive Labour Code) so as to allow strikes in the petroleum sector with the possibility of providing for the establishment of a negotiated minimum service with the participation of the trade unions, the employers and the public authorities concerned. The Committee requests the Government to keep it informed of any measure adopted in this regard.*

470. *As regards paragraph (b) of the recommendations, concerning the Committee's request that the Government take steps to amend section 451 of the Substantive Labour Code in line with the principle that responsibility for declaring a strike illegal should not lie with the Government, but with an independent body which has the confidence of the parties involved, the Committee notes that according to the Government, there are no provisions within Conventions Nos. 87 and 98 preventing the legality of a work stoppage being determined by a competent government agency; it believes that since the Government is answerable for the application of the Conventions, there cannot be a requirement for decisions on the legality or illegality of a strike to fall to another party. Moreover, it stresses that appeals against rulings by the Ministry may be brought before the administrative court, which is competent to pass judgement on the legality of such rulings.*

471. *In this regard, the Committee recalls, as it has done on previous occasions, that responsibility for declaring a strike or work stoppage illegal should lie not with the Government but with an independent body which has the confidence of the parties involved, particularly in those cases where the Government is party to the dispute [see* ***Digest****, op. cit. paras. 522 and 523], the judicial authority being best placed to act as an independent authority. In this regard, the Committee reiterates that section 451 of the Substantive Labour Code does not conform to the principles of freedom of association. Given these circumstances, the Committee once again requests the Government to take the necessary steps to modify the abovementioned provision so that responsibility for declaring a strike illegal lies with an independent body which has the confidence of the parties involved. As regards the reference by the Government to the possibility of lodging an appeal against government rulings declaring a strike to be illegal, the Committee suggests that the Government explore the possibility of the administrative authority applying to an independent body such as the judicial authority whenever it considers a strike to be unlawful. The Committee requests the Government to keep it informed in this regard.*

472. *As regards paragraph (c) of the recommendations, concerning the dismissal of 248 workers following the declaration that the strike at ECOPETROL S.A. was illegal, the Committee recalls that it had requested the Government: (1) to ensure compliance with the terms of the agreement of 26 May 2004 to end the strike, in particular with regard to the commitment by ECOPETROL S.A. to cancel the administrative measures initiated against workers who had not been notified, and (2) following the reinstatement of the workers in accordance with the orders of the voluntary arbitration tribunal and with a view to re-examining their situation, to take account of the fact that the sanction of dismissal as applied to the workers is based on legislation that raises problems of conformity the principles of freedom of association and to ensure that sanctions are not applied for the mere fact of participation in the strike.*

473. *The Committee notes the new allegations by the USO to the effect that: (1) the enterprise considers that the order handed down by the voluntary arbitration tribunal entails reinstatement of the workers in order for new disciplinary proceedings to be instituted and that if they are found to have participated in the work stoppage deemed illegal, the enterprise could then dismiss them; (2) on 15 September 2005, the USO, exercising the right of petition, requested the Minister of Social Protection, the Minister of Mines and Energy and the President of the Republic, to give effect to the recommendations of the Committee on Freedom of Association; (3) on 7 October 2005, the Government refused the request because: (a) the Committee's recommendation was "interim" and had not been approved by the Governing Body of the International Labour Organization; (b) resolution No. 01116 of 22 April 2004 declaring the strike illegal is open to review by the judicial authority and cannot be challenged by a plea of unconstitutionality, since it is based on a legal provision whose constitutionality has already been recognized by the judicial authority.*

474. *The Committee notes that according to the complainant, the enterprise reinstated 104 workers as a result of the decision by the voluntary arbitration tribunal but instituted disciplinary proceedings against all of these individuals, with the intention of dismissing them for participation in the strike. Indeed, the Committee notes that 11 workers have already been dismissed and that the trade union fears the imminent dismissal of the other workers.*

475. *The Committee notes that the Government, for its part, reports that the obligations stemming from the agreement signed on 26 May 2006 were fully observed. These obligations involved: (1) the cessation of the actions and the justified termination of employment contracts in relation to the events of 22 April 2004 and the administrative*

labour measures that had been initiated (signed by the president of ECOPETROL S.A. in the ECP report of 17 September 2004, held at the Ministry under No. 17723 of 23 September 2004); and (2) the establishment of a voluntary arbitration tribunal, which, in a ruling handed down on 21 January 2005, ordered the reinstatement of 104 workers so that the CDU could be applied.

476. *The Committee notes that according to the Government, the employer, by virtue of the application of the CDU and pursuant to section 450 of the Substantive Labour Code, is entitled to dismiss any person who has participated in an illegal work stoppage that has been declared illegal. According to the Government, such a decision could only be modified if the Council of State were to annul the resolution issued by the Ministry of Social Protection declaring the work stoppage illegal.*

477. *Nevertheless, the Committee recalls, as in its previous examination of the case and in preceding paragraphs of the present examination that the dismissals were carried out on the basis of legislation that raises problems of conformity with the principles of freedom of association. This is the case for the following two reasons: (1) the strike that was declared illegal did not, as claimed by the Government, take place within an essential service; (2) the declaration that the strike was illegal was not issued by a body independent from the parties. The Committee therefore regrets to observe that the reinstated workers are being dismissed again on the same grounds, pursuant to the CDU and section 450 of the Substantive Labour Code, as has already occurred in the case of 11 workers, who were also blacklisted from working in the public sector for between ten and 15 years. The Committee believes that the above constitutes a new violation of the principles of freedom of association and recalls that practices involving the blacklisting of trade union officials or members constitute a serious threat to the free exercise of trade union rights and, in general, governments should take stringent measures to combat such practices [see* ***Digest***, op. cit., para. 709]. *Moreover, the Committee has on a number of occasions expressed the opinion that "the use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ them, implies a serious risk of abuse and constitutes a violation of freedom of association" [see* ***Digest****, op. cit., para. 597]. Given these conditions, the Committee urges the Government to take steps to prevent the dismissal of the 104 workers reinstated at ECOPETROL S.A. in compliance with the ruling of the voluntary arbitration tribunal, as a consequence of the strike on 22 April 2004, and to annul the 11 dismissals that have already been ordered. The Committee requests the Government to keep it informed in this regard.*

478. *As regards the Government's refusal to admit the petition presented by the USO calling for compliance with the Committee's recommendations, on the grounds that these were interim in nature and had not been approved by the ILO Governing Body, the Committee must firstly make clear that when a case is classified as interim, this is because the Committee requires certain information from the Government or the complainants relating to particular aspects of the case in order to be able to make substantive rulings on these questions. There may however be matters within the case that do not require further information, thus enabling the Committee to express an opinion on the substance of such questions. At that point, the recommendations can be acted upon by the Government. Secondly, the Committee draws the Government's attention to the fact that both the interim and definitive conclusions of the 337th Report of the Committee on Freedom of Association were approved by the Governing Body at its 293rd session in June 2005.*

479. *As regards paragraph (d) of the recommendations, in which the Committee requested the Government and the complainants to inform it as to whether there are other judicial proceedings under way concerning the other 11 trade union officials dismissed (according to the Government there were only seven) in 2002 at the start of the collective dispute, the Committee notes that according to the Government, the individual contracts of 11 workers*

at the enterprise, of whom only seven were union leaders, were terminated on 29 November 2002. The Committee notes the Government's information to the effect that the union leaders brought legal proceedings and that three cases are currently being heard, one was reinstated, the action of trade union protection was no longer legally valid in another case, one of the other workers took retirement and finally, that one dismissal has been confirmed, owing to the involvement by the worker (Mr. Nelson Enrique Quijano) in the illegal work stoppage. The Committee observes that in the last case, the dismissal results from the illegality of the work stoppage. The Committee refers to the principles set out in preceding paragraphs with regard to strikes and illegal work stoppages and hence requests the Government to ensure his reinstatement without delay and, if reinstatement is not possible, to ensure that he is fully compensated. The Committee also requests the Government to keep it informed of the legal proceedings currently being heard concerning the other three dismissed trade union leaders.

480. *As regards paragraph (e) of the recommendations, concerning the allegations relating to the criminal proceedings instituted against seven USO trade union leaders (mentioned by name in the complaint) for participation in a strike, the Committee had requested the Government to inform it of the specific accusations brought against the officials in question, the status of proceedings against them and whether they are detained, as well as to provide information on the status of the proceedings concerning Hermes Suárez and Edwin Palma (who according to the complainants were detained on 3 and 11 June 2004 on charges of conspiracy to commit offences and terrorism). In this regard, the Committee notes the information from the Government that no criminal proceedings have been instituted against the seven trade union leaders for participation in a strike. As regards Mr. Suárez (whose first name is in fact Jamer and not Hermes) and Mr. Palma,, who have been charged with conspiracy to commit offences and terrorism, the Committee notes that according to the Government, these individuals are currently in custody in the City of Barrancabermeja and that the Office of the Attorney General of the Nation has been requested to report on this matter. The Committee requests the Government to supply information on the charges against Mr. Suárez and Mr. Palma and to inform it of the status of the proceedings against them.*

481. *As regards the new allegations presented by the SINDISPETROL in relation to the dismissal of the founding members of the trade union five days after it had been established, two days after the trade union registration process had begun, and after ECOPETROL S.A. and its contractors had been notified of the establishment of this trade union, and in relation to pressure on other members of the executive body, leading them to relinquish their trade union duties, the Committee observes that the Government has not sent its observations and requests it to do so without delay.*

482. *As regards the allegations presented by the USO and SINDISPETROL concerning the refusal by ECOPETROL S.A. to engage in collective bargaining, the Committee observes that the Government has not sent its observations and requests it to do so without delay.*

The Committee's recommendations

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

(a) The Committee trusts that the interim recommendations it had formulated in its 337th Report, and approved by the Governing Body in its 293rd Session (June 2005) will be implemented.

(b) The Committee once again requests the Government to take steps to make the necessary amendments to legislation (in particular section 430(h) of the Substantive Labour Code) so as to allow strikes in the petroleum sector with the possibility of providing for the establishment of a negotiated minimum service with the participation of the trade unions, the employers and the public authorities concerned. It requests the Government to keep it informed of any measure adopted in this regard.

(c) The Committee once again requests the Government to take the necessary steps to modify section 451 of the Substantive Labour Code so that responsibility for declaring a strike illegal lies with an independent body which has the confidence of the parties involved. In this regard, the Committee suggests that the Government examine the possibility of the administrative authority applying to an independent body such as the judicial authority whenever it considers a strike to be unlawful. The Committee requests the Government to keep it informed in this regard.

(d) The Committee urges the Government to take steps to prevent the dismissal of the 104 workers reinstated at ECOPETROL S.A. pursuant to the ruling of the voluntary arbitration tribunal, as a consequence of the strike on 22 April 2004, and to annul the 11 dismissals that have already been ordered. The Committee requests the Government to keep it informed in this regard.

(e) As regards the legal proceedings still pending in relation to the 11 other dismissed trade union leaders (according to the Government, there were only seven), with the Government reporting that three cases are being processed and that in one case (that of Mr. Nelson Enrique Quijano), the dismissal was confirmed, due to participation by the worker in the illegal work stoppage, the Committee requests the Government to keep it informed of the cases pending concerning the three dismissed trade union leaders. In the case of Mr. Quijano, taking into account that his dismissal was based on legislation that does not conform to the principles of freedom of association, the Committee requests the Government to take steps to have him reinstated without delay and, if reinstatement is not possible, to ensure that he is fully compensated.

(f) As regards Mr. Suárez and Mr. Palma who, according to the complainants, have been in custody on charges of conspiracy to commit offences and terrorism since 3 June and 11 June 2004 respectively, the Committee requests the Government to supply information on the charges and the status of the proceedings instituted against them.

(g) As regards the new allegations presented by SINDISPETROL, in relation to the dismissal of the founding members of the trade union five days after it had been established and the pressure exerted on other members of the executive body, leading them to relinquish their trade union duties, the Committee requests the Government to supply its observations in this respect.

(h) ***As regards the allegations presented by the USO and SINDISPETROL concerning the refusal by ECOPETROL S.A. to engage in collective bargaining, the Committee requests the Government to send its observations in this respect without delay.***

CASE NO. 2362

INTERIM REPORT

Complaints against the Government of Colombia presented by
— the National Union of Employees of AVIANCA (SINTRAVA)
— the Single Confederation of Workers of Colombia (CUT)
— the Colombian Association of Civil Aviators (ACDAC) and
— the Colombian Association of Aviation Mechanics (ACMA)

Allegations: Anti-union dismissals in the context of restructuring beginning in March 2004 within the AVIANCA-SAM-HELICOL group of companies; re-hiring of dismissed workers through work cooperatives, depriving them of coverage under the collective agreement with the group; threats against trade union officials, failure to comply with the collective agreement, pressure on individuals to sign a (non-union) collective accord and dismissals of trade union officials; non-compliance with a collective agreement and signing of a (non-union) collective accord

484. The Committee last examined this case at its June 2005 Session [see 337th Report, paras. 716-770]. The National Union of Employees of AVIANCA (SINTRAVA) presented new allegations in a communication dated 11 October 2005. The Colombian Association of Aviation Mechanics (ACMA) presented new allegations in October 2005 (given to the high-level tripartite visit which was held in Colombia from 24 to 29 October 2005). The Colombian Association of Civil Aviators (ACDAC) presented new allegations in a communication dated 23 May 2006.

485. The Government sent its observations in communications of 12 August and 15 September 2005 and 1 and 9 August 2006.

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

A. Previous examination of the case

487. In its June 2005 Session, the Committee made the following recommendations [see 337th Report, paragraph 770]:

(a) As regards the collective dismissal of workers affiliated to SINTRAVA and their replacement by workers in cooperatives or other companies in the AVIANCA-SAM group who do not have trade union rights, the Committee requests the Government to carry out an impartial investigation in order to ascertain whether the dismissed workers were in fact replaced by others from cooperatives or other companies in the AVIANCA-SAM group to do the same work; whether these new workers have trade union rights and, if that is not the case, to take steps to ensure full respect for freedom of association in line with the principles mentioned in the conclusions. The Committee requests the Government to keep it informed in this regard.

(b) As regards the allegations of threats against trade union members and officials in Cali by the United Self-Defence Forces of Colombia (AUC), the Committee requests the Government to carry out an independent investigation into the allegations and, if they are found to be true, to immediately take steps to ends these threats.

(c) With regard to the adoption by the company of new internal regulations without consulting the trade union, the Committee requests the Government to send its observations on the matter without delay.

(d) As regards the allegations made by ACDAC concerning the violation by HELICOL S.A. of the collective agreement, the Committee requests the Government to take the necessary steps to ensure full compliance with the collective agreement in force.

(e) As regards the failure to bring salaries up to date, the Committee requests the Government and the complainant to clarify whether or not the collective agreement was formally denounced, whether an impartial arbitration tribunal was actually appointed and, if so, whether that decision was rescinded, and whether the complainant appealed against that decision.

(f) As regards the allegations regarding pressure on workers to leave their union and sign a non-union collective accord, the Committee requests the Government to take the necessary steps to ensure that the HELICOL S.A. workers are not intimidated into entering into a collective accord against their will which would require them to leave their trade union.

(g) As regards the dismissal of 15 HELICOL S.A. pilots, of whom one had trade union immunity, another had protection from dismissal as a negotiator (Captain Leonardo Muñoz), and a third reported criminal contraventions within the company while the others were forced to accept voluntary retirement, the Committee requests the Government:

  (i) to inform it whether judicial authorization was sought before the union official's dismissal;

  (ii) with regard to the appointment of a negotiator in contravention of the collective agreement, to inform it whether or not the irregularity of the appointment was established by the judicial authority and to send a copy of the ruling;

  (iii) to inform it of any legal proceedings regarding the dismissals of the 15 pilots.

(h) As regards the failure to respect the trade union immunity of Captain Juan Manuel Oliveros, in view of the vague wording of the allegation, the Committee requests the complainant to specify how the official's trade union immunity has been violated.

(i) As regards the allegations concerning the refusal by the company AEROREPUBLICA S.A. to bargain collectively and the dismissal and sanctions against trade union officials for exercising their rights, the Committee requests the Government to carry out an impartial investigation and send its observations without delay.

B. New allegations

488. In its communication of 11 October 2005, the National Union of Employees of AVIANCA (SINTRAVA) alleges that the enterprise is offering individual workers greater benefits than those outlined in the collective agreement on condition that they renounce it. The complainant also alleges that on 3 September 2005 it signed an agreement, after presenting a list of demands, and that the enterprise then immediately summoned several trade union officials to offer them voluntary retirement. Those officials are: Alejandro Ferrer Carvajal, Adrián Marthe, Ramiro Vázquez de Moya, Rubén Jiménez Moreno, Benjamín Guzmán Bahoque, José de Avila Cedrón, Melba Florián, Jorge Loaiza, Estella Londoño, Darwin Fonseca Veloza and Jorge Aragón. Acting in this way, the enterprise is going against clause 1, paragraphs 1 and 2 and clause 5. According to the complainant, in these clauses the enterprise undertakes to abstain from trade union persecution, as well as any other act that would go against the free right to organize, to respect the right to freedom of association and to abstain from retaliating against any worker or trade union organization for presenting a list of demands.

489. In its allegations of October 2005, the Colombian Association of Aviation Mechanics (ACMA) reports that, since 1995, the enterprise AVIANCA S.A. has pressurized unionized workers to leave the company, guaranteeing them high levels of compensation and that they could continue working through the Avianca Cooperative (COOPAVA), which would mean that they would then not be able to join a trade union as they would no longer be workers but rather cooperative partners. Those workers who did not accept were transferred in violation of the collective agreement and those who did accept were not given the benefits they had been guaranteed. Then, in 1996, the enterprise dismissed all unionized workers without labour stability and retired all those with more than 27 years of service. Those with more than 24 years of service were also offered proportional pensions.

490. This represented 40 per cent of the enterprise's workforce. The remaining 60 per cent, who had been with the enterprise for between 17 and 24 years, were offered fast promotions, wage increases and training courses for licences, on the condition that, among other things, they renounced the current collective agreement. Several union officials who did not agree to these conditions were dismissed but then had to be reinstated in 2000 following a judicial decision. The complainant notes that since then they have been unable to bargain collectively with the enterprise, and that, in spite of having elected a negotiating committee which included members of ACMA and SINTRAVA, the Government only negotiated with the latter in 2002, and recently in 2005, and has not permitted ACMA to participate as a minority trade union. It also alleges that they are denied union leave and promotions, discriminating between them and the non-unionized workers.

491. In its communication of 23 May 2006, the Colombian Association of Civil Aviators (ACDAC) alleges that the enterprise HELICOL S.A. unilaterally fixed leave of one fixed day per week, as well as rescheduling all the flights of Mr. Orlando Cantilo, a member of the executive board. The complainant also alleges discrimination between unionized aviators, who are covered by a collective agreement, and non-unionized aviators, who benefit from a (non-union) collective accord with respect to benefits for length of service and promotion.

492. The complainant also alleges acts of anti-union discrimination in the enterprise AEROREPUBLICA S.A., including the non-payment of wages and the dismissal of Mr. Roberto Ballén. The complainant refers to various ongoing legal cases on these issues. In one of the cases brought by the enterprise, the judicial authority lifted Mr. Ballén's union privilege, which then allowed the enterprise to dismiss him. The complainant has lodged an appeal against that judicial decision.

C. The Government's reply

493. In its communications dated 12 August and 15 September 2005 and 1 and 9 August 2006, the Government made the following observations.

494. Regarding subparagraph *(a)* of the Committee's recommendations regarding the collective dismissal of workers affiliated to the National Union of Employees of AVIANCA (SINTRAVA) and their replacement by workers in cooperatives who do not have trade union rights, the Government states that, in accordance with article 39 of the national Constitution, all workers have the right to form trade unions or associations without intervention from the State, with the exception of public servants, a provision which is in accordance with article 353 of the Substantive Labour Code subrogated by article 38 of Act No. 50 of 1990 and modified by article 1 of Act No. 584 of 2000.

495. However, the Government states that the regulations of the associated labour cooperatives state that its members do not have an employment relationship, and are characterized by the following:

– they are associated enterprises with no profit motive;

– they link the individual work of associates with their incomes for the production of goods, the completion of works or the performance of services in a self-regulating way;

– voluntary entry and retirement;

– each member is the owner, possessor or holder of work materials;

– they are not regulated by labour legislation but by their own statutes and regimes.

496. It can be gathered from this, according to the Government, that if the members of an associated labour cooperative fulfil the conditions laid down in the Constitution and in law for joining a trade union, they can do so. The Government stresses that of the 46 people dismissed collectively, none was directly linked to the enterprise or provides their services through an associated labour cooperative.

497. Regarding the Committee's request to investigate AVIANCA S.A. for evidence that they hired people from cooperatives to replace dismissed unionized workers, the Government notes that the Ministry of Social Protection does not have the jurisdiction to launch an investigation for this reason unless there has been trade union persecution. Article 33 of the Political Constitution provides for economic freedom, understood to mean the freedom of employers to hire the staff that they consider necessary with a view to improving production, as long as the rights of workers are respected. The Government states, however, that it will officiate, at the Territorial Directorate of Cundinamarca of the Ministry of Social Protection, to obtain a ruling on the viability of launching an administrative labour investigation.

498. Regarding subparagraph *(b)* of the recommendations on the allegations of threats against unionized workers in Cali by the United Self-Defence Forces of Colombia (AUC), the Government requests clarification on the names of the people who have been threatened and specification of the acts behind the threat, so that they can communicate the information to the relevant authorities.

499. Regarding subparagraph *(c)* of the recommendations on the adoption by the company of new internal regulations without consulting the trade union, in contravention of current

legislation, the Government states that the labour regulations contain the collection of standards or provisions that govern the conduct of all parties for the duration of the labour relationship. That, although it is drawn up by the employer without outside intervention, needs to be revised and approved by the administrative labour authorities. The Government states that the approval of the regulations does not violate Convention No. 98 as it does not infringe on the right to organize or negotiate; for regulations to be approved, their contents must conform to internal legislation and cannot contain standards prohibiting workers to join a trade union or use that as a cause for dismissal. Likewise regarding collective bargaining, no part of the regulations can contain a standard impeding the free exercise of the right to negotiate. The Government would like to reiterate that national criminal law categorizes this type of behaviour as a punishable offence.

500. The Government notes that, on 16 May 2003, the enterprise AVIANCA S.A. presented the internal labour regulations to the Ministry of Social Protection for approval. The Atlantic Territorial Directorate of the Ministry of Social Protection, in accordance with resolution No. 1508 of 25 September 2003, objected to the internal labour regulations of AVIANCA S.A. because it considered that article 93 of the regulations should be deleted, as the just causes for termination of employment contracts are specifically established in article 7 of Legislative Decree No. 2351 of 1965. In the same way it considered that article 94 did not conform to the law. AVIANCA S.A. lodged appeals against the aforementioned resolution, resulting in resolution No. 000386 of 21 April 2004, which revoked resolution No. 1508 of 25 September 2003, approving AVIANCA S.A.'s internal labour regulations. In conclusion, the Government emphasizes that the Ministry of Social Protection acted in accordance with the provisions of national legislation, as the adoption of the regulations conformed to legal requirements.

501. Regarding the failure to notify the trade unions ACMA, ACAV, ACDAC, ACDIV and SINDITRA, the Government states that the Ministry of Social Protection followed the relevant procedure in accordance with the provisions of title 1 of Chapter IV of the Substantive Labour Code, regarding the procedure and revision of the internal labour regulations. Once the process of revision and approval of AVIANCA's internal labour regulations had been completed, the Atlantic Territorial Directorate of the Ministry of Social Protection notified SINTRAVA of resolution No. 000386 of 21 April 2004, complying with the provisions of the law; this shows that the other trade unions had some knowledge of it, and that the employer, in accordance with the provisions of article 120 of the Substantive Labour Code must publish the regulations and the Approval Resolution in two different places for two weeks, the time which the trade unions have to challenge the administrative act using the legal mechanisms such as direct repeal or appearing before the relevant administrative body to question the legality of the administrative act approving the regulations. Trade Unions which do not conform to the decisions made by the administrative authority have legal mechanisms for challenging the contents of the administrative acts.

502. The Government adds that, in accordance with article 109 of the Substantive Labour Code, the clauses of the regulations that weaken the conditions of the worker compared to what is established in laws, individual contracts, agreements, collective agreements or arbitrary decisions have no effect, as the latter override the regulations when they are in the worker's favour. According to the Government, the approval of internal labour regulations does not adversely affect trade union rights or freedom of association, as the internal labour regulations are a statute laying out the reciprocal obligations of the parties, thus forming a normative instrument that, far from weakening the conditions of the worker, must be subject to the principles, rights and duties corresponding to an adequate and efficient employer organization.

503. Regarding the enterprise unit AVIANCA-SAM-HELICOL, the Government clarifies that it ceased to exist following the declaration of loss of executive force of resolutions Nos. 0006 and 01017 of 6 January and 7 April 1976 respectively, which had declared the enterprise unit between the aforementioned companies, because the assumptions of fact and of law to maintain this unit had disappeared, as expressed in the Ministry of Social Protection resolution No. 0004045 of 15 December 2003.

504. Regarding sub-paragraph *(d)* of the recommendations about the allegations made by ACDAC concerning the violation by HELICOL S.A. of the signed collective agreement, the Government objects that the trade union has not indicated how the enterprise violated the provisions of the collective agreement in force and notes that the enterprise did not therefore send its comments on the matter. The Government adds that the Territorial Directorate of Cundinamarca, through its inspections, has sanctioned HELICOL S.A. and AEROREPUBLICA S.A. for violating the collective labour agreement, in accordance with the provisions of resolutions Nos. 2410 of 25 June 2004, 3702 of 28 September 2004 and 3923 of 11 October 2004.

505. Regarding subparagraph *(e)* of the recommendations on updating salaries, the Government notes that this point should not be examined by the Committee on Freedom of Association, as it is outside the texts of Conventions Nos. 87 and 98 and has no reference to trade union rights or freedom of association. The Government notes that the trade union has lodged an appeal for the protection of its constitutional right *(amparo)* which was not approved in the first instance, because it was considered that these were matters for ordinary law and because negotiations were pending, which is why the organization presented the challenge.

506. The Government adds that a series of collective labour agreements have been signed between HELICOL S.A. and ACDAC, the last of which was signed on 29 June 2001, covering the period 1 April 2001 to 31 March 2003. The validity of this agreement was extended twice for the period established in the Substantive Labour Code, following decisions adopted by the trade union to delay presenting the lists of demands. In the end, the trade union denounced the collective agreement and presented the list of complaints, a direct settlement stage began in May 2004, but no agreement was reached because HELICOL S.A. proposed similar conditions to those established in the workers' (non-union) collective accord, at which point the trade union's negotiating committee left the negotiations and refused to discuss these terms. For its part, the Seventeenth Inspectorate of the Territorial Directorate of Cundinamarca, through resolution No. 3794 of 4 October 2004, ordered the parties to move the direct settlement stage forward within five (5) working days, as established in law. The previous resolutions are no longer stable, because legal appeals have been lodged against them which are ongoing.

507. Presently, the Coordination of the Prevention, Inspection and Control Group of the Territorial Labour Directorate of Cundinamarca of the Ministry of Social Protection is in charge of the decision on the constitution of the Arbitration Tribunal, because the direct settlement stage has passed and there will be no strike as it is a public service. This decision is based on the appeal and the secondary appeal lodged by the enterprise against resolution No. 0003794 of 4 October 2004, during which both the trade union and the enterprise were ordered to negotiate in the direct settlement stage.

508. Regarding subparagraph *(f)* of the recommendations on the allegations regarding pressure on workers to leave their union and sign a (non-union) collective accord, the Government indicates that HELICOL S.A. and the vast majority of its workers signed up to a (non-union) collective labour accord, which was negotiated not only with pilots and co-pilots but with all employees in the enterprise, bringing together both their expectations and the needs of the enterprise. It is subject to the provisions of articles 481 and ff. of the Substantive Labour Code, in accordance with which, the negotiations took place between

the employer and its non-unionized workers. Negotiating and/or signing up to the accord were completely free and voluntary acts on the part of workers, who assessed its interest according to their expectations.

509. The Government notes, however, that, in the second instance, in accordance with the decision of the Twenty-fifth Criminal Court of the Bogota Circuit, it decided to protect the unionized workers' request and ordered: "to establish the same conditions, complete equality in the areas of wages, benefits and working conditions, for its unionized and non-unionized workers, extending to them the same labour benefits that are established for non-unionized workers in the current (non-union) collective labour accord".

510. Regarding the allegations of pressure on workers to sign or later join the (non-union) collective accord, the Government notes that the enterprise denies this and indicates that several of the resignations presented by HELICOL S.A. pilots to ACDAC were made before the accord was established.

511. Regarding subparagraph *(g)* of the recommendations which refers to the allegations of the dismissal of 15 HELICOL S.A. pilots, one of whom had trade union immunity, another had protection from dismissal as a negotiator of the list of demands, a third had reported contraventions within the company, while the others were forced to accept voluntary retirement, the Government makes the following observations.

512. Regarding the dismissal of Captain Leonardo Muñoz Olea without just cause and without consideration of his special status as a negotiator of the list of demands with union immunity, the Government states that Captain Muñoz was appointed as the negotiator by the assembly of unionized workers who approved the denouncement of the collective agreement in March 2003. The appointment of Captain Muñoz was communicated to the enterprise, which meant that he resigned from his post as a flying instructor in accordance with the provisions of clause 20 of the collective labour agreement: "pilots who are members of ACDAC and occupy administrative positions in the enterprise will have grounds for impediment for negotiating lists of demands, dealing with clauses and special conventions modifying posts, wages and signatures of special acts". As a result he also stopped receiving the administrative bonus allocated to the post of flying instructor.

513. On the express decision of the union, the negotiations were not completed but rather the enterprise was notified, from September 2003, of the intention to extend the agreement until 31 March 2004. As a result, with no negotiations to continue, all their accompanying acts were left without effect, such as the denouncements of the agreements presented by the union and the enterprise and the appointment of the union's negotiating committee. In light of this, Captain Leonardo Muñoz Olea requested to be reinstated as a flying instructor, which was done with the corresponding payment of the administrative bonus, which had yielded interest since his dismissal from the company. The enterprise decided, without just cause and having complied with the legal requirements, to dispense with the services of Captain Leonardo Muñoz Olea as of 14 April 2004, when Captain Muñoz was notified. The union proceeded to communicate the appointment of the new negotiating committee for the list of demands, including Captain Muñoz, to the enterprise in an official letter dated 22 April 2004 received the same day. Therefore, the enterprise only learned of his position as a negotiator after he had been dismissed. In addition, the Captain did not request union immunity, which had to be done within two (2) months, in accordance with the provisions of our legal order.

514. Regarding Mr. Néstor Morales León, the Government notes that the enterprise decided to terminate the employment contract as of 22 August 2003, with just cause deriving from the fact that he had begun drawing his pension, which constitutes legal reason to terminate the employment contract. The former worker called on ordinary justice to order his

reinstatement because Captain Morales supposedly had trade union immunity because he was part of the demands committee. The case was heard in the first instance by the Fourteenth Labour Court of the Bogotá Circuit, which, in its ruling on 4 March 2005, absolved the enterprise of all allegations made against it and ordered the plaintiff to pay costs. This was appealed by the plaintiff and, in a ruling on 17 June 2005, the Labour Decision Chamber of the Bogotá Legal District Tribunal upheld the ruling and ordered the plaintiff to pay costs. This ruling stands. Captain Morales did not have trade union immunity and therefore it did not need to be lifted.

515. Regarding Mr. Gerardo Sánchez, the Government notes that the enterprise terminated his employment contract as of 14 April 2004, without just cause and with payment of the corresponding compensation. In this case there has been no legal or administrative appeal of any kind from the former worker. As regards the criminal complaint for contraventions within HELICOL S.A., the Government states that the enterprise denies the existence of such a complaint.

516. Regarding subparagraph *(i)* of the recommendations concerning the refusal by AEROREPUBLICA S.A. to bargain collectively, the Government notes that in accordance with the information from AEROREPUBLICA S.A., it was the pilots and co-pilots appointed as negotiators by the trade union who adopted an unyielding position towards reaching agreements. The enterprise states that to date they have complied with the requirements for carrying out the various negotiations, that the last of these was resolved when the Arbitration Tribunal called before the Ministry of Social Protection by the parties, handed down a judgement on 9 February 2005, which was ratified by the Supreme Court of Justice, Chamber of Labour Cassation.

517. Regarding the legal cases brought by Captain Juan Manuel Vega, Captain Alfonso Pinzón, Captain Héctor Vargas and Captain Gonzalo Andrés Arboleda, and the appeals for protection lodged by Martha Aguilar, Sandra Anzola, Stella Hoyos, Adriana Morales and Claudia María Escobar, the enterprise states that it has complied with the rulings made by the various judicial and administrative bodies.

518. In this way, regarding the case of Captain David Restrepo Montoya, the employment contract of this crew member was terminated by a unilateral decision of AEROREPUBLICA S.A., which is why the appropriate amount of compensation due in law was paid. Captain Restrepo lodged a complaint against AEROREPUBLICA S.A. with the Territorial Directorate of Antioquia, which was closed by order of 28 April 2004 because the enterprise was considered to have acted in accordance with the current labour legislation.

519. Regarding Captain Jaime Patiño and Captain Andrés Luna, the enterprise notes that their employment contracts were terminated by a unilateral decision by AEROREPUBLICA S.A., which is why compensation was paid, in accordance with the law.

520. Regarding Captain Roberto Ballén Bautista, the Government states that AEROREPUBLICA S.A. brought a labour case to lift his immunity to end the employment contract with just cause, because he had refused to renew his co-pilot’s licence with the Colombian Civil Aviation, which prevented him from performing his duties.

521. The Government adds that the Territorial Directorate of Cundinamarca of the Ministry of Social Protection completed an administrative labour investigation into AEROREPUBLICA S.A. for trade union discrimination, issuing resolution No. 3923 of 11 October 2004 sanctioning the enterprise. The enterprise has lodged appeals against this decision which are ongoing.

522. In its communication of 1 August 2006, the Government reports that with regard to the method of offering workers greater benefits than those established in the collective labour agreement, the Substantive Labour Code establishes in article 470 that "collective agreements between employers and trade unions whose number of members is not more than one-third of the total workforce of the enterprise are only applicable to the members of the signing trade union and to those who sign up to them or join the union at a later date". When that is not the case, it is fair to grant additional benefits to non-affiliated workers.

523. In this way, because SINTRAVA did not fulfil the condition required in the aforementioned provision on the date it subscribed to the collective labour agreement, the non-unionized workers of AVIANCA S.A. legally obtained membership of a (non-union) collective accord valid from 1 July 2002 until 30 June 2004. Because the number of union members increased, the accord lost its validity in mid-2004, in accordance with the provisions of article 70 of Act No. 50 of 1990 which provides that "when the union or unions have a membership greater than one-third of the workforce of an enterprise, the enterprise cannot sign (non-union) collective accords or prolong those that are already in force".

524. However, in light of this, some workers told the company that they would like to retain or increase the benefits that they had and, because it was legally impossible to do this and they did not want to pursue them through the trade unions, the enterprise decided to offer all its collaborators, unionized or not, a package of benefits that came into force in January 2005.

525. The Government denies that it has used a strategy of offering more economic benefits than in the agreement to encourage workers to leave the trade union, because there is no exclusion condition in the "voluntary benefits plan", it is in clause 1 of the 2002-04 collective labour agreement. This is still in force as it was not modified by the agreement signed with trade unions on 3 September 2005 that provides that the provisions of the current agreement become obligatory clauses and an integral part of each worker's individual employment contract and all those signed during its validity period. As a result, any agreement between the enterprise and its workers contradicting this agreement is nullified and the provisions will supersede these agreements. This nullification can be invoked at any time by any of the contracting parties.

526. The Government adds that between January 2005 and April 2006, a period during which the voluntary benefits plan was in force, trade union membership has not shown any significant decline that could be attributed to this plan.

527. Lastly, regarding the allegations of offering voluntary retirement to the trade union officials, the Government emphasizes that this was not a policy of anti-union discrimination as labour relationships have been terminated over the past two years affecting both unionized and non-unionized workers by mutual agreement and without any reprisals. It adds that, where the conciliatory agreement is refused, no worker is subject to reprisals.

528. Regarding the new allegations presented by the Colombian Association of Aviation Mechanics (ACMA), in its communication of 1 August 2006, the Government reports that in 2003, having been unable to overcome its difficult economic situation, which had been critical since 1993, AVIANCA S.A. requested the Ministry of Social Protection for the authorization for the collective dismissal of 1,351 workers. In a communication of 8 September 2003, after carrying out another analysis, the company modified its request as regards the number of people and reduced its request from 1,351 to 1,084, this request was given to the ministerial body with detailed and in-depth analysis. In resolution No. 1789 of

31 October 2003, the Atlantic Territorial Director of the Ministry of Social Protection authorized AVIANCA S.A. to dismiss 350 workers.

529. The Colombian Association of Civil Aviators (ACDAC), the National Union of Transport Industry Workers (SINDITRA), the Colombian Association of Aviation Mechanics (ACMA), the Colombian Association of Flight Engineers (ACDIV) and the National Union of Employees of AVIANCA (SINTRAVA) legally appealed against the aforementioned administrative act. In resolution No. 0187 of 23 February 2004, the Ministry of Social Protection, Atlantic Territorial Directorate, confirmed resolution No. 1789 in all its terms. Of the 350 dismissals authorized by the Ministry, only 46 were carried out. The Government highlights that these dismissals affected both unionized and non-unionized workers, thus showing that there is no discrimination towards unionized workers by the enterprise. From these figures it is important to note that of the total of 46 dismissals, only two members of ACMA were affected.

530. The Government adds that during its delicate and increasingly critical economic situation and because it needed to increase its income, in 1996 the company created a system of recruitment called “revised contract”, which aimed to increase the productivity of the maintenance technicians through a payment system giving them immediate and medium-term benefits. These benefits included: increasing their income; improving cash flow by increasing monthly pay instead of periodic quarterly or annual payments; professional growth through rapid promotion as soon as requirements are met, without the need for a vacancy; greater productivity by increasing working hours from 42 to 48 hours per week in return for increased wages – which should be distinguished from interpretations giving impression that they are paid more for doing the same; continuing efforts were also made to improve the organizational climate, encourage professional development and seek ways to improve training and to encourage commitment to the enterprise. The offer of this system of recruitment was made not only to unionized workers, but also to non-unionized workers, showing therefore the company’s interest in giving benefits to all the technicians in the enterprise. This had not been possible for the unionized workers through a conventional agreement, which made implementing this payment model necessary. Rather than using a conventional agreement, individual agreements with certain workers were used instead, which were not always reflected in the trade union’s decisions, for the reasons mentioned, as the convention had not been successfully modified, they remained bound to their decisions because that same convention prevents an agreement in those terms. The provisions of clause 1 of the 1994-96 convention, which is still in force, establish that “any agreement between the enterprise and its workers contradicting the convention and its provisions is null and the provisions of the convention automatically supersede such agreements”. Therefore, those workers who were interested in this payment model were given full freedom to join this recruitment system.

531. Faced with the termination of an employment contract, the Government specifies that retirement cannot be considered as a repressive measure or similar. The enterprise, in accordance with the collective labour agreement, could retire its workers directly, as long as all the requirements listed were fulfilled. This benefit was available for all the workers covered by the collective agreement. If they were not covered, there was a retirement plan. As far as possible, the company planned not to abandon its workers and guaranteed their income even when the employment relationship was terminated until they received their pension from the Social Security Institute. This practice is no longer possible due to the recent amendment to the national Constitution in article 48 of Legislative Act No. 1 of 2005 which prevents the enterprise from recognizing early retirements.

532. Regarding the statement from the trade union about pressure on workers to opt for the “revised contract” model, because they first had to agree to the severance pay regime in

Act No. 50 of 1990, presented as obligatory and not in the interests of workers, the Government reports that workers voluntarily agreed to the company's offer and that there are currently 1,700 people in the company protected by Act No. 50 of 1990, which demonstrates the benefits of the change in regime. Also there are still workers on the old regime which proves that there was no pressure on workers in this or any other sense.

533. Regarding the allegations that the enterprise discriminates against members of trade unions when dismissing workers for economic reasons, it is important to note that when the retirement statistics of some members of the Colombian Association of Aviation Mechanics (ACMA) union from 1996 until 2005 was revised, it showed that only three people had been dismissed without just cause, including those affected by the collective dismissal in 2004. This shows that the enterprise has not discriminated against members of ACMA in particular or against any trade union members in general. On the contrary, when forced by its financial situation to take extreme measures, the enterprise has always done so using legal methods and guaranteeing the rights of its workers. This has not only affected unionized workers, but also non-unionized workers. The trade union does not clarify the relationship to the reinstatement of the executive board, particularly the relationship to workers who withdrew from ACMA.

534. Regarding the trade union's participation in the 1996 collective bargaining, the Government reports that in accordance with the Colombian legislation at the time, where several unions existed in an enterprise, the professional unions could negotiate directly when they fulfilled the legal requirements, that is, having membership totalling 75 per cent of the workers in the same profession working for the enterprise in 1996 and subsequent years; alternatively, if they did not fulfil this condition they could be represented at the negotiating table by the negotiating committee which would be formed by the majority union of workers in the enterprise, as stated in article 357 of the Substantive Labour Code, which at the time had not been overturned by ruling C-567 of 2000.

535. Article 357 of the Substantive Labour Code now provides that: "when a general trade union coexists with a professional or industry trade union in one enterprise, workers will be represented for all matters of collective recruitment by the union containing the majority of workers in the enterprise".

536. This means that until 2000, ACMA was represented in the negotiations either jointly, if none of the unions had a majority, or by the majority union, and that since 2000 it has always been able to represent itself directly. These situations, generally all internal to the trade union, show that it is not legally the responsibility of the enterprise if ACMA has not been involved in the negotiations since 1996 and still less in 2002 when the 2002-04 collective agreement was signed.

537. It is therefore important to note that in the early negotiations in 2002 when the collective agreement was signed, the company complied with its legal obligations and brought forward the proceedings for the collective labour dispute resulting from the denouncement of the collective agreement and the subsequent presentation of the list of demands by the trade unions; in so doing it observed its duties and complied with the legal terms provided for that effect, and this is clearly shown in the fact that the appeal for protection taken against the enterprise by ACMA for violation of their fundamental rights was not upheld, something which ACMA acknowledges and accepts in it allegations. It is important to note that ACMA's allegations contain evidence of a conflict between trade unions which has nothing to do with the enterprise.

D. The Committee's conclusions

538. *The Committee recalls that this case refers to a number of acts of anti-union discrimination in several aviation enterprises. Firstly, the Committee takes note of the information provided by the Government regarding the fact that the enterprise unit between AVIANCA-SAM and HELICOL S.A. had been declared not to exist and, as a result, the allegations regarding each of them will be dealt with separately.*

AVIANCA S.A. enterprise

539. *As regards subparagraph (a) of the Committee's recommendations regarding the collective dismissal of workers affiliated to the National Union of Employees of AVIANCA (SINTRAVA) and their replacement by workers in cooperatives, the Committee notes that, according to the Government, none of the dismissed workers has been re-hired by the enterprise through a cooperative. The Committee also notes that according to the Government, the Ministry of Social Protection does not have the jurisdiction to launch an investigation into the recruitment of cooperatives into AVIANCA S.A. unless there has been an allegation of trade union persecution, and highlights that in accordance with article 33 of the Political Constitution they have economic freedom to hire staff as long as the rights of workers are respected. The Committee observes that the allegations do indeed, in these circumstances, refer to anti-union discrimination manifested in the collective dismissal of workers and their replacement by workers in cooperatives who cannot join or form a trade union, a denial of rights which would constitute a clear violation of Conventions Nos. 87 and 98. The Committee again recalls the principles contained in Article 2 of Convention No. 87 and reiterates its request for the Government to take the necessary measures to carry out an impartial investigation in order to ascertain whether the dismissed workers were in fact replaced by others from cooperatives or other companies to do the same work; and to determine whether these new workers have freedom of association rights and, if that is not the case, to take steps to ensure full respect for freedom of association for these workers in line with the principles mentioned above and to reinstate those workers that may have been subject to anti-union discrimination and, if reinstatement is not possible, to ensure that they are fully compensated. The Committee requests the Government to keep it informed in this regard.*

540. *As regards subparagraph (b) of the recommendations on the allegations of threats against unionized workers in Cali by the United Self-Defence Forces of Colombia (AUC), in accordance with the Government's request, the Committee requests SINTRAVA to provide the names of the people who have been threatened and more information about the circumstances of the threats, so that more information can be requested from the relevant authorities.*

541. *As regards subparagraph (c) of the recommendations on the adoption by the company of new internal regulations without consulting the trade union, the Committee notes that, according to the Government, on 16 May 2003, the enterprise AVIANCA S.A. requested the approval of the Ministry of Social Protection for the internal labour regulations and that after a number of articles were objected to, decisions which were appealed by the enterprise, the regulations were approved on 25 September 2003 through resolution No. 00386 as it then complied with the legal requirements. SINTRAVA was notified of this resolution. The Committee notes this information, but emphasizes the importance that should be attached to full and frank consultation taking place on any questions of mutual interest, and regrets that the enterprise did not consult the trade unions during the process of drawing up the aforementioned regulations, given that its provisions would affect working conditions, and hopes that it will do so in future.*

542. *As regards the new allegations presented by SINTRAVA referring to the offer of greater benefits to individual workers than those established in the collective agreement and the offer of voluntary retirement to union officials immediately after signing an agreement between the trade union and the enterprise on 3 September 2005, the Committee notes the Government's observations that the offers of collective retirement are voluntary and are made to both unionized and non-unionized workers and that rejecting them does not lead to any kind of retaliation. Regarding the offer of benefits to individual workers, the Government states that, in accordance with the Substantive Labour Code, when a trade union does not comprise more than one-third of the employees in the enterprise, the collective agreement only applies to members of the union and therefore, there is a possibility to make agreements with the non-unionized workers (who are not covered by the collective agreement) about certain additional benefits by signing a (non-union) collective accord. In this regard, the Committee again recalls, as it has done in other cases from Colombia with similar allegations "that the principles of collective bargaining must be respected taking into account the provisions of Article 4 of Convention No. 98 and that direct negotiation with the workers must not be used to undermine the position of the trade unions" [see 324th Report, Case No. 1973, and 325th Report, Case No. 2068 (Colombia)]. Therefore, the Committee requests the Government to take the necessary measures to ensure that no (non-union) collective accords with non-unionized workers are signed that would undermine the collective bargaining process and the collective agreements in the AVIANCA S.A. enterprise. The Committee however notes that, according to the Government, in mid-2004, this collective accord with non-unionized workers ceased to apply because the number of trade union members increased to more than one-third of the workers in the enterprise. The enterprise then decided to offer all its workers, unionized or not, a package of benefits that came into force in January 2005.*

543. *As regards the allegations presented by the Colombian Association of Aviation Mechanics (ACMA) referring to: pressure by AVIANCA S.A. since 1995 on unionized workers to leave the company, the process of collective dismissals which began in 1996 and the compulsory retirement of workers; the pressure on workers who remained with the enterprise to renounce the collective agreement and the refusal of the enterprise to bargain collectively since 2002, the Committee notes the information from the Government. According to this, AVIANCA S.A. requested the Ministry of Social Protection for the authorization for the collective dismissal of 1,351 workers, and received authorization from the Ministry of Social Protection to dismiss 350 workers for economic reasons through resolution No. 1789; the trade unions in the enterprise lodged appeals; through resolution No. 0187 of 23 February, the Ministry of Social Protection, Atlantic Territorial Directorate, confirmed all the terms of resolution No. 1789. The Committee regrets, however, that, according to the Government's observations, the enterprise offered the new system of recruitment ("revised contract") in contradiction of the provisions of the collective agreement and highlights the importance it gives to respecting signed collective agreements. The Committee notes that, according to the Government, of the 350 dismissals authorized by the Ministry, only 46 were carried out, affecting both unionized and non-unionized workers, and of these only two were members of ACMA. Regarding ACMA's allegations of hiring workers through cooperatives, who then cannot join trade unions, the Committee has already dealt with these allegations above.*

544. *As regards the refusal to bargain collectively with the trade union since 2000, the Committee notes that, according to the Government, the enterprise has negotiated and signed collective agreements, but with a different trade union, because ACMA is not the most representative.*

HELICOL S.A. enterprise

545. *As regards subparagraph (d) of the recommendations about the allegations made by Colombian Association of Civil Aviators (ACDAC) concerning the violation by HELICOL S.A. of the signed collective agreement, the Committee notes that, according to the Government, the Territorial Directorate of Cundinamarca, through its inspections, has sanctioned HELICOL S.A. and AEROREPUBLICA S.A. for violating the collective labour agreement, in accordance with the provisions of resolutions Nos. 2410 of 25 June 2004, 3702 of 28 September 2004 and 3923 of 11 October 2004.*

546. *As regards subparagraph (e) of the recommendations referring to the allegations that the Government is not updating salaries in accordance with the provisions of the collective agreement, the Committee recalls that the Government reported during the previous examination of the case that this was due to the fact that the complainant had decided not to denounce the collective agreement, which meant that wages were maintained at the level outlined in the agreement still in force. The Committee also recalls that it had requested the Government and the complainant to clarify whether, with regard to updating salaries, the collective agreement had been formally denounced, whether an impartial arbitration tribunal had actually been nominated and, if so, whether this decision had been rescinded, and whether the complainant had appealed against that decision. The Committee notes that according to the Government, the collective agreement was denounced, the parties were ordered to turn to direct settlement through resolution No. 0003794 of 4 October 2004, a decision which was appealed by the enterprise and, as no agreement has yet been reached, the Territorial Directorate of Cundinamarca should appoint an arbitration tribunal. The Committee requests the Government to keep it informed of the final development of this dispute.*

547. *As regards subparagraph (f) of the recommendations on the allegations regarding pressure on HELICOL S.A. workers to leave their union and sign a (non-union) collective accord, the Committee notes that the Government, based on reports submitted by the enterprise, states that those who left the union did so before the collective accord was planned and drawn up and denies that there has been any pressure on workers to leave the union.*

548. *As regards the signature of the (non-union) collective accord in particular, the Committee notes that, according to the Government, HELICOL S.A. and the vast majority of its workers did indeed sign a non-union collective labour accord, which was negotiated not only with pilots and co-pilots but with all the company's employees, bringing together both their expectations and the needs of the enterprise, in accordance with articles 481 and ff. of the Substantive Labour Code. The Committee also notes that, according to the Government, in response to an appeal lodged by the unionized workers, the judicial authority ordered that the same working conditions be given to unionized and non-unionized workers to give the latter the benefits granted in the non-union collective accord. The Committee also notes that, according to the new allegations presented by ACDAC, unionized pilots are still being discriminated against, with regards to the benefits given to non-unionized pilots. In this regard, the Committee refers to the principles on signing non-union collective accords, as laid out in previous paragraphs, and requests the Government to take the necessary measures to guarantee that the trade union is free to negotiate, that workers (unionized or not) are not pressurized into accepting a collective accord against their will and that, in accordance with what has been established by the judicial authority, the signing of a collective accord with non-unionized workers does not undermine the rights of the unionized workers.*

549. *As regards subparagraph (g) of the recommendations which refers to the allegations of the dismissal of 15 HELICOL S.A. pilots, of whom one had trade union immunity, another had*

protection from dismissal as a negotiator of the list of demands, a third had reported contraventions within the company, and the others were forced to accept voluntary retirement, the Committee recalls that it had requested the Government to report on whether judicial authorization had been sought before the dismissal of the union official with trade union immunity, whether the appointment of the negotiator was considered irregular by the judicial authority, and whether the 15 dismissed pilots had taken any legal proceedings.

550. *The Committee notes that according to the Government, the dismissal of Captain Leonardo Muñoz Olea took place when he was no longer a negotiator of the list of demands and so did not have trade union immunity, as the trade union had decided in September 2003 to extend the collective agreement until 31 March 2004, meaning that there was no negotiation and so the denouncements of the agreements presented by the union and the enterprise as well as the appointment of the union's negotiating committee were left without effect. The Committee notes that according to the Government, on 14 April 2004, the enterprise decided to dismiss Captain Muñoz Olea without just cause, complying with the legal requirements and that the union only notified the enterprise of Captain Muñoz Olea's appointment as a member of a new negotiating committee on 22 April. The Committee also notes that, according to the Government, the Captain did not request authorities for union immunity within the two-month deadline, as required by the law.*

551. *As regards Mr. Néstor Morales Léon, the Committee notes that, according to the Government, his employment contract was terminated on 22 August 2003 because he had retired and begun drawing his pension. The Committee notes that the appeal for reinstatement brought by the worker, because of his union immunity as a member of the demands committee, was rejected by the judicial authority who denied that he had union immunity. This decision was confirmed by the Labour Decision Chamber of the Bogotá Legal District Tribunal in a ruling on 17 June 2005.*

552. *As regards the dismissal of Mr. Gerardo Sánchez for making a criminal complaint against the enterprise, the Committee notes that, according to the Government, the enterprise does not know of any such complaint and that Mr. Sánchez's contract was terminated on 14 April 2004, without just cause and with payment of the corresponding compensation, with no legal or an administrative appeal of any kind from the worker. The Committee observes that the Government has not provided any information on whether the other 12 dismissed pilots (forced to sign up to a voluntary retirement plan) have brought any legal action and requests it to do so without delay.*

553. *As regards subparagraph (h) of the recommendations concerning the failure to respect the trade union immunity of Captain Juan Manuel Oliveros, the Committee recalls that, in view of the vague wording of the allegation, it had requested the complainant for specification. The Committee regrets that it has not received any clarification from the complainant. As a result, it will not continue examining this allegation.*

554. *As regards the new allegations presented by ACDAC regarding the unilateral fixing of one day per week for exercising trade union activities and the rescheduling of all the flights of Mr. Orlando Cantilo, a member of the executive board, the Committee regrets that the Government has not sent its observations on the matter and requests it to do so without delay.*

AEROREPUBLICA S.A. enterprise

555. *As regards subparagraph* (i) *of the recommendations regarding the allegations of the refusal by AEROREPUBLICA S.A. to bargain collectively and the dismissals and sanctions of trade union officials for exercising their rights, the Committee notes that, according to*

the Government, the enterprise states that it has complied with the requirements for carrying out the various negotiations, and that the last negotiations concluded with the ruling of the Arbitration Tribunal called before the Ministry of Social Protection by the parties on 9 February 2005, which was ratified by the Chamber of Labour Cassation of the Supreme Court of Justice.

556. *As regards the dismissals and sanctions of trade union officials for exercising their rights, the Committee notes that according to the Government, the enterprise states that it has complied with the rulings made by the various judicial and administrative bodies. The Committee notes that in the case of Captain David Restrepo Montoya, whose contract was terminated by a unilateral decision of AEROREPUBLICA S.A., the Territorial Directorate of Antioquía closed the case brought by the worker by order of 28 April 2004, because the enterprise was considered to have acted in accordance with the current labour legislation. Regarding Captain Jaime Patiño and Captain Andrés Luna, the enterprise states that their employment contracts were terminated by a unilateral decision of AEROREPUBLICA S.A. which is why the compensation was paid, in accordance with the law. With regard to Captain Roberto Ballén Bautista, the Committee notes that: (1) the enterprise brought a labour case to lift his immunity to end the employment contract with just cause as he had refused to renew his co-pilot's licence with Colombian Civil Aviation; (2) since that date, the enterprise has not been able to make use of his services; and (3) that the judicial authority authorized the lifting of his immunity but the trade union appealed this decision. The Committee also notes that, according to the Government, the Territorial Directorate of Cundinamarca of the Ministry of Social Protection completed an administrative labour investigation into AEROREPUBLICA S.A. for trade union discrimination, issuing resolution No. 3923 of 11 October 2004 sanctioning the enterprise; the enterprise has lodged appeals against this decision which are ongoing. The Committee requests the Government to inform it of all the judicial appeals against dismissals and to keep it informed of ongoing judicial appeals.*

The Committee's recommendations

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

AVIANCA S.A. enterprise

(a) The Committee reiterates its request for the Government to take the necessary measures to carry out an impartial investigation in order to ascertain whether the workers dismissed from AVIANCA S.A. were in fact replaced by others from cooperatives or other companies, to do the same work; and to determine whether these new workers have freedom of association rights and, if that is not the case, to take steps to ensure full respect for freedom of association for these workers in line with the principles mentioned above and reinstate those workers that may have been subject to anti-union discrimination and, if reinstatement is not possible, to ensure that they are fully compensated. The Committee requests the Government to keep it informed in this regard.

(b) As regards the allegations of threats against AVIANCA S.A.'s unionized workers in Cali by the United Self-Defence Forces of Colombia (AUC), the Committee requests the National Union of Employees of AVIANCA (SINTRAVA) to provide the names of the people who have been threatened

and more information about the circumstances of the threats, so that more information can be requested from the relevant authorities.

(c) As regards the new allegations presented by SINTRAVA regarding the offer of greater benefits to individual workers than those established in the collective agreement, the Committee requests the Government to take the necessary measures to ensure that it does not sign (non-union) collective accords which harm the collective bargaining process and the collective agreements in the AVIANCA S.A. enterprise.

HELICOL S.A. enterprise

(d) As regards the allegations of the refusal of HELICOL S.A. to update salaries in accordance with the provisions of the collective agreement, and the pending decision on the appointment of an arbitration tribunal, the Committee requests the Government to keep it informed of the final development of this dispute.

(e) As regards the allegations of pressure on HELICOL S.A. workers to leave their union and sign a non-union collective accord, the Committee requests the Government to take the necessary measures to guarantee that the trade union is free to negotiate, that workers are not pressurized into accepting a collective accord against their will and that, in accordance with what has been established by the judicial authority, the signing of a collective accord with non-unionized workers does not undermine the rights of the unionized workers.

(f) As regards the allegations of the dismissal of 15 HELICOL S.A. pilots, the Committee, while noting that the Government refers to three of them, requests it to provide information as to whether the other 12 dismissed pilots, forced to sign up to a voluntary retirement plan, have brought any legal action on the matter.

(g) As regards the new allegations presented by the Colombian Association of Civil Aviators (ACDAC) of HELICOL S.A.'s unilateral fixing of one day per week for exercising trade union activities and the rescheduling of all the flights of Mr. Orlando Cantilo, a member of the executive board, the Committee requests the Government to submit its observation on this regard.

AEROREPUBLICA S.A.

(h) As regards the allegations of the refusal by the company AEROREPUBLICA S.A. to bargain collectively and the dismissals and sanctions of trade union officials for exercising their rights, the Committee requests the Government to inform it of all the judicial appeals against dismissals and to keep it informed of ongoing judicial appeals.

CASE NO. 2384

INTERIM REPORT

Complaint 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

558. The Committee last examined this case at its November 2005 meeting [see 338th Report, paras. 738 to 755] and presented a report to the Governing Body.

559. The Trade Union of Workers and Employees in Public and Autonomous Services and Decentralized Institutions of Colombia (SINTRAEMSDES) sent new allegations in communications dated October 2005 and in the communication dated 17 December 2005. SINTRAEMSDES sent further information in a communication dated 22 March 2006.

560. The Government sent its observations in communications dated 21 November 2005, 23 January and 24 July 2006.

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

A. Previous examination of the case

562. At its November 2005 meeting, the Committee made the following recommendations regarding this case [see 338th Report, para. 755]:

(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.

B. New allegations

563. In its communication of 17 December 2005, the Trade Union of Workers and Employees in Public and Autonomous Services and Decentralized Institutions of Colombia (SINTRAEMSDES) alleges that the departmental government of Antioquia, Colombia, created a state industrial and commercial enterprise, Productora Metalmecánica de Gaviones de Antioquia (PROMEGA), to which a number of workers were transferred, with the initial aim of taking members away from the Trade Union of Workers of Antioquia Department (SINTRADEPARTAMENTO).

564. As the workers transferred to PROMEGA could no longer remain members of SINTRADEPARTAMENTO, given that it is an establishment trade union, they joined SINTRAEMSDES, an industry trade union. PROMEGA began operating using assets provided by the Public Works Office, but the director did not carry out his duties, allowing PROMEGA to decline and thus justifying its immediate liquidation.

565. SINTRADEPARTAMENTO was one of the most militant and effective trade unions in terms of the active defence of the occupational guarantees of its members, in particular those related to the right to organize and collective bargaining.

566. While it was active, SINTRADEPARTAMENTO achieved coverage of all of the official employees by the terms of the collective agreement, especially those regarding stability of employment and procedures.

567. The employment relationship of the employees of the department is unique, given that public servants are appointed by regulation and the workers are subject to a body of regulations applied by the State.

568. However, a contractual relationship exists in the case of official employees who are governed by the terms of a collective agreement, when these exist, or legislation (Act 6a of 1945) which sets out a presumed or hypothetical contract concluded between the parties every six months, unless a different duration is agreed on by the parties.

569. SINTRADEPARTAMENTO had managed to establish an indefinite stability agreement, under which the workers could only be dismissed under the clauses expressly set out in sections 62 and 63 of Decree No. 2351 of 1965 and in full compliance with the agreed procedure, dismissal, moreover, being a disciplinary sanction under the agreement. This means that, in order to terminate an employment relationship with a worker, the department was obliged to follow due process.

570. Through Ordinance No. 10 of 8 June 1993, the Departmental Assembly, an administrative body elected by the people, authorized the Governor to establish a departmental-level industrial and commercial enterprise.

571. The Governor then proceeded to establish the departmental-level industrial and commercial enterprise known as "Productora Metalmecánica de Gaviones de Antioquia – PROMEGA" and, this being an industrial and commercial enterprise, the workers of the Machinery and Production Directorate of the Public Works Office were incorporated into PROMEGA as official employees, while their membership was transferred from the enterprise trade union SINTRADEPARTAMENTO to the Medellín local section of the industry trade union SINTRAEMSDES and the same collective agreement signed by SINTRADEPARTAMENTO was immediately negotiated with SINTRAEMSDES.

572. From the time of its inception until 1996, the enterprise, while it existed, did not operate. In March 1996, the workers went out to lunch as usual and, on their return, found the premises locked with chains and padlocks – a real lockout by the employer, in other words closure without authorization from the competent authority.

573. Faced with non-compliance by the department and inactivity on the part of the directors of PROMEGA, the workers were offered a retirement plan that would extinguish their right to organize.

574. The administrative authority had indeed closed the enterprise without the authorization of the Departmental Assembly or that of the Ministry of Labour, and this authorization was only granted later, through Ordinance No. 27E, authorizing the Governor to wind up the enterprise PROMEGA, before 31 December 1996.

575. As a consequence of the closure, many workers were forced to accept the settlements offered by PROMEGA with the approval of the department. But the employees referred to in this complaint were dismissed and, in the course of demanding their rights, took their case to the ordinary labour courts, where all their rights were rejected by the judges. Despite the fact that there are more than ten tribunals in the city of Medellín, the employees were obliged to undergo a process of conciliation before a single court, but the workers refused to engage in conciliation regarding their retirement from the department, considering that they had been forced into this situation through the use of underhanded tactics and pressure.

576. In its communication of 22 March 2006, SINTRAEMSDES sends further information on the allegations presented with regard to the legal proceedings in which Medellín Public Enterprises was acquitted of the charges brought against it. The complainant organization refers to the said legal proceedings, which involve several employees of Medellín Public Enterprises, and gives a detailed description of the proceedings.

577. In its communication of November 2005, SINTRAEMSDES alleges that, in 1995, the District Public Services Enterprises of Cartagena dismissed all the workers belonging to the trade union. This included Mr. Rafael León Padilla (referred to in the allegations previously examined) and Libardo Pearson Beleño, who, as members of the executive committee, enjoyed trade union immunity. According to the allegations, the legal proceedings brought and the requests for *tutela* (protection) of constitutional rights were rejected.

C. The Government's reply

578. In its communications dated 21 November 2005, 23 January and 24 July 2006, the Government sends the following observations.

579. With regard to subparagraph *(a)* of the recommendations, regarding the alleged dismissal of 54 members of the Trade Union of Public Employees of the Medellín Municipal Sports and Recreation Institute (ASINDER), the Government points out that, according to Record No. 370 of 14 December 2004, the Fourth Labour Division of the High Court of Medellín ordered the payment of full compensation – given the impossibility of reinstatement owing to the abolition of posts – for unpaid wages for the period between the date of dismissal and that of the decision, with the adjustments and benefits due, as a direct consequence of the dismissals.

580. The Government adds that compensation was paid in full to the 49 claimants by the Medellín Municipal Sports and Recreation Institute (INDER). No appeal lies against decisions in the second instance under the special trade union immunity procedure, this being expressly prohibited under section 117 of the Procedural Labour Code.

581. Furthermore, with regard to the 52 claims lodged with the administrative disputes jurisdiction by the same number of workers dismissed from INDER seeking the annulment of the decision on the abolition of posts – or restructuring – (Decision No. 017 of 23 January 2001) and dismissal and, consequently, reinstatement in their previous posts, on 12 September 2005 the Second Division of the Administrative Disputes Tribunal of Antioquia rejected these claims.

582. As to subparagraph *(b)* of the recommendations on the alleged refusal to register the new executive committee of the Trade Union of Workers at the Cartagena Communications Company (SINTRATELECARTAGENA) owing to the fact that the enterprise is in liquidation, the Government states that, through Decision No. 483 of 28 October 2004, the Inspector of the Labour, Employment and Social Security Unit of the Territorial Directorate of Bolívar turned down the request for registration of the executive committee of the trade union organization, based on a precept of the Legal Office of the Ministry of Social Protection, according to which "within public bodies in the process of liquidation, the establishment of trade union organizations and the registration of executive committees are not feasible, given that once the liquidation of a public body has been ordered, the word 'liquidation' must be indicated from that moment whenever it is referred to, to all effects and purposes, thus drawing a distinction with respect to the previous body and the only actions which may be undertaken are those directed towards this end. Consequently, the employment relationship of those public servants continuing to work for the body shall only last until the date on which that body ceases to exist, its legal representative lacking the capacity to conclude collective agreements, and hence any action in this regard therefore lacks any validity whatsoever".

583. According to the Government, workers forming trade unions, establishing locals or electing executive committees within official bodies in liquidation cannot fulfil the aims of the right to organize, in that the legal representatives of the public bodies employing them do not have the capacity to conclude collective labour agreements or improve working conditions, and hence they cannot be entered on the trade union register in these cases, all the more so given that the Ministry of Social Protection is responsible for monitoring and verifying compliance with the legal framework governing labour, and especially collective labour law in the public and private sectors, as stated under sections 3 and 465 of the Substantive Labour Code. The Government adds that appeals for reversal and special appeals were lodged against the abovementioned decision, and the decision not to register the executive committee of SINTRATELECARTAGENA was upheld.

584. The Government also states that, at the stage of examination of evidence, the coordinator warned that the trade union organization did not have the minimum number of members to justify its existence, as certified by the administrative director of TELECARTAGENA. The trade union organization attempted to register a new executive committee with only

12 members, without taking into account the provisions of section 359 of the Substantive Labour Code, which stipulates that, in order to be formed, trade union shall have at least 25 members.

585. As to subparagraph *(c)* of the recommendations, regarding the dismissal of Mr. Rafael León Padilla, a member of the Trade Union of Workers and Employees in Public and Autonomous Services and Decentralized Institutions of Colombia (SINTRAEMSDES), three days after the registration of the new executive committee, the Government states that, according to the receiver of the Public Services Enterprise of Cartagena, Mr. Rafael León Padilla was an employee of the said enterprise from 25 May 1982 to 4 August 1997, and has been paid his statutory entitlements. Mr. León Padilla's dismissal, along with that of the 496 employees of the Public Services Enterprise of Cartagena, was due to the liquidation of the Public Services Enterprise of Cartagena, ordered by the Municipal Council of Cartagena in a decision of 5 March 1994. In addition to ordering the dissolution and liquidation of the Public Services Enterprise of Cartagena, the decision orders that the District of Cartagena shall be responsible for the administration, management, execution and provision of public services, empowering the Mayor to that end. Decree No. 1540 of 23 December 1992 changed the legal status of the Public Services Enterprise of Cartagena, transforming it into an industrial and commercial public services enterprise of the district level. The receiver, in accordance with that legislation, issued Decisions Nos. 1294 of December 1995 and 125 of 30 December 1997, abolishing the posts of the staff of the Public Services Enterprise of Cartagena.

586. The Government states that Mr. León Padilla initiated proceedings before the ordinary labour courts, which led to the Eighth Labour Court of the Cartagena Circuit ordering the Public Services Enterprise of Cartagena to pay the sum of US$17,994,540.20 in wages unpaid from the date of retirement, 4 March 1997, until 30 March 1999. This decision was upheld by the Labour Division of the High Court of Cartagena, through a ruling of 13 December 1999. The High Court of Cartagena ruled that the order for the reinstatement of the claimant was inadvisable given that it was physically impossible for the enterprise to reinstate him. For this reason, the court only recognized the claimant's right to wages covering the period between the date of dismissal and the date on which the said ruling was handed down. The Public Services Enterprise of Cartagena is in liquidation and therefore has no staff members, neither is it providing the services it was created to provide, and hence cannot be required to reinstate a former worker, even if he is a trade union official. In accordance with the decision of 12 March 1999 of the Eighth Labour Court of the Cartagena Circuit, it is clear that the reinstatement action was litigated within the context of the trade union immunity proceedings, and is thus now *res judicata*. The Government adds that the enterprise paid Mr. León Padilla the following sums: US$19,367,682 in compensation and benefits and US$46,804,059 in accordance with the decision of the Eighth Labour Court of the Cartagena Circuit.

587. As for the case of Mr. Libardo Pearson Beleño, according to the information provided by the receivership, he was granted a retirement pension to be paid in part, according to resolution No. 021 of 18 March 1999, by the national army as from 5 August 1997, i.e. from the day he stopped working. Mr. Libardo Pearson Beleño filed an application against the enterprise, examined by the Labour Tribunal of Cartagena.

588. The Government refers to other questions, not related to the allegations. They are therefore not transcribed.

D. The Committee's conclusions

589. *Concerning subparagraph* (a) *of the recommendations on 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, with regard to which the Committee requested the Government to keep it informed on the appeals proceedings brought in respect of the decision of the ordinary courts rejecting the workers' reinstatement, the Committee notes that, the Government, according to Record No. 370 of 14 December 2004, the Fourth Labour Division of the High Court of Medellín ordered the payment of full compensation – given the impossibility of reinstatement owing to the abolition of posts – for unpaid wages for the period between the date of dismissal and that of the decision, with the adjustments and benefits due. The Government adds that compensation was paid in full to the 49 claimants by the Medellín Municipal Sports and Recreation Institute (INDER). The Committee points out, however, that the allegations refer to 54 dismissals. Consequently, the Committee requests the Government to inform it whether the other five trade union members who were dismissed were duly compensated.

590. *Concerning subparagraph* (b) *of the recommendations on 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 notes that, according to the Government, the request for registration of the executive committee of the trade union organization was refused by the administrative authority based on a precept of the Legal Office of the Ministry of Social Protection, according to which, within public bodies in the process of liquidation, the establishment of trade union organizations and the registration of executive committees are not feasible, given that, once the liquidation of a public body has been declared, the only actions which may be undertaken are those directed towards this end. Consequently, the employment relationship of those public servants continuing to work for the body shall only last until the date on which that body ceases to exist, its legal representative lacking the capacity to conclude collective agreements, and hence the registration of the new executive committee is invalid. The Committee also notes that the Government adds that, in any case, when the new executive committee was formed, the trade union organization did not have the minimum number of members required by law to enable it to function.*

591. *In general, the Committee notes that although the legislation stipulates that a body in liquidation may not conclude collective agreements, the members of the executive committee continue to play a fundamental role within the body in liquidation. This role mainly consists of defending workers' interests during the liquidation process. Furthermore, the Committee recalls that, in accordance with Article 3 of Convention No. 87, the workers shall have the right to elect their representatives in full freedom. As to the Government's statement to the effect that, at the time of the request for registration of the new executive committee, the trade union organization did not have the minimum number of members required by law to enable it to function, the Committee notes that, according to section 401 of the Substantive Labour Code, a trade union may be dissolved "(d) When the number of members falls below twenty-five (25), in the case of trade unions". However, subparagraph (e) of the same section stipulates that, in the event of one of the grounds for dissolution applying to a trade union, federation or confederation, the Ministry of Labour and Social Security, or whosoever can demonstrate that they have a legal interest, may request the competent labour judge to proceed with the dissolution and liquidation of the trade union and the cancellation of its registration in the trade union register. Consequently, the Committee requests the Government to ensure that, until the judicial authority hands down a ruling on the substance with regard to the lack of the minimum number of members required for the trade union to function, the executive committee is duly registered, taking into account the aforementioned fundamental role that the trade union plays during the liquidation process.*

592. *Concerning subparagraph* (c) *of the recommendations on the dismissal of Mr. Rafael León Padilla, a member of the Trade Union of Workers and Employees in Public and Autonomous Services and Decentralized Institutions of Colombia (SINTRAEMSDES),*

three days after the registration of the new executive committee, the Committee notes that, according to the Government, Mr. Padilla was dismissed in the context of a restructuring process along with 496 other employees of the Public Services Enterprise of Cartagena, that Mr. Padilla had recourse to the judicial authority in the first and second instance because he enjoyed trade union immunity and that the Labour Division of the High Court of Cartagena, through a ruling of 13 December 1999, ruled that the order for the reinstatement of the claimant was inadvisable given that it was physically impossible for the enterprise to continue its activities, and that the court therefore only recognized the claimant's right to wages covering the period between the date of dismissal and the date of the ruling, which was complied with by the enterprise through the payment of compensation.

593. *With regard to Mr. Libardo Pearson Beleño, the Committeee takes note, according to the Government's reply, that he retired the day of his dismissal and that he brought a suit against the enterprise whch is now before the court. The Committeee requests the Government to keep it informed of the final result of this case.*

594. *The Committee notes that, in its new allegations, SINTRAEMSDES refers to the mass dismissal of the workers of the Public Services Enterprise of Cartagena, as well as to the dismissal of Mr. Libardo Pearson Beleño, a member of the executive committee of the trade union organization, along with Mr. Padilla. The Committee notes that the Government has not sent its observations in this respect and requests it to do so without delay.*

595. *The Committee notes with regard to these allegations that, in one of its communications, SINTRAEMSDES refers to Medellín Public Enterprises and to certain legal proceedings brought against this enterprise. Taking into account the fact that this enterprise is not clearly linked to the allegations presented, the Committee will not proceed to examine these allegations.*

596. *Concerning the allegations presented by SINTRAEMSDES regarding the creation of a state industrial and commercial enterprise, Productora Metalmecánica de Gaviones de Antioquia (PROMEGA), to which a number of workers of the department of Antioquia formerly belonging to SINTRAEMSDES were transferred and its liquidation, resulting in the dismissal of all the workers belonging to the trade union organization, due to its no longer functioning, the Committee observes that the Government has not sent observations in this respect and requests it to do so without delay.*

The Committee's recommendations

597. ***In the 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 54 members of the Trade Union of Public Employees of the Medellín Municipal Sports and Recreation Institute (ASINDER), while noting that the High Court of Medellín ordered the payment of full compensation to 49 claimants, the Committee requests the Government to inform it whether the other five trade union members who were dismissed were duly compensated.

(b) With regard to the alleged refusal to register the new executive committee of the Trade Union of Workers at the Cartagena Communications Company (SINTRATELECARTAGENA) owing to the fact that the enterprise is in liquidation, and the fact that the trade union does not have the minimum

number of members to enable it to function, the Committee requests the Government to ensure that, until the judicial authority hands down a ruling on the substance with regard to the lack of the minimum number of members required for the trade union to function, the executive committee is duly registered.

(c) With regard to the dismissal of Mr. Libardo Pearson Beleño, the Committee requests the Government to keep it informed of the final decision taken by the relevant court.

(d) The Committee requests the Government to send its observations without delay regarding:

(i) the alleged mass dismissal of the workers of the Public Services Enterprise of Cartagena; and

(ii) the alleged creation of the state industrial and commercial enterprise, Productora Metalmecánica de Gaviones de Antioquia (PROMEGA), to which a number of workers of the department of Antioquia formerly belonging to the Trade Union of Workers and Employees in Public and Autonomous Services and Decentralized Institutions of Colombia (SINTRAEMSDES) were transferred and its liquidation, resulting in the dismissal of all the workers belonging to the trade union organization, due to its no longer functioning.

CASE NO. 2436

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

Complaint against the Government of Denmark presented by the Union of Drivers in Copenhagen

Allegations: The complainant alleges that, in order to bypass the provisions of Danish law, which require as a condition for obtaining a taxi licence that the employees of the taxi company be paid in accordance with the relevant collective agreements, the Danish Taxi Companies' Employers' Association established a puppet union named the Drivers' Association which entered into a collective agreement establishing less favourable terms and conditions of employment for taxi drivers. The complainant considers that the Government

violated Convention No. 98 by recognizing the Drivers' Association and, more generally, failing to protect workers' organizations from interference by employers' organizations

598. The complaint is contained in a communication dated 21 June 2005 from the Union of Drivers in Copenhagen. In a letter dated 20 June 2006, the complainant organization sent additional information.

599. The Government sent its observations in a communication dated 16 May 2006.

600. Denmark 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

601. In its communication dated 21 June 2005, the complainant organization indicates that, according to the Danish Law on Taxi Driving of 24 June 1999, section 5, subsection 5, it is a condition for obtaining a taxi licence that the employees of the taxi company are paid in accordance with the relevant collective bargaining agreements.

602. At the time of entry into force of the Law on Taxi Driving, the Union of Drivers in Copenhagen and its affiliated union, the General Workers Union in Denmark (SiD), were the only trade unions to have entered into collective bargaining agreements covering taxi drivers in Copenhagen. In this respect, the complainant organization submits a copy of the collective bargaining agreement signed by SiD on behalf of the employees and by the Federation of Employers in Trade, Transport and Service (AHTS).

603. The complainant alleges that in 1999 a number of taxi companies organized in a competing employers' association (Danish Taxi Companies' Employers' Association), which had not entered into any collective bargaining agreements, contacted some of their employees asking them to form a drivers' association in order to fulfil the obligation set down by the Law on Taxi Driving. The taxi companies were also organized in associations named BVH-Taxa, NORD-Taxi and VEST-Taxa.

604. The complainant states that the meetings preparing the establishment of the drivers' association were held at the offices of the Danish Taxi Companies' Employers' Association in the presence of Mr. Knud Erik Knudsen, representative of the Danish Taxi Companies' Employers' Association. At the meetings the statutes for the drivers' association were drafted. The association was to be named Drivers' Association, BVH-Taxa, NORD-Taxi and VEST-Taxa, (Chaufførforeningen BVH-Taxa, NORD-Taxi og VEST-Taxa); the complainant emphasizes that the last part of the name derives from the name of the employers' associations.

605. A few articles of the statutes of the Drivers' Association are reported as follows:

> 2. Purposes of the Association
>
> (1) The purposes of the association, which is an interest organization, are:

- to further understanding and collaboration between taxi owners, drivers and office workers in Danish Taxi Federation (DTF) District 10;
- to further uniform behaviour and appearance vis-à-vis customers in the district;
- to contribute to strengthening shared interests in the district, including extension and improvement of the customer base and internal rules;
- to contribute to preventing inadequacies and/or poor customer service;
- to contribute to settling disputes between taxi owners, drivers, booking office staff and customers;
- to inform the members on new rules and new initiatives and to help and advise new drivers.

(2) Another object of the association is to enter into collective agreements without closed-shop provisions, though only after having obtained binding approval in the form of a resolution taken in general meeting or by a ballot among the members of the association.

(3) The association shall look after the professional interests of its members, for example in the field of education and training.

(4) To assist members in disputes concerning pay and working conditions, including contributing to ensuring that disputes between individual taxi owners and drivers are in so far as possible avoided or otherwise settled amicably.

606. The complainant organization points out that Mr. Knud Erik Knudsen was present – in the role of chairperson of the meeting – when the Drivers' Association's inaugural general assembly was held in November 1999. He was also the person presenting the draft statutes to the assembly.

607. About half a year later the Drivers' Association entered into a collective bargaining agreement with BVH-Taxa, NORD-Taxi and VEST-Taxa. Mr. Knud Erik Knudsen assisted both parties during the negotiations. The complainant alleges that, by and large, this collective bargaining agreement establishes less favourable salary than the collective bargaining agreement between SiD and AHTS, mainly as a result, but not limited to, the lack of obligation for the employers to contribute to the employees' pension scheme.

608. The complainant further indicates that, on 24 May 2002, Mr. Lars Franyo, a member of Union of Drivers in Copenhagen, filed a claim against his employer. The claim was based on the grounds that he considered being entitled to salary in accordance with the collective bargaining agreement between SiD and AHTS, rather than the one between the Drivers' Association and BVH-Taxa, NORD-Taxi and VEST-Taxa.

609. The claim was filed at the county court of Hørsholm. The complainant informs that on 27 October 2003 the court found that Mr. Lars Franyo, in light of the Law on Taxi Driving, was entitled to salary in accordance with a collective bargaining agreement. The county court further found that the Drivers' Association constituted a trade union and that the collective bargaining agreement entered into by the Drivers' Association was a collective bargaining agreement in accordance with Danish labour law and consequently in accordance with the Law on Taxi Driving. Finally the county court found that the Law on Taxi Driving did not specify which collective bargaining agreement was to be applied in the matter, as a result of which Mr. Lars Franyo was not entitled to salary in accordance with the collective bargaining agreement between SiD and AHTS.

610. The judgement (a copy of which is attached to the complaint) has been appealed to the Danish High Court of the Eastern Circuit, which has been asked to postpone the case until the ILO has had a chance to review the case.

611. The complainant submits: (i) that the State of Denmark by the county court's recognition of the Drivers' Association as a trade union under the Danish Law on Taxi Driving has violated its obligations under ILO Convention No. 98 on the right to organize and collective bargaining; (ii) that the Drivers' Association, if not in name, is in effect a solidarist association or puppet union, established under the supervision of an employers' association to promote harmony between employers and employees and to further employers' interests; (iii) that the State of Denmark, according to Article 2(1) of the Convention, has failed to protect workers' organizations from interference by employers' organizations; and (iv) that Denmark under Convention No. 98 is obliged to work against the creation of puppet unions and to ensure that solidarist associations do not interfere with trade union activities.

612. In a communication dated 20 June 2006, the complainant indicates that the case is no longer pending before the Danish High Court of the Eastern Circuit. Both Danish high courts have decided that the Act on Taxi Driving, section 5(5), does not stipulate any rights for the taxi drivers to be paid according to a collective bargaining agreement. According to the decision, rather than stipulating individual rights for the taxi drivers, the Act stipulates the requirements to obtain and sustain a licence for taxi driving. Consequently, it belongs to the authorities to control whether or not a holder of a licence does pay his employees according to collective bargaining agreements. In the present case, the complainant informs that the municipal authority that controls whether or not a holder of a licence does pay his employees according to collective bargaining agreements is the Taxi Board of Greater Copenhagen. The Board has in fact recognized that holders of licences paying according to the agreement with the Drivers' Association do fulfil the requirements in the Act on Taxi Driving.

613. In consequence of the abovementioned judgements on the Act on Taxi Driving, the plaintiff chose to reach a settlement agreement with his employer. The complainant organization considers, however, that the fact that the individual court case has been settled does not make the present complaint redundant, as the Danish High Court of the Eastern Circuit has not had any chances to decide whether or not the Drivers' Association could be recognized as a trade union. The complainant does maintain that the Kingdom of Denmark, by its local authorities and the county court of Hørsholm's recognition of the Drivers' Association as a trade union, has violated its obligations under ILO Convention No. 98.

B. The Government's reply

614. In its communication dated 16 May 2006, the Government emphasized that the starting point for the complaint is section 5(5) of the Act on Taxi Driving (No. 517 of 24 June 1999), according to which: "The holder of a licence shall observe the provisions concerning pay and working conditions for drivers laid down in the relevant collective agreements."

615. In its reply, the Government indicates that, in Denmark, pay and working conditions on the labour market are governed by collective agreements between the social partners or by individual agreements between the employee and the employer. There is thus no general legislation concerning wages, including a minimum wage. However, the legislation may include provisions, as for instance in the Act on Taxi Driving, with reference to collective agreements concerning pay conditions in the relevant occupational field, without any further specification.

616. The Government recalls that the conclusion of collective agreements is based on the existence of independent contracting parties, i.e. typically an employees' organization and an employers' organization that can engage in voluntary and free collective bargaining.

617. While there are different types of collective agreements, ranging from central national level agreements between trade unions and employers' organizations concerning pay and working conditions down to local agreements, the decisive factor is that the agreement is actually the result of a genuine bargaining process between the two parties. It is not of decisive importance whether the parties have themselves used the term collective agreement about their agreement, but it is also a decisive precondition under Danish labour law that the agreement has been concluded between two mutually independent parties.

618. The Government stresses that the provisions laid down in section 5(5) of the Act on Taxi Driving do not stipulate a duty to conclude a collective agreement concerning pay and working conditions with a specific trade union. The Government states that this provision cannot promote the formation of employees' organizations dominated by employers or employers' organizations, as claimed by the complainant, as the very concept of a collective agreement is based on the concept of independent organizations. This provision just implies that the taxicab owner has a duty to comply with the provisions concerning pay and working conditions that may be laid down in one of the collective agreements that may be in force in the field of taxi driving. The Act gives further specification as to which agreement or at which level the agreement is to be concluded.

619. The Government points out that section 5(5) is drafted in accordance with similar provisions in the Act on Bus Service and the Act on Freight Transport and it is stated in the explanatory notes to all three Acts that the aim of these provisions is to contribute to the development of sound competition conditions and – in relation to rules regarding working time and other conditions laid down in the collective agreement – to promote road safety.

620. The Government states that, in the field of taxi driving, licences are issued by individual municipal authorities and, in addition to the national-level collective agreement between SiD and [A]HTS, a number of local agreements also exist. It emphasizes that applicants for licences are not turned down for failing to observe the national agreement, if applicants have chosen to follow a local agreement instead.

621. Concerning the status of the Drivers' Association, i.e. whether it is an employees' organization independent of the employer's interests, and whether the agreement concluded is a genuine collective agreement concerning pay and working conditions concluded by two mutually independent parties, the Government in its communication informed that it would not comment on this question, since the case at the time was pending before a Danish court. However, the Government contests the allegation that the Government has failed to observe its obligations under Convention No. 98 and, in particular Article 2(2), concerning the obligation to ensure that organizations – in an adequate way – are protected against intervention from each other in relation to their formation, operation or administration. In this respect, the Government points out that the case law of both the industrial court and the civil courts includes decisions that hold agreements not to be proper collective agreements because the employees party to the agreement cannot be considered to be an independent organization. The Government specifically refers to two decisions that hold agreements not to be collective agreements because it has been established that the parties have not been independent (Judgement of the High Court from 1946 (U46/353) and Judgement of the Industrial Court from 1977 (No. 8093)).

C. The Committee's conclusions

622. *The Committee notes that the present case concerns allegations that, in order to bypass the provisions of Danish law, which require as a condition for obtaining a taxi licence that the employees of the taxi company be paid in accordance with the relevant collective agreements, the Danish Taxi Companies' Employers' Association established a puppet*

union named the Drivers' Association which entered into a collective agreement establishing less favourable terms and conditions of employment for taxi drivers. The complainant considers that the Government violated Convention No. 98 by recognizing the Drivers' Association and, more generally, failing to protect workers' organizations from interference by employers' organizations.

623. *The Committee notes from the allegations that, according to the Danish Law on Taxi Driving of 24 June 1999, section 5(5), it is a condition for obtaining a taxi licence that the employees of the taxi company are paid in accordance with the relevant collective bargaining agreements. At the time of the entry into force of the Act on Taxi Driving, the Union of Drivers in Copenhagen and its affiliated union, the General Workers Union in Denmark (SiD), were, according to the complainant, the only trade unions to have entered into collective agreements on taxi driving.*

624. *The Committee notes that, in 1999, a number of taxi companies – BVH-Taxa, NORD-Taxi and VEST-Taxa – all organized in the Danish Taxi Companies' Employers' Association – encouraged their employees to form an association of drivers in order to conclude a collective agreement. The collective agreement was concluded between BVH-Taxa, NORD-Taxi and VEST-Taxa and the Drivers' Association BVH-Taxa, NORD-Taxi and VEST-Taxa for the period 1 July 2001 to 1 July 2003.*

625. *The Committee notes that, in May 2002, a member of the Union of Drivers in Copenhagen, brought legal proceedings against his employer with the county court of Hørsholm with the claim that his remuneration had been calculated in accordance with the agreement concluded between the Drivers' Association and BVH-Taxa, NORD-Taxi and VEST-Taxa and not with the agreement between SiD and the Federation of Employers in Trade, Transport and Service (AHTS). In this respect, the county court found that the Law on Taxi Driving did not specify which collective bargaining agreement was to be applied in the matter, as a result of which the plaintiff was not entitled to salary in accordance with the collective bargaining agreement between SiD and AHTS.*

626. *In this respect, the Committee notes that, in its communication dated 20 June 2006, the complainant informs that the Danish High Court of the Eastern Circuit decided in appeal that section 5(5) of the Act on Taxi Driving does not stipulate any rights for the taxi drivers to be paid according to a collective bargaining agreement, but rather refers to the obligations which must be met to hold a taxi licence. The Committee notes that as a consequence the plaintiff chose to reach a settlement agreement with his employer.*

627. *Nevertheless, the Committee notes that, according to the complainant organization, the fact that the individual court case has been settled does not make the present complaint redundant, as the Danish High Court of the Eastern Circuit did not decide whether or not the Drivers' Association could be recognized as a genuine trade union. The Committee will therefore proceed with the examination of this allegation.*

628. *Regarding the allegation of employer interference, and in particular that the Drivers' Association is actually a solidarist association or puppet union to further employers' interests, the Committee notes that the judgement of the county court of Hørsholm considered that the agreement concluded between BVH-Taxa, NORD-Taxi and VEST-Taxa and the Drivers' Association had been concluded between a plurality of employees' and an employers' organization and that the agreement was thus a collective agreement. The Committee notes however from the allegations that: (i) the taxi companies themselves encouraged the taxi drivers to form an association in order to conclude a collective agreement; (ii) the meetings in connection with the formation of the Drivers' Association were held at the premises of the Danish Taxi Companies' Employers' Association (DTA); (iii) a representative from DTA was present during the meetings and presided the*

inaugural general assembly; and (iv) the outcome of these meetings was the formation of the Drivers' Association BVH-Taxa, NORD-Taxi and VEST-Taxa.

629. *As regards the allegations of the creation of a "puppet union", the Committee recalls the importance it attaches to protection being ensured against acts of interference by employers designed to promote the establishment of workers' organizations under the domination of an employer. In this connection, the Committee considers that the conditions for the creation of the Drivers' Association referred to above do not appear to be in full conformity with Article 2 of Convention No. 98 and would tend to indicate the possibility of employer interference in the establishment, functioning and administration of the Drivers' Association. The Committee would emphasize in this respect that negotiations should not be conducted on behalf of employees or their organizations by bargaining representatives appointed under the domination of employers or their organizations [**Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 771].*

630. *In responding to the allegations of interference, the Government confined itself to indicating that it would not comment on this question, since the case at the time was pending before a Danish court. In addition, the Government specifically mentions two decisions that hold agreements not to be collective agreements because it has been established that the parties have not been independent (Judgement of the High Court from 1946 (U46/353) and Judgement of the Industrial Court from 1977 (No. 8093)), thus indicating that redress is possible in such cases.*

631. *The Committee recalls, however, that the individual case referred to by the Government is no longer pending before the Danish courts and that the judgement handed down by the Danish High Court of the Eastern Circuit made no reference to or review of the legitimacy and independence of the Drivers' Association when dealing with the specific complaint from one of the drivers concerning the collective agreement that should cover his employment. Given the serious nature of the allegations of intereference by the taxi companies in the creation of the Drivers' Association that have been raised by the complainant, the Committee requests the Government to ensure that the competent national body duly investigates these allegations so that corrective measures can be taken against any interference found. The Committee requests the Government to keep it informed of the measures taken in this respect.*

The Committee's recommendation

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

Given the serious nature of the allegations of interference by the taxi companies in the creation of the Drivers' Association that have been raised by the complainant and, in the absence of any pending court review of or determination as to the legitimacy and independence of the Drivers' Association, the Committee requests the Government to ensure that the competent national body duly investigates these allegations so that corrective measures can be taken against any interference found. The Committee requests the Government to keep it informed of the measures taken in this respect.

CASE NO. 2396

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

Complaint against the Government of El Salvador presented by
— the Salvadorian Inter-Union Committee (CIEL) and
— the International Confederation of Free Trade Unions (ICFTU)

Allegations: The murder in Usulután (El Salvador) of Mr. José Gilberto Soto, a native of El Salvador with United States citizenship and an official of the United States Teamsters Union, while he was visiting Central America in order to develop closer working relations and collaboration with transport sector workers

633. The complaint is contained in a communication from the Salvadorian Inter-Union Committee (CIEL) dated 10 November 2004. The International Confederation of Free Trade Unions (ICFTU) associated itself with the complaint in a communication dated 28 February 2006, and provided additional information.

634. The Government sent its observations in communications dated 19 January and 26 August 2005.

635. El Salvador ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151) on 6 September 2006.

A. The complainants' allegations

636. In its communication dated 10 November 2004, the Salvadorian Inter-Union Committee (CIEL), which comprises the Confederation of Salvadorian Workers (CTS), the Autonomous Confederation of Salvadorian Workers (CATS), the Confederation of Democratic Workers (CTD), the Single Confederation of Salvadorian Workers (CUTS), the General Confederation of Labour (CGT) and the Trade Union Coordinating Body of Salvadorian Workers (CSTS), alleges that, on 5 November 2004, trade unionist Mr. José Gilberto Soto was murdered by unidentified men who shot him in the back. Mr. José Gilberto Soto, a native of El Salvador with United States citizenship, was an official of the United States Teamsters Union. The crime was perpetrated at the home of the victim's relatives in the city of Usulután (Department of Usulután), El Salvador. Mr. Soto was in El Salvador during a tour of Central America for the purpose of developing closer working relations and collaboration with transport sector workers.

637. The CIEL states that such an event causes great concern among Salvadorian trade unions, given that the motives for the attack are unclear. Furthermore, they fear that practices used in the past to repress union leaders will be repeated. According to the CIEL, the authorities have thus far remained silent about the murder, which may become just another crime that goes unpunished.

638. In its communication of 28 February 2006, the International Confederation of Free Trade Unions (ICFTU) states that there is much evidence to suggest that the investigation carried out by the Government into the death of Mr. Soto has been anything but professional and objective. The ICFTU is especially concerned by the findings of Ms. Beatrice Alamanni de Carrillo, the Human Rights Ombudsperson of El Salvador, who investigated Mr. Soto's death exhaustively. Her investigation revealed that:

– The police did not protect the crime scene or the evidence when they arrived. For example, the bicycle identified by witnesses as having been used by one of the men who shot the victim was not left at the crime scene but placed in the back of a police car. Similarly, there are indications that the established procedures for safeguarding and transmitting evidence were not followed.

– First-hand interviews with the suspected murderers indicate that they were held in isolation and tortured physically and mentally (suffocation, sexual abuse, serious death threats). The Ministry of Public Prosecution supported the police and did not open any investigation into the allegations of torture. One of the complainants, on 8 December 2004, brought charges of torture before the Third Magistrate's Court of Usulután but the judge did not order an investigation and did not even require that the plaintiff be medically examined.

– Allegations of torture also came to light when one of the men who shot at the victim publicly retracted his original statement in which he had named Mr. Soto's mother-in-law as being behind the killing. The suspect retracted his statement before an open court in the presence of a magistrate, and stated that he had been coerced into naming the victim's mother-in-law and that members of the Ministry of Public Prosecutor had been present and taken part in the coercion.

– The Attorney-General's Office and El Salvador's Elite Division against Organized Crime (DECO) had constantly referred to "secret or confidential informants" as being the source of information against the suspected murderers and the deceased man's mother-in-law. Since one of the men who had shot at the victim retracted the testimony implicating Mr. Soto's mother-in-law in the crime, there is no means of corroborating the testimony of these informants and the situation is thus especially worrying.

– The Ministry of Public Prosecutor and the police have sealed all the files pertaining to the investigation of the murder of Mr. Soto and refused access to his family and to the Human Rights Ombudsman. It is difficult to understand this decision, especially if the Government is, as it claims to be, sure that the real murderers are in custody.

– It is clear that the Government has never considered the hypothesis that Mr. Soto's union activities might have been the motive for the crime. This is reflected by what happened when the Salvadorian police went to the United States to interview Mr. Soto's family. The police had a damaged photograph of members of the victim's family, allegedly obtained from one of the suspects. The police stated that it believed the photograph to have been given to the suspects by Mr. Soto's mother-in-law to help them identify him. Mr. Soto was not in the photograph, although the family member interviewed was in it. The person next to the person interviewed had been cut out of the picture but his hand could be seen on the latter's hip. The person who was interviewed could not say whose hand it was but said when pressed that it "might be" Mr. Soto's hand. In the sworn written statement, the police indicated that the hand seen in the photograph was that of Mr. Soto. That unequivocal statement was not reconsidered until the interpreter who had been present at the interview pointed out the mistake and insisted that it be corrected.

– Another example that illustrates the lack of police interest in finding other possible motives for the killing of Mr. Soto is the failure to interview people whom the victim had met on the day of his murder and on the previous day. It is not clear if these people were in fact interviewed at all by the police, and it is impossible to find out because the police have sealed the files.

639. For the reasons indicated above, the ICFTU would be grateful if the Committee would recommend that:

– the Government of El Salvador open an investigation once again and seriously consider the extent to which Mr. Soto's trade union activities had a bearing on his killing;

– the Government desist from obstructing the work of the Human Rights Ombudsperson; and

– the Government re-open the files relating to the case of Mr. Soto and allow the Office for Human Rights, the victim's family and the trade unions concerned full access to the investigation and the investigators.

B. The Government's reply

640. In its communication of 19 January 2005, the Government states that, just like the Salvadorian Inter-Union Committee (CIEL), it condemned this crime from the outset, and has already launched relevant investigations to find the criminals responsible for this deplorable incident. To that end, the Government has taken all the necessary measures to ensure a serious, in-depth and impartial investigation with a view to identifying those responsible for the murder of Mr. Soto, as well as their motives, and to ensuring that they are tried and duly punished. The Government will not rest until it finds those responsible. It has requested the Attorney-General of the Republic to prepare an official report on developments in the investigation into the death of Mr. Soto and to investigate all possible motives for the crime, including those related to Mr. Soto's labour activities.

641. The Government shares the CIEL's concern that such deplorable situations could pose a threat to the country's stability and democratic system. However, it highlights the fact that respect for the right to freedom of association is duly protected in El Salvador and will not be affected by this incident.

642. The Government states that it will keep the Committee informed of any progress made by the Attorney-General's office in shedding light on the incident.

643. In its communication dated 26 August 2005, the Government reiterates its previous statements and states that, according to investigations carried out by the Elite Division against Organized Crime (DECO) of the National Civil Police which led to the arrest of those currently facing charges (including Mr. Soto's mother-in-law) in connection with the crime, all the elements suggest a crime committed for (family-related) personal motives unconnected with the victim's trade union activities. Accordingly, the relevant legal proceedings are currently under way. Proceedings are at the pre-trial stage, which means that all the elements to support the charges brought by the Attorney-General's office against the accused now in custody are currently being gathered (section 265 of the Penal Code). The Government adds that these proceedings are subject to judicial secrecy, for which reason any reports or investigations relating to the case cannot be made public, and that it will inform the Committee of any decisions handed down during the proceedings.

C. The Committee's conclusions

644. *The Committee notes that after the Government's observations dated 9 January and 26 August 2005, the ICFTU presented additional information on 28 February 2006, which was subsequently communicated to the Government, and that the Government had not replied to this information despite two previous requests by the Committee in this respect. The Committee notes that this case concerns the murder in Usulután (El Salvador) of Mr. José Gilberto Soto, a native of El Salvador with United States citizenship and an official of the United States Teamsters Union, while he was visiting Central America in order to develop closer working relations and collaboration with transport sector workers. The Committee notes the Government's statements expressing its concern, condemning and regretting this incident and offering its assurances that the right to freedom of association will not be affected.*

645. *On previous occasions, the Committee has indicated that the killing, disappearance or serious injury of trade union leaders and trade unionists requires the institution of independent judicial inquiries in order to shed full 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].*

646. *In this regard, the Committee notes the Government's statements to the effect that current legal proceedings are at the pre-trial stage and the individuals now facing charges, including the mother-in-law of Mr. José Gilberto Soto, have been arrested. The Committee notes that the complainants emphasize that the motives for the murder were unclear. The Committee also notes the deficiencies and irregularities during the investigation, which were reported by the International Confederation of Free Trade Unions (ICFTU), and the fact that, in the view of that organization, the investigation did not consider the hypothesis that Mr. Soto might have been murdered because of his trade union activities; according to the ICFTU, the proper procedures for safeguarding and transmitting material evidence was not respected; no investigations were carried out into allegations of physical and psychological torture of the suspects (isolation, suffocation, sexual abuse and death threats); a statement was made by one of those who shot at the victim to the effect that he had been coerced into naming the victim's mother-in-law as being behind the crime; the office of the Attorney-General and the El Salvador's Elite Division against Organized Crime (DECO) referred to secret or confidential informants providing information on the role of the mother-in-law and the other suspects; the Public Prosecutor's office and the police have refused access to all the files relating to the investigation, which means that the victim's family and the Human Rights Ombudsman have not been able to consult them; the photograph said to have been obtained from one of the suspects, which had allegedly been given to the suspects by the victim's mother-in-law, was not of the victim himself but of a member of his family, while according to the police, the hand in the photograph was not unequivocally confirmed as being that of Mr. Soto by a family member, who stated only that it "might be" that of Mr. Soto; and the police did not immediately question the persons whom the victim had met on the day of his death and on the day before, and whether they did so subsequently is not known. The Committee notes on the other hand the Government's statement to the effect that the inquiries carried out by the national civil police suggest that the crime was motivated by personal (family-related) factors unrelated to Mr. Soto's trade union activities.*

647. *Under these circumstances, and deeply deploring the murder of trade union official Mr. José Gilberto Soto, the Committee emphasizes the importance of bringing the guilty parties to justice and requests the Government, as a matter of urgency, to keep it informed of the criminal proceedings under way. It expects that the plaintiffs will be allowed access*

to all the elements of the case; that the investigation will be completed and all the deficiencies reported by the ICFTU, if proven true, be rectified, without any attempts to obstruct the work of the Human Rights Ombudsman; and that these proceedings will be concluded in the near future.

The Committee's recommendation

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

> ***Deeply regretting the killing of the trade union leader José Gilberto Soto, the Committee emphasizes that it is essential to bring the guilty parties to justice and requests the Government, as a matter of urgency, to keep it informed of the criminal proceedings currently under way. It expects that the plaintiffs will be granted access to all the elements of the case file, that the investigation will be completed and the deficiencies reported by the ICFTU, if proven true, be rectified, without any attempts to obstruct the work of the Human Rights Ombudsman, and that the proceedings will be concluded in the near future.***

CASE NO. 2435

INTERIM REPORT

Complaint against the Government of El Salvador presented by
— the National Trade Union Federation of Workers of El Salvador (FENASTRAS) supported by
— the International Confederation of Free Trade Unions (ICFTU)

Allegations: Anti-union dismissals at Industria de Hilos de El Salvador, S.A. de C.V., CMT, S.A. de C.V., and Diana, S.A., other anti-union practices ("offer of money" to union officials, harassment of trade union members, illegal work stoppages by companies, etc.)

649. The complaint is contained in a communication dated 15 June 2005 from the National Federation of Workers of El Salvador (FENASTRAS), which sent additional information and new allegations in communications dated 20 and 26 July, 25 August and 22 September 2005. The International Confederation of Free Trade Unions (ICFTU) supported FENESTRAS' complaint in a communication dated 2 December 2005.

650. The Government sent its observations in communications dated 21 and 29 September 2005.

651. El Salvador ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151), on 6 September 2006.

A. The complainants' allegations

652. In communications dated 15 June and 26 July 2005, FENASTRAS states that the Executive Board of a section of the Trade Union of Workers in the Cotton, Synthetics, Clothing, Textiles and Allied Products Industry (STITAS) was constituted on 3 April 2005 and that on 7 April 2005 the Ministry of Labour and Social Welfare recognized the Executive Board's credentials. On 18 April 2005 the Secretary General of the section's Executive Board requested the intervention of the Ministry of Labour to settle a list of demands (full payment of wages, payment of contributions to the administrators of pension funds and payment of contributions to the Social Security Institute of El Salvador); during an inspection of the company its legal representative stated that the debts were due to a shortage of money because of the lack of orders from its clients, that no decision had yet been taken to close down the company and that it was looking for new clients so as to be able to pay the wages owed. The trade union representative complained that the company's legal representative had offered the union officials money (30,000 colones) through their supervisors to leave the organization or to speak out against it.

653. The complainant organization, FENASTRAS, adds that on 2 May 2005, during a tripartite meeting, the company's legal representative recognized that the situation was unjust and requested a temporary halt in order to be able to meet the workers' demands; however, representatives of the company took advantage of this temporary halt to take legal steps shortly thereafter to order a "work stoppage for lack of raw materials" so as to sidestep the Executive Board's request to the Ministry of Labour to order the payment of wages and other benefits due. Following this "work stoppage" the company's owner and legal representative began removing the machinery from the plant and transporting it to another company that he owned. The workers therefore decided to hold a permanent meeting in front of the plant so as to prevent any other machinery being removed, as it was their only means of securing payment of the wages and benefits owed to them by the company.

654. The complainant organization adds that, at a tripartite meeting on 26 May 2005, the employer claimed that he had followed the legal procedure for declaring a work stoppage for lack of raw materials. The trade union side argued that the stoppage had not been authorized by the Ministry of Labour and proposed that the workers receive due compensation. The Director-General of Labour stated that the Ministry had not issued any resolution regarding a work stoppage and that the workers should be paid compensation. On 3 June 2005 the workers employed by the company, together with the trade unions of two other companies (Mobilia S.A. de C.V., and Servipronto de El Salvador, S.A.), met at the plant of one of the companies and held a demonstration calling for the company to settle the dispute. On 6 June 2005 the workers of Hermosa Manufacturing, S.A. de C.V., closed off the street in front of the plant in order to bring pressure to bear on the company to settle the workers' demands. On 7 June 2005 the Fourth Labour Judge informed the workers of Hermosa Manufacturing, S.A. de C.V., that the company had submitted a request that the strike be declared illegal. This was a surprise to the workers since they had never been on strike but had simply been holding a permanent meeting in front of the plant because of the company's declaration of a work stoppage for lack of raw materials. On 8 June 2005 the Fourth Labour Judge informed the 64 workers of Hermosa Manufacturing, S.A. de C.V., that the strike had been declared illegal and ordered the workers to return to work on 10 June 2005. The section's Executive Board therefore wrote to the judge the next day to explain the facts of the matter and the real reason behind the dispute. Twenty-four hours later the 64 company employees returned to work, but they were surprised to discover that the company refused to comply with the court order to reinstate them and denied them access to the plant. A ruling by the Ministry of Labour confirmed the illegal nature of the company's "work stoppage". On 6 July 2005 the Fourth Labour Judge informed the trade union that she had revoked her earlier ruling that the strike was illegal, but the company continued to refuse to resume operations.

655. The complainant organization adds that on 11 June 2005 the members of STITAS and of its section's Executive Board at Hermosa Manufacturing, S.A. de C.V., received $15 in payment of two-and-a-half days' wages and 50 per cent for three days' work stoppage. This action by the owner of Hermosa Manufacturing, S.A. de C.V., illustrates his inhumane treatment of the workers, since the amount paid – which supposedly covered a period of some three months – amounted in fact to not even 0.05 per cent of the cost of the basic household basket.

656. On 13 July 2005, as agreed with the Ministry of Labour and Social Welfare, the members of the STITAS section's Executive Board at Hermosa Manufacturing, S.A. de C.V., and their colleagues returned to work, where they found notices posted on the main gate informing them of a new work stoppage, in clear violation and defiance of the legal institutional framework and of their labour rights.

657. To date, the section's Executive Board has not received any reply to the letter it sent to the President of the Republic on 30 May 2005, nor from the Office of the Attorney General. In the complainant organization's opinion, the action described above was designed to restrict the workers' freedom of association and to intimidate them into abandoning their legitimate demands.

658. In its communication dated 2 December 2005, the ICFTU endorses the complaints submitted by FENASTRAS and states that, on 8 May 2005, 57 members of the trade union section of Hermosa Manufacturing, S.A. de C.V., were suspended, in addition to the following seven officials: Estela Marina Remírez, Flor Jazmín Zometa, Sara Guadalupe Beltrán de Fuentes, Sonia Marily Reyes Linares, Julia Estarada Rosa, Tomasa Martínez and María Raquel Cornejo de Véliz.

659. In its communications dated 20 July and 25 August 2005 the complainant organization alleges the unjustified dismissal by Industria de Hilos de El Salvador, S.A. de C.V., of union official Oscar López Cruz, Secretary for Education and Culture of the Trade Union of Workers of the Textile Cross-Border Industries of El Salvador (SITRAMATEX) on 12 November 2004, i.e. the month following recognition of the credentials of the members of the Executive Board. The complainant organization states that, when the owner of the company dismissed him, he said that he would not allow any trade union to operate anywhere in his company, no matter who was concerned.

660. The complainant organization states that, from the moment that Oscar López Cruz became a trade union official, his freedom of association started to be curtailed by his immediate superior in the company, who picked on every single mistake – and invented mistakes when he could not find any – in order to find something wrong with the maintenance of the machinery for which Oscar López Cruz was responsible. The owner of the company also aggressed him verbally every time he requested to attend FENASTRAS union meetings, told him he had to leave the trade union if he wanted to keep his job and offered him all kinds of sums of money to do so.

661. The complainant organization states that the owner of the company did not attend the conciliation meetings convened by the Ministry of Labour and that, during a labour inspection of the company in February 2005, he said that he would not reinstate the union official or pay him the wages due to him. The Ministry of Labour simply initiated proceedings to have the company fined.

662. The complainant organization states that on 25 August 2005 Oscar López Cruz had still not been reinstated. It enclosed a statement written by him describing the difficult circumstances he and his family had faced since his dismissal on 12 November 2004; he

adds that he is sick and that he would prefer the company to pay him the compensation to which he is entitled because he is afraid of being killed if he returns to work.

663. In its communication dated 26 July 2005 the complainant organization further alleges that, since the convening of a meeting on 18 April 2005 to set up a section of STITAS at Inversiones Fortex, S.A. de C.V., and to elect the section's Executive Board, the company has dismissed a total of 28 workers (including the eight organizers of the section), claiming that it was calling a work stoppage for lack of raw materials and hiding behind a letter from one of the company's suppliers. In fact, this was nothing but a boycott of the trade union section, since the company's decision came immediately after the workers had been convened to set up the section. The Ministry of Labour recognized the credentials of the members of the section's Executive Board on 6 May 2005.

664. The complainant organization adds that, at a conciliation meeting of all the parties to the dispute on 26 May 2005, the section's list of demands calling for the immediate reinstatement of the workers who had been suspended (including the union officials) had been discussed. The company's legal representative said that he had no conciliatory measure to offer and that the workers who had been dismissed were entitled to lodge an appeal through any channels they wished. On its side, the union section argued that, by taking that attitude, the company was violating the legal provisions of the Constitution, the Labour Code and international conventions, and that it therefore reserved the right to defend the workers' rights by means of legal and direct action in order to obtain payment of the wages that they had not received through a fault on the part of the employer.

665. The complainant organization states that on 28 May 2005 the owner of Inversiones Fortex, S.A. de C.V., telephoned each one of the union officials to ask them to come to her office. Since the owner insisted on meeting with the officials alone, the unionized workers decided that they would go to the company too. The owner told them that they had to leave the trade union because they would never find any work so long as they remained members. Subsequently, the company made the union officials "an offer" and, on 17 June 2005, the members of the section's Executive Board received their compensation. In the opinion of the complainant, by taking advantage of the reduced financial circumstances of the dismissed officials the company infringed their freedom of association.

666. In its communication dated 22 September 2005 the complainant organization alleges that on 20 July 2005 a group of 12 workers from the production plant of CMT, S.A. de C.V., decided to request the general Executive Board of STITAS to hold a meeting of all the workers employed by the company in order to set up an Executive Board of the STITAS section there. On 13 August 2005, at the request of the workers, the general Executive Board of STITAS agreed to set up a union section at CMT, S.A. de C.V.

667. On 15 August 2005 the general Executive Board of STITAS convened the workers of CMT, S.A. de C.V., to the first session of an extraordinary general meeting (which was held on 21 August 2005) in order to set up a STITAS union section at the company and to elect the section's Executive Board.

668. At that extraordinary general meeting, once the section had been set up and the members of the Executive Board appointed, the Secretary General elect proposed that, as soon as their credentials were recognized, the workers' list of demands should be submitted to the company.

669. On 22 August 2005 a group of workers who had been dismissed following the shutdown of Indústrias Textiles Cuscatlán, S.A. de C.V., a factory under the same ownership as CMT, S.A. de C.V., held a demonstration in front of the latter's plant (both factories being under the same owner). The workers of Indústrias Textiles Cuscatlán, S.A. de C.V., were

protesting against the fact that the owner, who had closed the factory, had promised to pay them 40 per cent of the compensation due to them, but he had lied to them because for around four months he had never paid them. At the demonstration the workers of CMT, S.A. de C.V., expressed their support for the workers of Indústrias Textiles Cuscatlán, S.A. de C.V., who finally got the owner to pay them what they were owed. The owner's lawyer told the workers of CMT, S.A. de C.V., at the time that they would be accused of misappropriation of company assets and illegal entry and that they would go to jail.

670. The complainant organization states that on 29 August 2005 the Ministry of Labour and Social Welfare recognized the credentials of the section's Executive Board of CMT, S.A. de C.V., but that on 31 August 2005 María Esperanza Reyes Sifontes, reporter for the Executive Board, was dismissed on the grounds that there was no work for her at the company. In fact, she was dismissed for being an official of the trade union. Between 1 and 6 September 2005, 11 other workers, all of them members of the trade union or of the union section, were dismissed: Felicita Amalia Orantes Córdova, Lorena Elizabeth Campos Flores, Rosa Antonia Gonzalez de Franco, Rutilia Esperanza Ortíz López, Zulma Jeannette Rivas Granados, Mélida Ester Navarro, María de los Angeles García Nieto, Edith Noemí Castro García, Zulma Yanira Meléndez Pérez, Ninfa Bonilla Alvarado and Margarita Elizabeth Lozano Figueroa. Despite the situation, the company failed to attend either of the two conciliation meetings convened by the Ministry of Labour, following which the Ministry merely informed the company that it would be fined if it did not attend.

671. The representative of the trade union requested the Ministry of Labour at the beginning of September 2005 to settle a list of demands concerning labour conditions. These included the payment of wages owed, the payment of contributions to administrators of the pension fund, the payment of contributions to the Social Security Institute of El Salvador, etc. On 9 September the company again failed to attend a conciliation meeting, although summoned to do so; nor did it send its legal representative. In addition to the problems already described, the meeting had been called to discuss the case of two union officials, Blanca Lucía Osorio and María Esperanza Reyes Sifontes, who were being harassed and hounded at home by a company employee who went to their houses in person. This constituted a clear violation of sections 244, 245, 246 and 247 of the Penal Code.

672. A conciliation meeting was held on 12 September 2005, at which the company representative cynically claimed that he had no idea that a trade union even existed and that the dismissals had nothing to do with that, but that the workers had been dismissed for "taking over the CMT, S.A. de C.V., plant, wreaking havoc and hurling insults" (which was quite untrue). He did not propose their reinstatement in their jobs.

673. According to the ICFTU, seven union officials of the SGC cross-border plant were dismissed on 25 October 2005: María Rosa Beltrán Melendez, Teresa Martínez Guerra, Marena Escobar de Paulino, Dora Alicia Rivas Oseguera, Cecilia Lizeth Abarca de García, Eva Lorena Umaña Pacheco and Blanca Araceli Fuentes Castro.

674. The ICFTU alleges that four officials of the trade union section of the Sweets and Pastry Industrial Trade Union (SIDPA) at Diana, S.A., were also dismissed (Yanira Isabel Chávez Rodríguez, Heidi Sofía Chávez Leiva, José Alfredo Rivas Merino and Daniel Ernesto Morales Rivera), along with two members of the section (Carlos Mauricio Flores Saldaña and Rafael Antonio Soriano).

675. The ICFTU draws attention to the various instances of mass dismissal of workers without their being paid the social benefits to which they are entitled and expresses its grave concern at the steady deterioration of labour rights, and especially trade union rights, that is taking place in El Salvador.

B. The Government's reply

676. In its communication dated 21 September 2005 the Government states that no workers had at any time been dismissed from Inversiones Fortex, S.A.de C.V. What actually happened was that individual contracts were suspended for lack of raw materials. The company concerned found itself obliged to suspend the contracts of 28 individual workers because of a shortage of raw materials from 2 May to 12 June 2005; all the workers concerned were aware of this because they were duly informed at a meeting on 29 April 2005, and their wages had been paid in accordance with national labour legislation.

677. The Government adds that, when a special inspection took place on 14 September 2005, it was obvious that the company was functioning normally and that the workers who had been suspended had already gone back to work on 13 June 2005, as agreed.

678. The Government states that, of the 28 workers who had been suspended, Blanca Lilian Alberto Quintanilla and Carlos Alexander Ascencio González were not at work, as they had not returned to their posts even though they had been duly notified. The company is currently operating with a total of 126 workers, as the inspection unit was able to see; obviously, then, there had been no infringement of current labour legislation nor had there been any dismissals or violations of freedom of association.

679. In a communication dated 29 September 2005 the Government further declares that the Ministry of Labour and Social Welfare has made use of the legal machinery provided by the labour legislation to endeavour to have trade union official Oscar López Cruz, who had been dismissed from Industria De Hilos de El Salvador, S.A. de C.V., on 12 November 2004, reinstated in his post. Two conciliation meetings had been held at the General Labour Directorate, but they had not been successful because the representatives of the employer did not attend either meeting. Consequently, proceedings were initiated to have the employer fined, as provided for in section 32 of the Act concerning the organization and functions of the labour and social welfare sector.

680. The Government adds that four labour inspections have been carried out since 18 February 2005 and have recommended the reinstatement of the worker and the payment of the wages due to them because of a fault on the part of the employer. Here again there had been no positive outcome, despite the efforts of the labour inspectors, as the employer's representative continued to refuse to reinstate Oscar López Cruz in his job and pay the wages due to him because of a fault on the part of the employer. Consequently, proceedings have been initiated to have the employer fined.

681. The Government observes that the labour legislation does not contain any provision regarding reinstatement, which means that the Labour Inspectorate can do no more than make a recommendation. In spite of the efforts of the Ministry of Labour to ensure compliance with the labour legislation through administrative channels (i.e. the Labour Inspectorate), the worker has been informed of his right to go through judicial channels and to use the available legal machinery; he has also been informed that he can apply for legal protection.

C. The Committee's conclusions

682. *The Committee welcomes the recent ratification by El Salvador of Conventions Nos. 87, 98, 135 and 151.*

683. *The Committee notes that the allegations in this complaint refer to: (1) an illegal work stoppage "for lack of raw materials" by Hermosa Manufacturing, S.A. de C.V., without a proper ruling by the Ministry of Labour, in order to avoid the list of demands submitted by*

the Executive Board of the STITAS union section, and the transfer of machinery to another company belonging to the same owner; the ruling of a – supposed – strike as illegal by the judicial authority at the request of the enterprise (the ruling was subsequently revoked by the said authority); another illegal work stoppage by the company affecting 64 union officials or members; and the offer of money to officials of the section's Executive Board to leave the trade union or speak out against it; (2) the anti-union dismissal by Industria de Hilos de El Salvador, S.A. de C.V.; of Oscar López Cruz, an official of SITRAMATEX; (3) the anti-union dismissal of 28 workers (including the eight founders of the STITAS trade union section) at Inversiones Fortex S.A. de C.V.; the pressure exercised by the company on the trade union officials to leave the trade union, followed by "an offer" of compensation which they accepted; (4) the anti-union dismissal of María Esperanza Reyes Sifontes, an official of the STITAS section's Executive Board at CMT, S.A. de C.V., and of another 11 members of the union section in September 2005, as well as the harassment and hounding at their home of other officials of the section (Blanca Lucia Osorio and María Esperanza Reyes Sifontes); the dismissal of seven other trade union officials in October 2005; and (5) anti-union dismissal of four officials and two members of the SIDPA trade union section at the Diana, S.A., company.

684. *Regarding the alleged anti-union dismissal of trade union official Oscar López Cruz on 12 November 2004, the Committee notes the Government's statement that the Ministry of Labour did on a number of occasions call for his reinstatement and the payment of wages due to him because of a fault on the part of the employer but that Industria de Hilos de El Salvador, S.A. de C.V., had refused, as a result of which the Ministry of Labour had initiated proceedings to impose the fines provided for by law. The Committee regrets that the company has taken such an attitude, and the resulting delay in resolving this question, and requests the Government to inform it of the outcome of the proceedings to impose a fine and to continue urging the company to reinstate this official and to pay him the wages that are due to him, or – as Oscar López Cruz reportedly appears to prefer, due to the death threats he received – only to pay him the wages and compensation due to him by law for dismissal by fault of the employer.*

685. *Regarding the allegations concerning Inversiones Fortex S.A. de C.V. (dismissal of 29 workers, including eight founders of the STITAS union section, and the pressure exerted by the company to make them leave the union, followed by "an offer" to the union officials which they accepted), the Committee notes the Government's statement that: (1) there had in fact been no dismissals but rather a suspension of individual contracts because of a shortage of raw materials from 2 May to 12 June 2005 affecting 28 workers (out of the 126 employed by the company), and their wages had been paid in accordance with the law; (2) the Labour Inspectorate had noted that they had gone back to work on 13 June; (3) of the 28 workers suspended only two had failed to turn up for work despite having received due notification; and (4) the Labour Inspectorate had noted that there had been no dismissals or violations of freedom of association.*

686. *The Committee draws attention to the contradictions between the allegations – which refer to dismissals – and the Government's reply, which refers to a temporary suspension of individual contracts because of a shortage of raw materials without anyone having been dismissed (only two workers had failed to return to the company at the end of their temporary suspension although they had been duly notified) and, given the precise nature of the Government's reply, considers that there is no call to pursue its examination of these allegations unless the complainant organization sends it new information.*

687. *Finally, the Committee regrets that the Government has not sent its observations on the allegations described below and calls on it to do so without delay:*

– *an illegal work stoppage "for lack of raw materials" by Hermosa Manufacturing S.A. de C.V., without a proper ruling by the Ministry of Labour, in order to avoid the list of demands submitted by the Executive Board of the STITAS union section, and the transfer of machinery to another company belonging to the same owner; the ruling of a – supposed – strike as illegal by the judicial authority at the request of the enterprise (the ruling was subsequently revoked by the said authority); another illegal work stoppage by the company affecting 64 union officials of members; and the offer of money to officials of the Executive Board of the section to leave the trade union or speak out against it;*

– *the anti-union dismissal of María Esperanza Reyes Sifontes, an official of the STITAS section's Executive Board at CMT, S.A. de C.V., and of another 11 members of the union section in September 2005, as well as the harassment and hounding at their home of other officials of the section (Blanca Lucia Osorio and María Esperanza Reyes Sifontes); the dismissal of seven other trade union officials in October 2005; and*

– *the anti-union dismissal of four officials and two members of the SIDPA trade union section at the Diana, S.A., company.*

The Committee's recommendations

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

(a) The Committee welcomes the recent ratification of Conventions Nos. 87, 98, 135 and 151.

(b) Regarding the alleged anti-union dismissal of trade union official Oscar López Cruz on 12 November 2004, the Committee requests the Government to inform it of the outcome of the proceedings to impose a fine on Industria de Hilos de El Salvador S.A. de C.V., and to continue urging the company to reinstate this official and to pay him the wages that are due to him, or – as Oscar López Cruz reportedly appears to prefer, due to the death threats he received – only to pay him the wages and compensation due to him by law for dismissal by fault of the employer.

(c) Regarding the allegations concerning anti-union dismissals at the enterprise Inversiones Fortex S.A. de C.V., the Committee underlines the contradiction that exists between the allegations – which refer to dismissals – and the response of the Government, which refers to a temporary suspension of individual contracts because of a shortage of raw materials without anyone having been dismissed (only two workers had failed to return to the company at the end of their temporary suspension although they had been duly notified) and, given the precise nature of the Government's reply, the Committee considers that it is no longer necessary to examine these allegations unless the complainant organization communicates new information in this respect.

(d) The Committee regrets that the Government has not sent its observations on the allegations described below and calls on it to do so without delay:

– ***an illegal work stoppage "for lack of raw materials" by Hermosa Manufacturing S.A. de C.V., without a proper ruling by the Ministry of Labour, in order to avoid the list of demands submitted by the Executive Board of the STITAS union section, and the transfer of machinery to another company belonging to the same owner; the ruling of a – supposed – strike as illegal by the judicial authority at the request of the enterprise (the ruling was subsequently revoked by the said authority); another illegal work stoppage by the company affecting 64 union officials or members; and the offer of money to officials of the Executive Board of the section to leave the trade union or speak out against it;***

– ***the anti-union dismissal of María Esperanza Reyes Sifontes, an official of the STITAS section's Executive Board at CMT, S.A. de C.V., and of another 11 members of the union section in September 2005, as well as the harassment and hounding at their home of other officials of the section (Blanca Lucia Osorio and María Esperanza Reyes Sifontes); the dismissal of seven other trade union officials in October 2005; and***

– ***the anti-union dismissal of four officials and two members of the SIDPA trade union section at the Diana, S.A., company.***

CASE NO. 2449

INTERIM REPORT

Complaint against the Government of Eritrea presented by
— the International Confederation of Free Trade Unions (ICFTU)
— the International Textile, Garment and Leather Workers' Federation (ITGLWF) and
— the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco & Allied Workers' Association (IUF)

Allegations: The complainant organizations allege that three senior trade union executives have been arrested by police and security forces in March and April 2005. They have been detained incommunicado and without charges since then; they have not been allowed access to legal counsel; and the authorities refuse to give any information on their whereabouts and the reasons for their arrest

689. The complaint is contained in a joint communication dated 26 September 2005 from the International Confederation of Free Trade Unions (ICFTU), the International Textile, Garment and Leather Workers' Federation (ITGLWF), and the International Union of Food, Agriculture, Hotel, Restaurant, Catering, Tobacco & Allied Workers' Association (IUF).

690. The Government forwarded two communications dated respectively 23 December 2005 and 13 July 2006.

691. The Committee has been obliged to postpone its examination of the case on two occasions [see 338th and 340th Reports, paras. 5 and 6, respectively]. At its meeting in May-June 2006 [see 342nd 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. As to the substance of this case, no reply from the Government has been received so far.

692. Eritrea 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

693. In their communication of 26 September 2005, the International Confederation of Free Trade Unions (ICFTU), the International Textile, Garment and Leather Workers' Federation (ITGLWF) and the International Union of Food, Agriculture, Hotel, Restaurant, Catering, Tobacco & Allied Workers' Association (IUF) indicate that Tewelde Ghebremedhin, the chairperson of the IUF-affiliated Food, Beverages, Hotels, Tourism, Agriculture and Tobacco Workers' Federation, and Minase Andezion, the secretary of the ITGLWF-affiliated Eritrean Textile, Leather and Shoe Workers' Federation were arrested by the security police in Asmara on 30 March 2005 and were detained in a secret detention centre controlled by the security service. On 9 April 2005, the police arrested Habtom Weldemicael, the chairperson of the Red Sea Bottlers Coca-Cola Workers' Union and a member of the executive board of the Food and Beverage Workers' Federation. These three persons are now being held incommunicado without charges and in violation of their constitutional right to be brought before a magistrate within 48 hours following their arrest. The complainants indicate that all communication with the Eritrean authorities and with the National Confederation of Eritrean Workers (NCEW) has failed to yield any concrete information on the arrested trade unionists' whereabouts or the charges against them. The few replies received were confined to stating that the arrests of the three trade union officials were not linked to the exercise of their trade union activities, that the government security service was well aware of the case, that the place of detention was secret and that relevant authorities did not provide information about such issues, that the detainees' state of health was satisfactory, but that no details were available and that details of any legal steps taken in defence of the detainees were equally not available.

694. The complainants further indicate that while Tewelde Ghebremedhin was in detention, on 6-7 May 2005, Mrs. Alem Berhe was elected chairperson of the Food, Beverages, Hotels, Tourism, Agriculture and Tobacco Workers' Federation of Eritrea. She has also failed to provide information on the circumstances of the arrest.

B. The Government's reply

695. In its communications dated 23 December 2005 and 13 July 2006, the Government states that the detention of the three trade union leaders is not related to their trade union activities.

C. The Committee's conclusions

696. *The Committee regrets that, despite the time that has elapsed since the complaint was first presented, the Government has not replied in substance to 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.*

697. *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.*

698. *The Committee recalls that the purpose of the whole procedure established by the ILO 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].*

699. *The Committee notes that the complainants in this case allege the arrest of Tewelde Ghebremedhin, the chairperson of the IUF-affiliated Food, Beverages, Hotels, Tourism, Agriculture and Tobacco Workers' Federation, Minase Andezion, the secretary of the ITGLWF-affiliated Eritrean Textile, Leather and Shoe Workers' Federation, and Habtom Weldemicael, the chairperson of the Red Sea Bottlers Coca-Cola Workers' Union and a member of the executive board of the Food and Beverage Workers' Federation, by the police and security forces of Eritrea in March and April 2005. According to the complainant organizations, they have since then been detained incommunicado, without charges brought against them and without access to legal counsel. It is further alleged that the authorities refuse to give any information on their whereabouts or on the reasons for their arrest.*

700. *The Committee regrets that the only reply that the Government has provided so far is a communication by which it confines itself to stating that the detention of the three trade union leaders is not related to their trade union activities.*

701. *With regard to the arrest of three trade union leaders, the Committee recalls that the arrest of trade unionists entails a serious risk of interference in trade union activities. The arrest of trade union leaders against whom no charge is brought further involves restrictions on freedom of association, and governments should adopt measures for issuing appropriate instructions to prevent the danger involved for trade union activities by such arrests [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, paras. 74, 76, 79 and 80].*

702. *The Committee further recalls that although the exercise of trade union activity or the 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 constitutes a serious impediment to the exercise of trade union rights. Detained trade unionists, like anyone else, should benefit from normal judicial proceedings and have the right to due process, in particular, the right to be informed of the charges brought against them, the right to have adequate time and facilities for the preparation of their defence and to communicate freely with counsel of their own choosing, and the right to a prompt trial by an impartial and independent judicial authority [see* ***Digest****, op. cit., paras. 91 and 102].*

703. *Noting that these three trade unionists were arrested over one year ago and that no information has since been made available in respect of the reasons for their arrest and the charges brought against them, the Committee deeply deplores the failure by the Eritrean authorities to ensure observance of the fundamental human rights of these three trade union leaders to be informed of the charges brought against them, to have access to legal counsel and to be brought without delay before the appropriate judge. The Committee emphasizes that it is one of the fundamental rights of the individual that a detainee be brought without delay before the appropriate judge and, in the case of unionists, freedom from arbitrary arrest and detention and the right to a fair and rapid trial are among the civil liberties which should be ensured by the authorities in order to guarantee the normal exercise of trade union rights [see* ***Digest****, op. cit., para. 105]. In the absence of any specific indication of the charges giving rise to the trade unionists' detention incommunicado for over one year, the Committee firmly urges the Government to take the necessary measures for the immediate release of Tewelde Ghebremedhin, Minase Andezion and Habtom Weldemicael. It further urges the Government to submit all relevant information, as precise as possible, concerning the arrests of these three trade union leaders, particularly on the reasons for their arrest, charges brought against them, legal or judicial proceedings as a result thereof and the outcome of such proceedings.*

The Committee's recommendations

704. ***In the light of its foregoing interim 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 in substance to any of the complainant's allegations. The Committee strongly urges the Government to be more cooperative in the future.***

(b) ***Noting that Tewelde Ghebremedhin, Minase Andezion and Habtom Weldemicael were arrested over one year ago and that no information has since been made available in respect of the reasons for their arrest and the charges brought against them, the Committee deeply deplores the failure by the Eritrean authorities to ensure observance of the fundamental human rights of these three trade union leaders to be informed of the charges brought against them, to have access to legal counsel and to be brought without delay before the appropriate judge. The Committee firmly urges the Government to take the necessary measures for the immediate release of these three trade union leaders. It further urges the Government to submit all relevant information, as precise as possible, concerning the arrests, particularly on the reasons for their arrest, charges brought against them, legal or judicial proceedings as a result thereof and the outcome of such proceedings.***

CASE NO. 2292

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

Complaint against the Government of the United States presented by
— the American Federation of Government Employees (AFGE), AFL-CIO supported by
— Public Services International (PSI)

Allegations: The complainants allege a successive use of executive orders, as well as the recent passage of legislation and preparation of draft laws which exempt a variety of federal employees from the basic rights of freedom of association and collective bargaining

705. The complaint is contained in a communication from the American Federation of Government Employees (AFGE), AFL-CIO, dated 14 August 2003. Public Services International (PSI) associated itself with the complaint in a communication dated 20 August 2003. By a communication dated 1 May 2006, the complainants withdrew a number of elements contained in their original complaint.

706. The Government sent its reply in communications dated 23 December 2004 and 4 August 2006.

707. The United States has not ratified 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), nor the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainants' allegations

708. The American Federation of Government Employees, American Federation of Labor, Congress of Industrial Organizations (AFGE, AFL-CIO, hereinafter AFGE), is North America's largest federal employee union, representing 600,000 workers in the federal government and the Government of the District of Columbia. AFGE alleges serious violations of the right to bargain collectively by the Government of the United States, and in particular by the current administration.

709. American federal law provides working persons in the United States the right to join, or refuse to join, a labour union. The United States Supreme Court upheld this right in 1937 when it stated that labour unions are essential for curbing the abuses of workers by their employers. Almost 25 years later, President Kennedy signed an executive order in January 1962, granting federal employees these same rights. Both Presidents Nixon and Carter also signed executive orders or civil service laws that strengthened these rights.

710. Although collective bargaining has been available to federal employees since 1962, Congress did not enact the Federal Service Labor-Management Relations Statute (FSLMRS), as part of the Civil Service Reform Act, until 1978. This was the first comprehensive legislation governing labour relations between federal civil employees and their managers. The FSLMRS itself manifests some of the principles of the ILO

instruments on freedom of association and collective bargaining, but restricts at the federal level the scope of collective bargaining by excluding wages and other monetary issues and by providing for the excessive protection of management rights. The complainant adds that the legislation affirmatively exempts from the coverage of its provisions certain federal agencies engaged in national security work and personnel or labour relations functions, as well as management officials, supervisory personnel, and confidential employees. The FSLMRS also authorizes the President, under certain conditions, to issue an order excluding otherwise covered federal agencies or subdivisions from FSLMRS rights "if the President determines that: (A) the agency or subdivision has as a primary function intelligence, counter-intelligence, investigative, or national security work, and (B) the provisions of this chapter cannot be applied to the agency or subdivision in a manner consistent with national security requirements and considerations" (5 USCA §7103(b)(1)).

711. The 5 USCA §7103(b) specifically authorizes the President to exclude certain agencies and agency subdivisions from labour relations under the FSLMRS on the basis that he alone has determined the unit to have intelligence, counter-intelligence, investigative, or national security work as a primary function. Although the FSLMRS, on its face, may be consistent in many respects with Article 1 of Convention No. 151, which states that "the extent to which the guarantees provided for in this Convention shall apply to high-level employees whose functions are normally considered as policy making or managerial or to employees whose duties are of a highly confidential nature shall be determined by national laws or regulations", the repeated application of §7103 has resulted in the exclusions by executive fiat of hundreds of thousands of federal employees from the rights of the FSLMRS and from the rights of Conventions Nos. 87, 98, and 151. In summarily denying such employees these rights, current American law dictates that it is not even necessary for US Presidents to include in an executive order specific findings concerning the mission of an excluded agency and the inability of that agency to fulfil its mission under the constraints of the FSLMRS.

712. The AFGE contends that for several years, US government presidential orders issued under the authority of the FSLMRS have inappropriately denied federal government employees *not* directly engaged in the administration of the State the right to union representation and collective bargaining by simply invoking the "national security" provision of the FSLMRS.

713. For a historical perspective on the violations of collective bargaining in the public sector through executive order, the AFGE first refers to President Jimmy Carter's issuance of the first executive order to suspend a federal agency from the collective bargaining process. Executive Order No. 12171 was used to remove thousands of employees of the Library of Congress, Department of Treasury, Department of Justice, and Department of Energy, among other agencies, from coverage of the federal labour relations programme. Shortly thereafter, President Ronald Reagan proceeded to promulgate a number of executive orders to further exclude otherwise eligible agencies and subdivisions from coverage under the FSLMRS. For example, in 1986 President Reagan signed Executive Order No. 12559, which excluded subdivisions of the United States Marshals Service from coverage and protection under the FSLMRS. The AFGE challenged the legality of this executive order, asserting that federal marshals are not engaged in protection of the national security and therefore should not be excluded from collective bargaining by power of the §7103(b) Executive Order. For different reasons, the United States district court voided the Order. However, a higher court upheld a revised Executive Order 12559, issued less than one year later and registered as Executive Order No. 12632, on the grounds that "[s]ection 7103(b)(1) makes clear that the President may exclude any agency from the Act's coverage whenever he 'determines' that the conditions statutorily specified exist". Since issuance of the 1986 order, the US Marshals Service has abrogated the collective bargaining agreement

affecting deputy marshals, and denied deputy marshal rights under the FSLMRS, thereby depriving thousands of employees the basic rights mandated by ILO standards.

714. President George Bush, Sr. and President Bill Clinton also violated the principles set forth in Conventions Nos. 87, 98 and 151 when they excluded the Mapping Agency Reston Center and the Naval Special Warfare Development Group from collective bargaining, respectively. These agencies of the federal Government were suspended from the Federal Labor-Management Relations Program for reasons of national security without judicial challenge in the face of the *Reagan* court's holding that such presidential actions are entitled to a presumption of regularity and are thereby essentially not reviewable by American courts. The accepted policy of US Presidents unilaterally removing otherwise eligible federal employees from labour protections by virtue of executive order has existed for five administrations and, at this point, can only be properly addressed at an international level.

715. The current administration has continued the trend of "infringement and interference in the right to bargain collectively" undertaken by predecessor administrations. However, the current actions have effectuated a more encompassing prohibition of collective bargaining and freedom of association under the guise of government structural adjustment and in the name of national security where US courts generally do not have jurisdiction to challenge such actions.

716. The federal public sector has appeared to be the direct target of the Government's increasingly anti-collective bargaining policies of the past two years. For example, last year the Bush Administration took away collective bargaining rights from approximately 1,000 federal employees in the US Attorneys' offices – rights these employees had exercised for almost three decades – in the name of national security (Executive Order No. 13252 (attached to the complaint)). The administration then pushed for legislation to eliminate the collective bargaining rights for the 170,000 federal employees in the new Department of Homeland Security – again in the name of national security. The Bush Administration has further refused to provide about 56,000 federal airport screeners in the newly created Transportation Security Administration (TSA) with civil service rights and employee benefits including workers' compensation, (veterans' preference, equal employment opportunity rights, and the right to union representation). Only 20 days after the TSA decision, the current Administration terminated the collective bargaining rights of over 2,000 cartographers, digital imaging specialists, secretaries and security guards in the National Imagery and Mapping Agency (NIMA).

717. While the AFGE understands that the national security of the United States is critically important, it submits that equally important is the protection of the rights of the federal employees who are ultimately responsible for assuring national security, for as the FSLMRS recognizes, "experience in both public and private employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labour organizations … in decisions which affect them – safeguards the public interest". As discussed in detail below, AFGE contends that repeated actions by the Government in the past two years, including legislation enacted by the Congress, executive orders of the President and orders issued by government agency directors violate Conventions Nos. 87, 98, and 151. The AFGE therefore urges the Committee to address what appears to be an ever-growing and increasingly methodical effort to undermine federal employee collective bargaining rights and federal employee labour unions in the name of American national security.

Transportation Security Administration (TSA)

718. Federal baggage screeners are the first line of defence guarding US commercial airlines, and maintaining a stable and focused workforce of screeners is essential to protecting airline employees and passengers. However, the current workforce can hardly be called either stable or focused. According to the Transportation Department, screener turnover has been between 30 and 35 per cent at airports where the TSA has assumed staffing responsibilities. Screeners from around the country have complained of delayed pay checks, unpaid overtime and training hours, unpredictable and constantly changing work schedules, and sexual harassment. As a result, workers from New York City's La Guardia Airport, Baltimore-Washington International Airport, Pittsburgh International Airport, Chicago's Midway Airport and ten other airports nationwide filed petitions with the Federal Labor Relations Authority (FLRA), requesting that an election be held to determine whether the workers can be represented by the AFGE.

719. Amidst this backdrop, TSA decided to prohibit 56,000 federal baggage screeners from unionizing on 8 January 2003. TSA's administrator, James M. Loy issued an order (attached to the complaint), which states in pertinent part:

> By virtue of the authority vested in the Under-Secretary of Transportation for Security in section 111(d) of the Aviation and Transportation Act, Pub. Law No. 107-71, 49 USACA §44935 Note (2001), I hereby determine that individuals carrying out the security screening function under §44901 of Title 49, United States Code, in light of their critical national security responsibilities, shall not, as a term or condition of their employment, be entitled to engage in collective bargaining or be represented for the purpose of engaging in such bargaining by any representative or organization.

720. In response, the AFGE originally filed suit in the US District Court for the District of Columbia on 10 January 2003 charging that the TSA administrator did not have the authority under the Aviation and Transportation Security Act to prohibit screeners from organizing.

721. On 7 July 2003, the Boston Regional Director of the FLRA issued a decision dismissing the AFGE petitions on the ground that the FLRA lacked jurisdiction. According to the FLRA, the undersecretary of the agency has sole and exclusive discretion to determine conditions of employment of security screening personnel and thus acted with requisite authority to exempt the agency from any obligation to bargain collectively with a labour organization under 5 USCA §§7101 et seq.

National Imagery and Mapping Agency (NIMA)

722. On 28 January 2003, the Bush Administration terminated the collective bargaining rights of over 2,000 cartographers, digital imaging specialist, data management specialists – and a significant number of secretaries and security guards – at the National Imagery and Mapping Agency (NIMA). These employees had been represented by AFGE and other unions for decades.

723. The decision by the director of NIMA, James Clapper, to immediately terminate the collective bargaining rights of NIMA's workers, was challenged by AFGE before the FLRA. In a decision dated 18 June 2003, the Denver regional director of the FLRA dismissed the consolidated cases for lack of jurisdiction, finding that the director's determination was not reviewable by the FLRA under 10 USCA §461(c). (Under the 1996 law that created NIMA from eight defence and intelligence agencies, the NIMA employees are entitled to collective bargaining rights unless the director determines that the employees' responsibilities have been modified to include intelligence, counter-

intelligence, investigative, or security duties not previously assigned, and the performance of the newly assigned duties directly affect national security). It is notable that 10 USCA §461(c) prohibits review of the NIMA director's determination to end collective bargaining rights by any US court, as well as by the FLRA.

Department of Justice (DOJ)

724. Invoking national security concerns, on 7 January 2002, President George W. Bush issued an executive order under 5 USCA §7103(b) barring union representation for thousands of employees in five US Justice Department offices. The directive, Executive Order No. 13252, excludes employees at the Criminal Division, the National Central Bureau of Interpol, the National Drug Intelligence Center, the Office of Intelligence Policy and Review, and the 93 US Attorneys' offices across the country from coverage by the FSLMRS. Nine units and over 900 employees previously represented by unions for many years were affected in the US Attorneys' offices.

725. The AFGE then refers to an article in *The New York Times* on 16 January 2002, reporting that White House officials said President Bush had issued the executive order to prevent union contracts from restricting, through strikes or other means, "the ability of workers in the justice Department to protect Americans and national security". According to Anne Womack, a White House spokeswoman, the order "recognizes that a unionized workforce is not always appropriate for certain agencies or subdivisions of government, including employees who engage in investigation, intelligence, counter-intelligence or national security".

Department of Defense (DoD)

726. According to the AFGE, the Government is preparing to introduce legislation that eliminates collective bargaining rights in the Department of Defense, which is by far the largest federal civilian agency. At issue is legislation entitled the *Civil Service and National Security Personnel System Act* that would place almost 700,000 civilian Department of Defense employees under a completely new personnel system, potentially without collective bargaining and union representation rights. This legislation was inserted into the 2004 House Defense Authorization Bill that passed the US House of Representatives on 22 May 2003.

Department of Homeland Security (DHS)

727. According to the AFGE, when President George W. Bush decided to support the establishment of a Department of Homeland Security (DHS) on 25 November 2002, the agenda to silence federal employee unions had been set. In the past year, "flexibility" has meant the authority to deny federal employees collective bargaining and union representation, the authority to allow management to design and implement new pay systems unilaterally, the authority to allow managers unilateral authority to design new systems for classification, performance appraisals and hiring, and finally, the authority to deny employees the right to appeal adverse action to the Merit Systems Protection Board (MSPB).

728. At the time the Department of Homeland Security Bill was signed into law, it was composed of 22 federal agencies and over 170,000 employees, 30,000 of whom were represented by AFGE. Most of these employees have been working for the Immigration and Naturalization Service (INS) as border patrol agents, immigration inspectors, special agents, detention officers and detention and deportation officers. In addition, a smaller

number of employees in other agencies who are represented by the AFGE will also become part of the new Department.

729. Under the new law, the transition to creating a new Department is to be carried out by 24 January 2004. In setting up the new system, the Department is required to provide employee representatives with advance notice of the new rules and the reasons that they are being proposed, and to allow them 30 days to respond to those changes. The Department is then required to engage in a 30-day mediation process with five employee representatives that it selects, but is free to unilaterally impose its personnel system at the end of that time. In other words, the Department can unilaterally implement a new personnel system with no meaningful input from the employees or their representatives. The chances of a fair system emerging from that process are remote at best. The new law creates a process to allow employee collaboration in the development of the new system, but leaves the Secretary of the DHS with the final authority to impose changes over objections from unions or other employee representatives.

730. One of the most contentious issues in the congressional debate on the creation of the DHS related to the authority of the President to deny collective bargaining rights to employees, subdivisions and agencies engaged in national security work. At the time of filing the complaint, the AFGE states that the possibility of President Bush exercising his authority to exclude all or parts of the DHS from collective bargaining is unknown. If it does happen, the President is required to notify Congress ten days in advance of the effective date. Even if the administration opts not to use its authority to exclude unions from the new department based on national security considerations, it could eviscerate the union's effectiveness by establishing a personnel plan that effectively eliminates collective bargaining rights and civil service protection. Both of those matters are among the areas subject to change as part of the Administration's new personnel plan.

731. Under such a system, unions would be powerless to influence the working conditions of employees or to correct the wrongs suffered by employees. Overall it is clear that the Administration has a wide range of tools available to deny employees collective bargaining rights and civil service protections as required under international labour standards.

732. The complainant refers to a previous case examined by the Committee concerning the denial of the right to freedom of association by a government in the name of national security (Case No. 1261, the United Kingdom) and contends that this case has a similar posture.

733. In conclusion, the complainant contends that the right of government employees to be represented by a union and engage in collective bargaining has never been proven to be a national security risk. Under current American law, the United States Government has the authority to act quickly if necessary in case of such a risk. Thus, 5 USCA §7532 authorizes the head of any agency to *immediately* suspend and remove a federal employee without pay when he or she poses a national security threat. US Presidents do not use this provision often, not because it is not effective but because there have been very few cases where its use was warranted. As with other nations, it is clear that federal employees are professionals who take their jobs of public service very seriously.

734. To deny a group of citizens – in this case, citizens in service to the American Government and the pursuit of justice – a fundamental human freedom is a serious action that should only be taken under the most extreme circumstances. Therefore, it is for all of the reasons stated above that the AFGE urges the Committee to request the government to take action to reverse recent US Government decisions regarding the Department of Homeland Security, NIMA, and TSA, and withdraw executive orders that exclude otherwise eligible employees from coverage under the FSLMRS.

735. In its communication dated 1 May 2006, the AFGE indicates its desire to withdraw its complaint except with respect to the employees of the TSA. The AFGE indicates that, along with several unions that represent federal sector workers, it had challenged the legality of the new DHS and DoD labour relations regimes in two separate proceedings in the US District Court for the District of Columbia. The AFGE declares that both courts have now ruled that the Government's proposed systems violate the collective bargaining rights of all employees covered by those systems under the Homeland Security Act (HSA) or the National Defense Authorization Act, regardless of their specific duties, and have enjoined the implementation of this labour relations regime. (The complainant refers specifically to the following two cases: *D.C. National Treasury Employees Union* v. *Chertoff*, 385 F. Supp. 2d 1 (D.D.C. 2005), *app. pending*, No. 05-5436 (D.C. Cir.); *AFGE* v. *Rumsfeld*, 2006 U.S. LEXIS 7068 (D.D.C. 2006).

736. The complainant explains that, although TSA screeners are employees of the DHS, the labour relations regulations at issue in the *Chertoff* case do not cover them. Those regulations, promulgated by the HSA, explicitly exclude employees of the TSA (5 C.F.R. §9701.505(b)(6)). In addition, the complainant recalls that screeners have extremely limited rights of association and no collective bargaining rights whatsoever by virtue of an order issued by the Administrator of the TSA that was not within the scope of the challenge in *Chertoff*. That order states, in relevant part:

> Individuals carrying out the security screening function under section 44901 of Title 49, United States Code, in light of their critical national security responsibilities, shall not, as a term or condition of their employment, be entitled to engage in collective bargaining or be represented for the purpose of engaging in such bargaining by any representative or organization.

737. According to the complainants, these employees remain, to date, without the fundamental rights of association or bargaining guaranteed to them by the Declaration on Fundamental Principles and Rights at Work and by Conventions Nos. 87 and 98. The AFGE therefore expresses its intent to pursue its complaint with respect to these employees.

B. The Government's reply

738. In a communication dated 23 December 2004, the Government first summarizes the allegations made by the American Federation of Government Employees (AFGE), AFL-CIO and highlights that the AFGE more specifically alleges that a number of executive orders issued by several administrations dating back to 1979 have excluded "hundreds of thousands of federal employees" from the collective bargaining provisions of the Federal Service Labor-Management Relations Statute (FSLMRS) by "executive fiat" and in so doing have established a pattern of "denying and/or undermining" these employees' fundamental right to organize and bargain collectively. The AFGE further contends that the new personnel systems being developed at the Department of Defense (DoD) and the Department of Homeland Security (DHS) will deny federal employees employed in those agencies collective bargaining and effective union representation. As indicated below, neither of these allegations has merit.

739. The Government recalls that it has not ratified Conventions Nos. 87, 98, or 151 and therefore has no international law obligations pursuant to these instruments and no obligation to give effect to their provisions in US law. Nonetheless, the US Government has on numerous occasions demonstrated that its labour law and practice are in general conformity with ILO Conventions concerning freedom of association, and the ILO supervisory bodies have generally upheld this view.

740. As always, the Government accepts the mandate of the Committee to examine complaints filed against it. However, inasmuch as the United States has not undertaken the international legal obligations of the specific Conventions mentioned in the complaint filed by the AFGE, the standard by which the United States should be judged in this case is that of the general, commonly accepted principles of freedom of association as they are reflected in the ILO Constitution and the ILO Declaration on Fundamental Principles and Rights at Work. This is particularly significant in regard to Convention No. 151, with which the AFGE alleges that the Government is not in compliance, but which is not one of the fundamental Conventions that give expression to the principles the Committee was established to promote. Further, Convention No. 151 has not achieved the same level of international acceptance as Conventions Nos. 87 and 98, as evidenced, inter alia, by its low rate of ratification to date. The Government considers that these distinctions are important in all cases before the Committee in which the country concerned has not ratified the fundamental Conventions relating to freedom of association or the specific Convention relating to freedom of association referenced in the complaint; otherwise according to the Government the act of ratifying an ILO Convention on freedom of association would have no legal or practical significance.

741. The Government then refers to an earlier case examined by the Committee relating to public sector workers in the United States, including federal government employees (Case No. 1557) and the Government's observations, which provided a detailed overview of the history and structure of collective bargaining in the federal Government that may prove useful in the present case.

742. The present case is significant because it concerns modifications in federal sector collective bargaining on grounds of national security. United States law permits restriction of the rights to federal employees to engage in collective bargaining when those employees' duties affect national security. The AFGE's complaint challenges the recent exclusions of several subdivisions of agencies from the FSLMRS by executive order, and those by administrative determination in the case of the Transportation Security Administration (TSA) and the National Geospatial-Intelligence Agency (NGA), as well as the recent authority granted to DHS and DoD by federal legislation to modify their personnel systems. These measures were a direct response to the new and greater threats to citizens and residents of the United States since the devastating terrorist attacks of 11 September 2001, and are being taken to ensure that the agencies responsible for national security can react immediately and effectively, as circumstances require. These measures were narrowly drawn and linked to national security needs. In implementing these measures, the United States is striking a balance between the security of the State and the rights of public sector employees.

743. The Government expects that its reply will demonstrate that: (1) the limited exclusions of special groups of employees performing work related to national security from the coverage of the FSLMRS are consistent with ILO principles of freedom of association and collective bargaining; and (2) the authority to modify the personnel systems at DoD and DHS explicitly provides the right of the employees of those agencies to organize and bargain collectively and provides a framework for employee participation in the design and implementation of any modifications to those personnel systems.

The limited exclusion of employees from coverage under the FSLMRS

Executive orders pursuant to §7103(b)(1)

744. The AFGE asserts that eight executive orders issued under §7103(b)(l) of the FSLMRS, which allows the exclusion of subdivisions of agencies from the coverage of that statute based upon considerations of national security, violate ILO principles relating to freedom of association

and collective bargaining. The FSLMRS, codified in Chapter 71 of Title 5 of the US Code, governs labour relations between federal agencies and their employees, and provides for the right to "form, join, or assist any labour organization" and to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees ..." (5 USC §7102J). This statute also provides for exclusions from these rights.

745. Section 7103(b)(l) is one of three provisions in the FSLMRS that allow exclusions from coverage of Chapter 71 of categories of employees, agencies, or subdivisions of agencies based on national security considerations. Section 7103(a)(3) explicitly excludes specific agencies responsible for investigation, intelligence, and national security work, e.g., the Federal Bureau of Investigation and the Central Intelligence Agency (5 USC §7103(a)(3)). Section 7112(b)(6) restricts "any employee engaged in intelligence, counter-intelligence, investigative, or security work which directly affects national security" from being part of a bargaining unit for the purpose of collective bargaining (5 USC §7112(b)(6)). Section 7103(b)(l) authorizes the exclusion of an agency or subdivision of an agency from the coverage of Chapter 71 for the sake of national security if the President determines that: (1) the primary function of the agency or subdivision is intelligence, counter-intelligence, investigative, or national security work; and (2) the provisions of Chapter 71 cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations (5 USC §7103(b)(l)). The limited authority of §7103(b)(l) provides the necessary ability to adjust the governing personnel rules when the mission of an agency is created. The term "agency" as defined under §7103(a)(3) refers mainly to executive agencies, such as the DoD or the DOJ and will be used in this sense in these observations. In practice, §7103(b)(1) has been applied to exclude subdivisions of agencies rather than entire agencies.

746. The executive orders at issue, dating back to 1979, contain presidential determinations that one or more subdivisions of an agency have as a primary function intelligence, counter-intelligence, investigative, or national security work and that Chapter 71 of Title 5 of the United States Code cannot be applied to these subdivisions in a manner consistent with national security requirements and considerations. A reading of the eight orders demonstrates that the link of many of the particular subdivisions to national security is very clear. Regarding those subdivisions of agencies, with respect to which the link is not as obvious, those subdivisions do indeed have as their primary function intelligence, counter-intelligence, investigative, or national security work. For example, the US Attorney's Office and the Enforcement Division of the US Marshals Service, both subdivisions of the US DOJ have a direct role in enforcing laws relating to terrorist activities. These types of presidential determinations are made on a case-by-case basis, after a thorough review within the executive branch to ensure that the exclusion meets the requirements of §7103(b)(l).

747. Contrary to the allegations of the AFGE, §7103(b)(l)'s national security exemption may not be invoked arbitrarily. It is extremely difficult to exclude an agency or subdivision of an agency through the operation of §7103(b)(l) because the procedure through which an executive order is issued involves substantial analysis and multi-layer reviews to ensure that the requirements of the statute are met. Executive Order No. 11030, issued in 1962, prescribes the manner in which executive orders shall be prepared, presented, filed and published. According to these rules, any proposed executive order must be submitted to the Director of the Office of Management and Budget (OMB), together with a letter, duly signed by the properly authorized officer of the originating federal agency, that explains the nature, purpose, background and effect of the proposed executive order and its relationship, if any, to pertinent laws and other executive orders. If the Director of OMB approves the proposed order, he or she must transmit it to the Attorney-General, the head of DOJ, for his or her consideration as to both form and legality. If the Attorney General approves the proposed order, it is sent to the President for review and approval. This substantial review procedure shows that these executive orders originate with agency initiatives, in this case in response to workplace adjustments needed within the agency. Moreover, the executive order process demonstrates that a decision to

exclude an agency by virtue of §7103(b)(l) is not made by the President alone, contrary to the AFGE's contentions in its complaint.

748. In determining whether a subdivision of an agency comes within the "national security" exception of §7103(b)(l), the President's discretion to exercise executive authority granted him by the Constitution is at its highest. Referring to an earlier court decision, the government states that limited judicial review is nevertheless available, under which the President's action is entitled to a "rebuttable presumption of regularity". This presumption is not unique to this circumstance, but "has been recognized since the early days of the Republic" in a "variety of contexts". The presumption "supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties". Thus, while the challenger bears a significant evidentiary burden in seeking to invalidate an executive order issued pursuant to §7103(b)(l), there is access to the courts through this limited judicial review procedure, providing an additional safeguard against misuse of this authority.

749. With regard to the AFGE's contention that it is not necessary for US Presidents to include in an executive order specific findings relating to the exclusion under §7103(b)(l), it is important to note that this, too, is done for reasons of national security. Few of the documents developed in the executive order review process could be made public due to the confidential nature of the work in which these subdivisions of agencies are engaged.

750. The authority conferred by §7103(b)(l) has been used sparingly since the FSLMRS was enacted in 1978. As a result, the number of employees affected by these exclusions is relatively small, and is far short of the "hundreds of thousands" as the AFGE claims. For example, the number of employees of subdivisions within the Department of Defense Intelligence Community excluded from collective bargaining by executive order, constituting most of §7103(b)(l) exclusions, is less than 6 per cent (roughly 36,000 persons) of the overall DoD civilian workforce. Further, the majority of subdivisions were excluded through the first two executive orders, issued in 1979 and 1982; only a few subdivisions of agencies have been excluded since 1982.

751. Section 7103(b)(l) exclusions are necessary for the reason that collective bargaining is incompatible with the national security work carried out by those subdivisions of agencies because the procedural requirements and information dissemination through negotiation would increase the likelihood that national security could be compromised. Generally, under the FSLMRS, an agency is legally obligated to give a union advance notice of, and the opportunity to bargain over, agency decisions that impact the working conditions of bargaining unit employees represented by the union. Under most circumstances, an agency may not implement a decision that affects conditions of employment until the agency has bargained with the union to agreement or impasse. If the union timely invokes the intervention of the Federal Mediation and Conciliation Service or the Federal Service Impasses Panel upon impasse, the agency generally may not implement its decision until the impasse has been resolved. This bargaining obligation under federal labour law applies to many significant agency decisions, including agency reorganizations, equipment and technology changes, work relocations, contracting out of work, reductions in force, work schedules, shift assignments, overtime assignments, training, drug testing, and agency regulations.

752. Bargaining obligations such as these, however, are untenable in subdivisions of agencies whose missions and functions are related to national security functions. This is not to say that federal employees or their union representatives themselves pose a national security risk. Rather, advance notice of an agency decision and the open nature of the negotiation process could give substantial advantages to enemies of the United States and would increase to an unacceptable level the potential for compromise of agency operations and risk to national security.

753. In considering the AFGE's allegations, it is important to note that those employed by subdivisions of agencies that have been excluded from collective bargaining by the executive orders at issue are not prevented from forming, joining or participating in a labour organization. Unlike the situation in Case No. 1261 against the United Kingdom, cited by the AFGE, government employees performing intelligence work and related national security functions for the United States Government are not required to relinquish their union membership in order to retain their jobs, even though they are restricted from engaging in collective bargaining.

754. As demonstrated by the foregoing, executive order exclusions issued under §7103(b)(l) conform to ILO principles of freedom of association and collective bargaining. ILO Conventions, as well as the supervisory findings of the Committee of Experts and the Committee, recognize that there are instances in which restrictions on collective bargaining are permissible, particularly in the public sector. Thus, collective bargaining may be restricted when public servants are engaged in the administration of the State, under Article 6 of Convention No. 98, or even prohibited when their duties are of a highly confidential nature, under Article 1 of Convention No. 151. The subdivisions of agencies excluded from collective bargaining by virtue of the executive orders issued under §7103(b)(l) fall simultaneously into both of these categories.

755. The Government states that the Committee has consistently maintained that public servants engaged in the administration of the State are "civil servants employed in government ministries and other comparable bodies as well as officials acting as supporting elements in these activities". As civil servants employed in government agencies, the employees employed in the subdivisions of agencies prohibited from bargaining collectively under the executive orders at issue are public servants engaged in the administration of the State. As such, they are persons with respect to whom the right to collective bargaining may be restricted.

756. Further, the subdivisions of agencies excluded from collective bargaining under the executive orders at issue are engaged in intelligence, counter-intelligence, and investigative or national security work. There is no question that these excluded subdivisions of agencies at issue perform duties that are highly confidential under Article 1 of Convention No. 151 and therefore, employees of those subdivisions may be excluded from collective bargaining.

757. While the subdivisions of agencies exempted from collective bargaining on grounds of national security have not been designated under US law as part of the armed forces or police, these subdivisions of agencies nonetheless are responsible for protecting the external and internal security of the United States. Furthermore, while this case does not involve questions pertaining to the right to strike, the subdivisions in which they work provide essential services, the compromise of which would pose a clear and imminent threat to the population of the United States.

758. The AFGE correctly notes that there have been instances in which the subdivisions of agencies excluded under §7103(b)(l) had previously been covered under Chapter 71. But, as explained above, this was necessitated by a change in the mission or function of the subdivision of the agency in question to one involving national security matters and a determination that Chapter 71 could no longer be applied to that subdivision in a manner consistent with national security requirements and considerations.

759. Even though these subdivisions of agencies are excluded from collective bargaining under Chapter 71 by virtue of the executive orders, the employees of these subdivisions of agencies have rights to offset the exclusion of their respective subdivisions of agencies from collective bargaining, which serve to safeguard their interests. These employees may file grievances through agency grievance systems generally established by agencies for employees who are not part of the bargaining unit. To illustrate, DoD and DOJ have adopted internal administrative grievance procedures. (Descriptions of these grievance systems were annexed to the reply.) In

addition, employees are entitled to bring a representative to each stage of a disciplinary action. Further, federal government employees are protected by a wide variety of workplace rights and other protections (details of these were annexed to the reply).

Other exclusions from the FSLMRS

760. The AFGE alleges that the exclusion of employees of the NGA, (formerly known as the National Imagery and Mapping Agency) and the TSA from the protections of the FSLMRS is inconsistent with the basic principles of freedom of association and collective bargaining. While these exclusions stem from different laws than the exclusions discussed above, the rationale, operation and effect of these laws are analogous to those underlying the application of the executive orders pursuant to §7103(b)(l).

761. The US Congress expressly authorized the Director of NGA to terminate bargaining unit coverage for positions that have been modified to include intelligence, counter-intelligence, investigative, or security duties (10 USC §461(c)(l)). The Director of NGA made such a determination on 28 January 2003. Similarly, the Administrator of the TSA, which was transferred to the DHS, Directorate of Border and Transportation Security, by the Homeland Security Act of 2002 was granted broad authority by the Aviation and Transportation Security Act (ATSA), (2001), to determine conditions of work of federal employees carrying out security screening at US airports. On 8 January 2003, the Administrator determined that airport security screeners would henceforth not be entitled to engage in collective bargaining.

762. In both cases, these determinations were made in light of the critical national security responsibilities of those agencies and the federal employees who work there. Just as in the case of exclusions under §7103(b)(l), they were carefully and narrowly drawn, in conformity with ILO principles of freedom of association and with no prejudice to the right of those federal employees to exercise their right to form, join or participate in a union.

763. Further factual details concerning the rationale and effect of the exclusion from collective bargaining at NGA and TSA were provided in Annex to the reply.

New personnel systems at the Department of Homeland Security and the Department of Defense

764. The Government refers to the AFGE’s assertion that the two new personnel systems that Congress recently authorized within DHS and DoD are not in conformity with the principles of freedom of association and collective bargaining. The Government then goes on to describe the key elements set forth in the legislation for the establishment and the development of the DHS system and the DoD system, which it maintains, do in fact recognize the basic principles of freedom of association and collective bargaining.

The DHS personnel system

765. The legislation creating DHS was enacted in direct response to the attacks of 11 September 2001. These attacks drastically changed the sense of security enjoyed by the United States and revealed significant vulnerabilities in the United States homeland defence, which necessitated changes in how national security functions are carried out. After a period of intense scrutiny, an effort was initiated to reorganize the national security functions spread throughout the executive branch under the direction of one cabinet-level agency. In November 2002, the Homeland Security Act was signed into law.

766. The HSA merged 22 organizations and functions previously assigned to other federal agencies into a new agency, the most significant reorganization in the executive branch of the US

Government in more than 50 years. DHS was created with the overriding mission of protecting the nation against further terrorist attacks. DHS analyses threats and intelligence, guards US borders and airports, protects US critical infrastructure, coordinates the response of the United States to emergencies, and implements other security measures.

767. The HSA authorized the Secretary of DHS to establish by regulation a new human resources management system, separate and apart from the civil service personnel system established under the Civil Service Reform Act. These regulations must be issued jointly with the Director of OPM. Through this authority, DHS may establish a modern, flexible human resources system to support its mission and improve employee performance that supports the agency's primary mission of protecting Americans from attack, without compromising fundamental employee rights.

768. The AFGE claims that this reorganization authorized the elimination of collective bargaining and the right to union representation and amounts to an "agenda" to silence federal unions. The HSA shows clearly that this is not the case. Section 9701(b)(4) of the HSA provides:

> Any system established ... shall ... ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them, subject to any exclusion from coverage or limitation on negotiability established by law ...

In including this language, Congress created an unequivocal requirement with which any modifications resulting from the reform process must conform: any new personnel system must provide for freedom of association and collective bargaining. Moreover, the legislation does not allow the new personnel system rules to completely replace the Civil Service Reform Act, which applies generally to federal civil servants. Rather, it allows DHS to modify provisions within certain designated chapters according to specific needs. The authority to make changes is designed to ensure that the new human resources management system adhere to the critical mission requirements while protecting the civil service rights, including the freedom of association and collective bargaining rights, of its employees.

769. The legislation also mandates substantial employee and union participation through a collaborative mechanism. Through this mechanism, employees are given a framework in which to voice their views regarding the design, development, and implementation of the labour-management relations system and later modifications to this system. The key elements of this mechanism include: (1) notice and exchange of views; (2) consultation with the possibility of mediation; and (3) implementation with congressional oversight.

770. *Notice and exchange of views*. With respect to any proposed system or adjustment, the Secretary of DHS, together with the Director of OPM, must give employee representatives at least 30 calendar days to review and make recommendations to the proposal and give any recommendation received from such representatives "full and fair consideration". Following receipt of the recommendations from the employee representatives, the Secretary of DHS and the Director of OPM may accept the recommendations that they deem advisable.

771. *Consultation with the possibility of mediation*. With respect to any parts of the proposal that they did not accept, the Secretary of DHS and the Director of OPM must meet and confer for not less than 30 days with the employee representatives in order to reach agreement on whether and how to proceed on those parts of the proposal. At the option of the Secretary of DHS, or if requested by a majority of the employee representatives participating, the services of the Federal Mediation and Conciliation Service may be used during the meet-and-confer period to facilitate the process of attempting to reach an agreement.

772. *Implementation with congressional oversight*. Any part of the proposal to which the employee representatives do not make a recommendation or with respect to which the Secretary of DHS and the Director of OPM accepted the recommendations may be implemented immediately. With respect to those parts of the proposal about which there was not agreement, if the Secretary of DHS determines that further consultation and mediation is unlikely to produce agreement, he or she may implement those parts, but only after 30 days have elapsed after notifying Congress of the decision to so implement the parts of the proposal.

773. The requirement to notify Congress of a decision to implement a part of a proposal with which the employee representatives did not agree gives Congress the final authority, rather than the Secretary of DHS, as the AFGE asserts. Not only must any personnel plan conform to the requirement set out in the Act that freedom of association and collective bargaining be preserved, but the legislation ensures that Congress has the opportunity to modify the law if Congress concludes the requirements of the legislation are not being satisfied.

774. The mechanism set forth in the new legislation requires the Secretary of DHS and the Director of OPM to submit any proposed system to the union representatives for their review. In fact, the two agencies have gone above and beyond this requirement in creating further opportunities for employee involvement. From the beginning, the Secretary of DHS and the Director of OPM made a commitment that the new human resources system would be a result of a collaborative, inclusive, and meaningful process throughout its entire design process, rather than the thirty-day advance notice of a proposal required by statute. To this end, in early 2003 they established a design team including unions representing DHS employees, including the AFGE, that carried out research and extensive solicitation of views though a series of town hall (all-employees) meetings, meetings with 55 focus groups, and exchanges with a field team composed of DHS managers and local union officials. The options that were developed were presented to a senior review committee, which included the president of the AFGE, at a hearing at which public comments were also received. This Committee prepared a summary report to accompany the options, which was sent to the Secretary of DHS and the Director of OPM. Thus, DHS went to very substantial lengths to create extraordinary avenues of participation for employees and their representatives prior to 20 February 2004, when the proposed system was submitted to the employees and their representatives for review as required under the legislation. The DHS proposed regulations and the accompanying supplementary information providing an extensive description of the collaborative design process were published in the Federal Register for public comment (these proposals were annexed to the reply). In the design process of the new human resources management system, the design team was careful not to infringe on the statutory provision requiring the protection of freedom of association and collective bargaining.

775. The proposed regulations include a provision that retains the right to form, join, or assist in any labour organization and to engage in collective bargaining as required by Congress. The DHS and the OPM have been engaged in dialogue and exchange of views. This process will soon culminate in the issuance of the final regulations establishing the new human resources management system, which are currently under review at the OMB. It is clear that whatever personnel rules emerge from the process, they must satisfy the legislative requirement to uphold these federal workers' right to freedom of association and collective bargaining. The benefits gained by federal sector employees through collective bargaining are supplemented by extensive benefits and protections, including a wide range of rights set forth in the Civil Service Code as well as rights from laws of general application. Many of these benefits are bargained for in the private sector, such as rights to paid leave and retirement benefits. It should be noted that the HSA provides that the new personnel regulations shall not affect DHS employees' rights under the discrimination, whistleblower, and merit principle provisions, further discussed in the annex.

776. Congress' intent to circumscribe the flexibility granted by the legislation is further supported by its act of including "sunset provisions" into the authorizing law. Under these provisions, the DHS's authority to change the personnel system through regulation expires in 2009. The DHS

has stated that, during the period leading up to this date, it is committed to an ongoing evaluation of the system to ensure that the personnel regulations are achieving their intended purpose.

777. In conclusion, the Government states that under ILO principles, public employees engaged in the administration of State and whose duties are of a highly confidential nature may be excluded from the right to bargain collectively. These employees fall into both categories. Therefore, the authority granted in the legislation is consistent with the ILO principles. As described earlier in the observations, the exclusion of any DHS employees from collective bargaining are offset by a range of protections, including grievance procedures and the right to appeal adverse employer decisions.

The DoD's National Security Personnel System

778. After the attacks of 11 September 2001, a consensus emerged within DoD that a new civilian personnel system was needed. DoD's civilian personnel management system was fragmented in that it was governed by multiple titles of the US Code, included nine personnel demonstration projects covering 30,000 employees, 50 different pay plans, and several alternative personnel systems. Further, DoD was concerned that the former industrial-age civil service system was not agile enough to help fight the war on terrorism and transform the Department.

779. In November 2003, Congress enacted legislation that authorized the Secretary of DoD, acting jointly with the Director of OPM, to establish by regulation a human resources management system for DoD, to be called the National Security Personnel System (NSPS) (5 USC §9902(a)). This legislation shares many common features with the DHS legislation. This Act too contains an explicit requirement by Congress that any new system must provide for freedom of association and collective bargaining (5 USC §9902(b)(4)). In addition, it too contains a collaborative mechanism for the design, development, and implementation of the system that includes the same key elements discussed above.

780. With respect to DoD's NSPS, collective bargaining will occur at the national level rather than the organizational level in order to facilitate an efficient and effective dialogue (5 USC §9902(m)(4)). DoD is now authorized to streamline the collective bargaining process, which used to involve negotiations with approximately 1,400 separate bargaining units ranging from 30 employees to 30,000 under the former system. However, there is no intent to eliminate the role of local bargaining units to bargain over issues that are local in nature. Local bargaining units will continue to have a valuable role to play in the new system.

781. Similar to the DHS authority, Congress also limited the period during which the changes may apply with a "sunset provision." The authority to establish, implement and adjust the new labour relations system expires in 2009, at which time the provisions of Chapter 71 of the Civil Service Reform Act will apply, unless it is extended or otherwise provided for in law, (5 USC §9902(m)(9)). (Further detail regarding the currents status of the NSPS was annexed to the reply.)

782. The Government maintains that the authority granted by Congress to DHS and DoD to issue regulations creating new personnel systems was carefully tailored to preserve federal employees' freedom of association and collective bargaining rights and included a significant mechanism for employee and union participation. Both agencies are making progress in the design and development of their respective systems consistent with the collaborative mechanism described above. While the personnel systems are not yet complete, any system developed will be required to satisfy Congress' requirements to provide for employee rights to freedom of association and collective bargaining.

783. In conclusion, the Government asserts that the foregoing observations demonstrate that the United States is in full conformity with the fundamental ILO principles of freedom of

association and collective bargaining with respect to federal employees whose work is critical to national security. US law provides, consistent with ILO principles, for limited instances in which employees may be excluded from the statutory right to bargain collectively when their duties affect national security. Significantly, these employees still have the right to join labour organizations of their choice and they enjoy a range of other rights and benefits that serve to safeguard their interests. Furthermore, the new personnel systems being developed at DHS and DoD are also consistent with the basic principles of freedom of association and collective bargaining in that the authorizing legislation contains strict requirements to provide for employee rights to freedom of association and collective bargaining. Through the collaborative mechanism set forth in the legislation, employees and their representatives are provided meaningful opportunities to participate actively in the design, development, and implementation of those systems.

784. In a communication dated 4 August 2006, the Government indicates that, as the recent partial withdrawal made by the complainant in this case does not provide any further substantive information regarding the TSA than what was included in the original complaint, its position has not changed. The Government further indicates its readiness to respond to additional AFGE allegations or to specific questions raised by the Committee.

C. The Committee's conclusions

785. *The Committee notes that the allegations in this case concern the violation of the collective bargaining rights of a variety of federal employees through the expanded use over several decades of executive orders exempting certain employees from the Federal Service Labor-Management Relations Statute (FSLMRS). In particular, following the complainant's request for a partial withdrawal, the complainant alleges that federal airport screeners have been denied their collective bargaining rights.*

786. *Setting out the historical context, the complainant first refers to the adoption in 1978 of the FSLMRS, the basic legislation governing labour relations between federal civil employees and their managers. The FSLMRS was based on the conclusion that "labor organizations and collective bargaining in the civil service are in the public interest" (5 USCA. §7101(a)). In setting out the definition of "employee" and "agency" covered by the Statute, §7103(a) already excludes certain employees and agencies. Furthermore, §7103(b)(1) authorizes the President to issue orders excluding otherwise covered agencies or subdivisions thereof if the President determines that: (a) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative or national security work; and (b) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.*

787. *The complainant alleges that the systematic use of the authority granted under §7103(b)(1) has resulted in the exclusion by executive fiat of hundreds of thousands of federal employees from the rights of the FSLMRS and thus from the rights stemming from ILO Conventions on freedom of association and collective bargaining. According to the complainant, presidential orders issued under this section going as far back as President Carter's term in office have inappropriately denied federal government employees who are not directly engaged in the administration of the State the right to union representation and collective bargaining. Moreover, the complainant contends that a court judgement concerning the use of this section by President Reagan has established that such presidential actions are entitled to a presumption of regularity and are thereby essentially not reviewable by American courts. For this reason, the complainant considers that this matter can only be properly addressed at the international level.*

788. *The complainant adds that the current administration has continued this tendency of infringing upon collective bargaining rights and has even carried out a more*

encompassing prohibition of these rights under the guise of government structural adjustment and in the name of national security where US courts generally do not have jurisdiction to challenge.

789. *The Government, for its part, admits to recent restrictions of the collective bargaining rights of various groups of federal employees, but insists that these restrictions must be considered within the context of the permissive provisions in US law that allow such restrictions for employees whose duties affect national security. The Government maintains that all of the measures called into question in the complaint were a direct response to the new and greater threats to citizens and residents of the United States since the terrorist attacks of 11 September 2001 and were aimed at ensuring that agencies responsible for national security can react immediately and effectively. Moreover, the Government contends that these measures were narrowly drawn so as to strike a balance between the security of the State and the rights of public sector employees. Finally, the Government argues that exclusions from the FSLMRS provisions for employees involved in national security work are necessary because the cumbersome procedures involved with collective bargaining on significant agency decisions, such as agency reorganizations, equipment and technology changes, work relocations, etc., are incompatible with national security work.*

790. *As regards more specifically the §7103(b)(1) permissible exclusions, the Government further evokes what it describes as a substantial multi-layer review process for the presentation, filing and publishing of executive orders excluding certain federal employees from the FSLMRS. According to the Government, such orders are not unilaterally invoked by the President, but rather originate with agency initiatives that are reviewed by the Director of the Office of Management and Budget (OMB) and the Attorney-General. While judicial precedence has established a "rebuttable presumption of regularity" for the President's actions in this respect, such orders may be appealed under a limited judicial review procedure, thus providing, according to the Government, an additional safeguard against the misuse of this authority.*

791. *While noting that both the complainant and the Government refer to the justification of these restrictions in security terms and, in particular, the specific reference to this effect in the exclusionary provision of the FSLMRS, the Committee recalls that, when examining the question of collective bargaining rights for civil servants, it has always used a standard similar to that developed in Convention No. 98 concerning public servants engaged in the administration of the State. The Committee will therefore base its considerations on whether the federal employees concerned may be properly considered as public servants engaged in the administration of the State, which in the Committee's view is a broader criterion encompassing the more narrowly defined concept of national security work.*

792. *The Committee notes in this respect that the only allegation remaining in this case concerns the issuance by the Transportation Security Administration (TSA) Administrator of an order, by virtue of the authority vested in him by the Aviation and Transportation Security Act (ATSA), denying 56,000 federal airport screeners the right to engage in collective bargaining or be represented by any organization for collective bargaining purposes. While the complainant attempted an appeal to the Federal Labor Relations Authority (FLRA) arguing that the ATSA did not grant the Administrator any such authority, the FLRA, referring to the sole and exclusive jurisdiction of the agency to determine conditions of employment of security screening personnel and the authority under 5 USCA §7101 et seq., dismissed the petition on the ground that it lacked jurisdiction.*

793. *The Government indicates that the rationale, operation and effect behind the law permitting the exclusion of federal airport screeners from the protection of the FSLMRS*

are analogous to those underlying the application of the executive orders pursuant to §7103(b)(1). According to the Government, the Administrator of TSA was granted broad authority by the ATSA of 2001 to determine conditions of work of federal employees carrying out security screening at US airports and, drawing its exclusions carefully and narrowly, the TSA Administrator determined, in January 2003, that airport security screeners would henceforth not be entitled to engage in collective bargaining. There would, however, be no prejudice to the right of those federal employees to exercise their right to form, join or participate in a union.

794. *In the case of this particular exclusion, the Committee is concerned about two issues: (1) the use of an ever-enlarged definition of work connected to national security to exclude employees that are further and further away from the type of employee considered to be "engaged in the administration of the State"; and (2) the apparent lack of, or at least severely limited jurisdiction, to review possible excesses of authority in excluding federal employees from the FSLMRS. As regards the determination of public servants engaged in the administration of the State, the Committee recalls, as was cited in the Government's reply, 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 [see* ***Digest,*** *op. cit., para. 794]. When previously examining a complaint against the Government of the United States in respect of the violation of the collective bargaining rights of federal employees, the Committee had concluded that all public service workers other than those engaged in the administration of the State should enjoy collective bargaining rights and priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of terms and conditions of employment in the public service [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 1994, 4th edition, para. 893 (see also Case No. 1557; 284th Report, para. 806 and 291st Report, para. 285(a))].*

795. *In light of these abovementioned principles, the Committee queries whether the 56,000 federal airport screeners in question here may actually be considered as public servants engaged in the administration of the State. While recognizing that there is clearly a security element involved in their work, as indeed exists for security screeners of private enterprises, the Committee is concerned that the extension of the notion of national security concerns for persons who are clearly not making national policy that may affect security, but only exercising specific tasks within clearly defined parameters, may impede unduly upon the rights of these federal employees. The fact that the link of exclusions to national security concerns so clearly set out in §7103(b)(1) (referred to by the FLRA and stated by the Government to be analogous to the rationale used by the TSA) on the basis of a dual requirement – this section refers not only to the primary function of the work, but also to a determination that the FSLMRS could not otherwise be applied to those employees in a manner consistent with national security requirements – has been considered unreviewable by the FLRA has added to the Committee's concern in this regard.*

796. *In these circumstances, the Committee recalls its previous conclusion in Case No. 1557 that 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. In particular, the Committee wishes to emphasize that one of the main objectives of workers in exercising their right to organize is to bargain collectively their terms and conditions of employment. It requests the Government to carefully review, in consultation with the workers' organizations concerned, the matters covered within the overall terms and conditions of employment of federal airport screeners which are not*

directly related to national security issues and to engage in collective bargaining on these matters with the screeners' freely chosen representative. It requests the Government to keep it informed of the measures taken in this regard. The Committee further trusts that all necessary measures will be taken to ensure that the organizational rights of these employees are effectively guaranteed in practice and that they may be represented in respect of their individual grievances by the organizations freely chosen by them.

797. *The Committee reminds the Government that the technical assistance of the Office is available in respect of the matters raised in this case.*

The Committee's recommendations

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

(a) Recalling that 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, the Committee requests the Government to carefully review, in consultation with the workers' organizations concerned, the matters covered within the overall terms and conditions of employment of federal airport screeners which are not directly related to national security issues and to engage in collective bargaining on these matters with the screeners' freely chosen representative. It requests the Government to keep it informed of the measures taken in this regard. The Committee further trusts that all necessary measures will be taken to ensure that the organizational rights of these employees are effectively guaranteed in practice and that they may be represented in respect of their individual grievances by the organizations freely chosen by them.

(b) The Committee reminds the Government that the technical assistance of the Office is available in respect of the matters raised in this case.

CASE NO. 2341

INTERIM REPORT

Complaint against the Government of Guatemala presented by
— the Workers' Trade Union of Guatemala (UNSITRAGUA) and
— the International Confederation of Trade Unions (ICFTU)

Allegations: Interference by the Labour Inspectorate in the internal affairs of the Trade Union of Portuaria Quetzal, illegal banning of seven member of the Executive Committee from carrying out their trade union duties, restructuring (voluntary retirement plan) of the enterprise for anti-union purposes and without consultation, and practices contrary to the right to bargain collectively; dismissal of union

members in violation of the collective agreement; subcontracting of teachers for anti-union purposes by the Ministry of Education; mass anti-union dismissals at the Crédito Hipotecario Nacional; dismissals in the Municipality of Comitancillo (department of San Marcos) in violation of a court reinstatement order, dismissal of a member of the Trade Union of the Supreme Electoral Tribunal; application of criteria contrary to Convention No. 87 for the representation of employers on the Tripartite Commission for International Affairs; raiding of trade union headquarters and use of threats and intimidation against trade union members

799. The Committee last examined this case at its November 2005 meeting [see 338th Report, paras. 891-942, approved by the Governing Body at its 294th Session].

800. The Government sent new observations in communications dated 3 November 2005, and 1 February, 28 June and 18 July 2006.

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

A. Previous examination of the case

802. In its previous examination of the case, the Committee made the following recommendations [see 338th Report of the Committee, paragraph 942]:

(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 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.

(b) The Committee requests the Government to guarantee in the future that, when the Portuaria Quetzal enterprise intends to dismiss employees, the Joint Board 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 Alegría" 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.

B. The Government's reply

803. In its communications dated 3 November 2005 and 1 February, 28 June and 18 July 2006 the Government sent the following observations.

804. With regard to subparagraph (d) of the recommendations, in which the Committee requested the Government to inform it of the specific grounds for terminating the employment relationship of trade union member Yuri de Leon Polanco by the Credito Hipotecario Nacional, the Government states that it was because Mr. Polanco's contract came to an end on 31 December 2004, and that he had been paid the compensation and other benefits required by law. Mr. Polanco signed the form signifying the end of his contract.

805. With regard to subparagraphs (a), (b) and (f) containing allegations with respect to the restructuring of Portuaria Quetzal for anti-union purposes and in violation of the right to bargain collectively, the Government enclosed a copy of a communication from the general manager of the enterprise indicating that its Executive Board, consisting of government delegates and of workers delegates appointed at a meeting of unionized and non-unionized workers, announced the voluntary retirement plan in August 2004. All those who agreed to the plan received full compensation plus benefits. As to the alleged deduction of up to 95 per cent of the wages and the enterprise's refusal to authorize overtime, the enterprise denies the claim, pointing out that such deductions, which can amount to no more than 35 per cent of employees' wages, can only be made by court order and that, by the very nature of port work, overtime is a common occurrence.

806. Regarding the alleged failure to appoint a Joint Board, the enterprise states that it was the workers' fault. As to the alleged refusal to negotiate a collective agreement, the enterprise states that negotiations were held in 2004 and an agreement was adopted in September 2004. With regard to the alleged selective dismissal of workers, the enterprise states that, in the few cases of dismissal for gross negligence that occurred, due process was observed, with the workers being given the opportunity to justify their mistakes; moreover, not one reinstatement order had been issued by the courts.

807. With respect to subparagraph (f) concerning the criteria for representation of employers on the Tripartite Commission for International Affairs, the Government states that the criteria were the outcome of the direct contacts mission carried out by the ILO in May 2004 and were designed to establish a rapid response mechanism for examining complaints

addressed to the ILO so as to try and find a solution to any problems within 15 days, before the complaints were sent to the ILO. The Government emphasizes that it was not a compulsory preliminary mechanism for submitting complaints and that the Tripartite Commission for International Affairs was set up in accordance with the law, since its members were free and independent representative organizations enjoying the right to freedom of association (the Government enclosed a copy of government agreement No. 285-2004 which provided for the establishment of the Tripartite Commission and, in its section 1, stipulates that its members shall be representatives of the Government, employers and workers through their most representative organizations.) The Government adds that the Coordinating Committee of Agricultural, Commercial, Industrial and Financial Associations (CACIF) coordinates Guatemala's most representative chambers and associations of employers, which also constitute the country's eight most important economic activities in terms of their contribution to its gross domestic product. These are: (1) the Chamber of Industry of Guatemala; (2) the Chamber of Agriculture of Guatemala; (3) the Chamber of Finances of Guatemala; (4) the Chamber of Construction of Guatemala; (5) the Association of Sugar Mills of Guatemala; (6) the Non Traditional Export Products Trade Association; (7) the Chamber of Tourism of Guatemala; (8) the Federation of Small and Medium-sized Enterprises; (9) the National Coffee Association; (10) the Employers' Chamber of Commerce and Services; and (11) the National Network of Management Groups. These chambers and associations represent over 60,000 organized employers spread over more than 120 trade committees.

808. With regard to subparagraph (g), which refers to the allegations submitted by the ICFTU on 2 August 2005 concerning the raid on the headquarters of the Education Workers' Trade Union of Guatemala (STEG) and subsequent theft of communication equipment, fax machines, telephones and files, the Government states that there is not sufficient evidence to determine who was responsible for the incident; this was confirmed by the Office of the Special Attorney for Crimes against Journalists and Trade Unionists. With regard to the harassment of Jovial Acevedo, the organization's Secretary-General, in a communication sent to the Vice-Minister (with a copy for the Government) the Office of the Special Attorney states that no investigation is being conducted into any infringement of Jovial Acevedo's rights.

809. With regard to the allegations submitted by the ICFTU concerning the raid on the National Coordinating Committee for Peasant Organizations (CROC) and the theft of 15 computers containing important data belonging to the organization, the Government states that the CROC is not a trade union organization, since its purpose is to acquire land, and that allegations concerning it should therefore not be examined in the present case.

810. With regard to the alleged threats against the Executive Committee of the Workers' Trade Union of the Credito Hipotecario Nacional (STCHN), the Government states that the Office of the Attorney-General does not indicate in its report who was the perpetrator. On the contrary, the trade unionists' claim that the manager of the bank had threatened them was contradicted by an inspector who was present.

C. The Committee's conclusions

811. *The Committee recalls that the allegations relate to interference by the Labour Inspectorate in the internal affairs of the Trade Union of Portuaria Quetzal, the illegal banning of seven members of the Executive Committee from carrying out their trade union duties, the restructuring (voluntary retirement plan) of the enterprise for anti-union purposes and without consultation, and practices contrary to the right to bargain collectively, the dismissal of union members in violation of the collective agreement, the subcontracting of teachers from the " Fe y Alegría" Movement association for anti-union purposes by the Ministry of Education, mass anti-union dismissals at the Credito*

Hipotecario Nacional, dismissals in the municipality of Comitancillo (department of San Marcos) in violation of a court reinstatement order, the dismissal of a member of the Trade Union of the Supreme Electoral Tribunal, and the application of criteria contrary to Convention No. 87 for the representation of employers. In its previous examination of the case the Committee also took note of allegations presented by the ICFTU on 2 August 2005 concerning the raiding of trade union headquarters, the theft of union assets and the use of threats and intimidation against trade union members, including the issue of a warrant against one of them.

812. *With regard to the alleged interference by the Labour Inspectorate in the extraordinary general assembly of the Portuaria Quetzal Trade Union, during which trade union leaders were removed from their position in the absence of a quorum, and concerning which the Committee had requested the Government to keep it informed of any administrative or judicial decision that was taken, particularly with regard to the fact that decisions of the trade union assembly were challenged by 113 of the 600 members, the Committee observes that the Government has not sent its observations on the subject and requests it to do so without delay.*

813. *With regard to the other allegations concerning the restructuring of the enterprise for anti-union purposes and without consultation by means of a voluntary retirement plan and practices contrary to the right to bargain collectively, the Committee notes that, according to the Government, the retirement plan was voluntary and the workers who accepted it were paid the corresponding compensation. The Committee notes further that the Government adds that the retirement plan was decided upon by the enterprise's Executive Board, which is composed of government delegates and of workers' delegates appointed by an assembly of unionized and non-unionized workers. Without derogating from the point of view expressed by these delegates of the enterprise's Executive Board, the Committee observes that, although there are worker members (trade union members and non-members) on the Executive Board, the views of the trade union organization – which is the legitimate representative of the workers – were not taken into account in deciding upon the voluntary retirement plan. The Committee recalls that rationalization and staff reduction processes should involve consultations or attempts to reach agreement with the trade union organizations [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 936]. The Committee regrets that the Government has not taken this principle into account and expects that the Government will duly consult the trade union organizations in the future.*

814. *With regard to the convening of the Joint Board provided for in the collective agreement at Portuaria Quetzal, the Committee notes that, according to the Government, it was the workers' fault that the Board was not set up. In this connection, the Committee stresses the importance of the Government and the social partners making the necessary effort in good faith to set up the Joint Board so that it can carry out the functions assigned to it in the collective agreement properly, especially where it is a matter of deciding upon collective dismissals.*

815. *With regard to subparagraph (c) concerning the alleged practice by the Ministry of Education of encouraging subcontracting from the "Fe y Alegria" Movement association through parent associations in order to weaken the trade union, by making renewal of the subcontracted employees' contracts conditional upon their not joining the union, in which connection the Committee had requested the Government to carry out an independent investigation into these alleged anti-union practices, the Committee observes that the Government has not sent its observations on the subject and requests it to do so without delay.*

816. *With regard to subparagraph (d) of the recommendations concerning the termination of the employment relationship of trade unionist Yuri de Leon Polanco by the Credito Hipotecario Nacional, the Committee notes the Government's statement that this was due to the fact that Mr. Polanco's contract had come to an end on 31 December 2004, that he had been paid the compensation and other benefits required by law and that he had signed a document to the effect that his contract was terminated.*

817. *With regard to subparagraph (e) of the Committee's recommendations in which it requested the Government to inform it of the outcome of the appeal for trade union immunity that had been lodged in connection with the dismissal of 18 employees of the municipality of Comitancillo, the Committee observes that the Government has not sent its observations on the subject and requests it to do so as soon as it learns of the decision handed down.*

818. *With regard to subparagraph (f) of the recommendations concerning the dismissal of Victor Manuel Cano Granados, who is a member of the Trade Union of the Supreme Electoral Tribunal, the Committee regrets once again that the Government has not sent its observations on the subject and requests it to do so without delay.*

819. *With regard to the criteria for representation of employers on the Tripartite Commission for International Affairs, the Committee notes the Government's statement that the Commission was set up in accordance with the law, since its members were free and independent representative organizations enjoying the right to freedom of association. The Committee notes that government agreement No. 285-2004 provides for the establishment of the Commission and, in its section 1, stipulates that its members shall be representatives of the Government and of employers and workers through their most representative organizations, and that the Government adds that the Coordinating Committee of Agricultural, Commercial, Industrial and Financial Associations (CACIF) coordinates Guatemala's most representative chambers and associations of employers, which in turn constitute the country's eight most important economic activities in terms of their contribution to its gross domestic product. Finally, the Committee notes that, according to the Government, these chambers and associations represent more than 60,000 organized employers spread over 120 trade committees.*

820. *With regard to the ICFTU's allegations concerning the raiding of trade union headquarters, the theft of union assets and the use of threats and intimidation against trade unionists, including the issuing of a warrant against one of them, the Committee notes the Government's statement that the evidence presented with respect to the raid of the headquarters of the Education Workers Trade Union of Guatemala (STEG) and subsequent theft of communication equipment, fax machines, telephones and files is not sufficient to determine who were the perpetrators of the incident, as was confirmed by the Office of the Special Attorney for Crimes against Journalists and Trade Unionists. The Committee observes that these are serious allegations of anti-union acts against a trade union organization and one of its officials. The Committee regrets that the Government does no more than state that the evidence is not sufficient to determine who were the perpetrators of the raid and theft of assets. The Committee expects that the Government will take the necessary steps to avoid any recurrence of such incidents.*

821. *Regarding the harassment of the union's Secretary-General, Jovial Acevedo, and, in particular, the warrant for his arrest following protests against the Free Trade Agreement, the Committee, noting that according to the Government no investigation is being conducted, requests the Government to conduct an inquiry into the matter and to inform it of the outcome, particularly if there is still a warrant for his arrest.*

822. *With regard to the serious allegations concerning death threats and intimidation against the Executive Committee of the Workers Trade Union of the Credito Hipotecario Nacional (STCHN), the Committee notes the information supplied by the Government to the effect that the Attorney-General's report does not indicate who were the perpetrators of the incident, and that the trade unionists' claim that the manager of the bank made death threats against them was contradicted by an inspector who was present. Given the contradictions between the allegations of the trade union organization and the statement of the Government, the Committee requests the Government to take the necessary steps to confirm the facts of threats and to conduct an appropriate investigation, and to keep it informed of the outcome.*

The Committee's recommendations

823. ***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 interference by the Labour Inspectorate in the extraordinary general assembly of the Portuaria Quetzal Trade Union, during which trade union leaders were removed from their position in the absence of a quorum, the Committee requests the Government to send its observations without delay on any administrative or judicial decision taken, particularly with regard to the fact that the decisions of the trade union assembly were challenged by 113 of the 600 members.

(b) With regard to the alleged practice by the Ministry of Education of encouraging subcontracting from the "Fe y Alegria" Movement association through parent associations in order to weaken the trade union, by making renewal of the subcontracted employees' contracts conditional upon their not joining the union, the Committee once again requests the Government to carry out without delay an independent investigation into the alleged anti-union practices and to send its observations on the subject.

(c) The Committee once again requests the Government to inform it of the outcome of the appeal for trade union immunity that was lodged in connection with the dismissal of 18 employees of the municipality of Comitancillo, as soon as it learns of the decision handed down.

(d) The Committee once again requests the Government to send its observations without delay on the dismissal of Victor Manuel Cano Granados, a member of the Trade Union of the Supreme Electoral Tribunal.

(e) With regard to the allegations concerning the raid on the headquarters of the Education Workers Trade Union of Guatemala (STEG) and subsequent theft of communication equipment, fax machines, telephones and files, and observing that these are serious allegations of anti-union acts against a trade union organization, the Committee regrets that the Government does no more than state that the evidence is not sufficient to determine who were the perpetrators and expects that the Government will take the necessary steps to avoid any recurrence of such incidents.

(f) Regarding the harassment of the STEG's Secretary-General, Jovial Acevedo and, more specifically, the warrant for his arrest following the protests

against the Free Trade Agreement, the Committee requests the Government to conduct an inquiry into the matter and to inform it of the outcome.

(g) ***With regard to the serious allegations concerning death threats and intimidation against the Executive Committee of the Workers Trade Union of the Crédito Hipotecario Nacional (STCHN), and given the contradictions between the allegations of the trade union organization and the statement of the Government, the Committee requests the Government to take the necessary steps to confirm the facts of the threats and to conduct an appropriate investigation, and to keep it informed of the outcome.***

CASE NO. 2361

INTERIM REPORT

Complaint 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

824. The Committee last examined this case at its meeting in November 2005 [see 338th Report, paras. 943 to 958] and presented an interim report to the Governing Body.

825. The Trade Union Federation of Public Employees (FENASTEG) sent additional information in a communication dated 3 November 2005. The Government sent partial observations in communications dated 5 January and 28 June 2006.

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

A. Previous examination of the case

827. At its meeting in November 2005, the Committee made 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.

B. Additional information from the complainant

828. In its communication of 3 November 2005, the Trade Union Federation of Public Employees (FENASTEG) refers to the dismissal of 16 members of the Union of Workers of the "José de Pineda Ibarra" National Centre for Textbooks and Educational Material (CENALTEX), part of the Guatemalan Ministry of Education. In this regard, it expresses

its disappointment at the negative stance put across by the Minister for Education to the Alternative Dispute Resolution Office (attached to the Ministry of Labour and Social Security), since despite being sent four notifications on different dates, inviting it to participate in seeking a conciliatory solution and thereby resolve the issue of the dismissal of the 16 workers, it refused to attend. This shows that the organs established for the purposes of alternative resolution of labour questions and vaunted by the Government in international forums are unfortunately not operational. Lastly, FENASTEG supplies the names of the dismissed members of the abovementioned trade union: (1) Amabilia Valdez Guzmán de Morales, (2) Sandra Verónica Vázquez de González, (3) Miriam Amparo Hernández Cuté, (4) Alba Elizabeth Bátrez de Méndez, (5) Consuelo Lila Paiz Salazar de López, (6) Aurora Roca Sinay, (7) Patricia del Rosario García Castellanos, (8) Loida Judith Pacheco Quintana, (9) Mario Raúl Mancilla Guerra, (10) Adolfo Eduardo Merida Higueros, (11) Enmanuel de Jesús Hernández Lima, (12) Feliciano Rivera Polanco, (13) César Enrique Alvarado Tello, (14) Elido Amado Hernández Ortiz, (15) Alberto Ruiz and (16) Juan Carlos García Castellanos.

C. The Government's reply

829. In its communication of 5 January 2006, the Government states that it has received the additional information from FENASTEG concerning the dismissals of members of the Union of Workers of the National Centre for Textbooks and Educational Material, but that before initiating an in-depth investigation, it requires the names of the dismissed workers and indication of which court is dealing with the case.

830. In its communication of 28 June 2006, the Government states, with respect to the allegations concerning the process of reorganization at the Ministry of Education with the aim of destroying the union that operates there, that the Second Court of Labour and Social Provision was requested to provide information on the collective dispute referred to in the complaint presented. The judicial authority reported that the action in question was brought by the members of the Executive Body of the Trade Union of Workers of the Department of Education of Guatemala (SITRADDEG) against the State of Guatemala, as representative of the Ministry of Education.

D. The Committee's conclusions

831. *The Committee recalls that the present case concerns allegations of anti-union dismissals and violations of the right to collective bargaining, as well as the promotion by the Government of a civil service bill containing provisions that may be contrary to ILO Conventions ratified by Guatemala. Specifically, at its meeting in November 2005, the Committee, observing the Government's statement that a conciliation and arbitration court had been set up as a result of the socio-economic dispute in Chinautla Town Hall brought before the judicial authority, requested the Government to inform it of any decisions handed down by that court regarding the 14 dismissed union members (who, according to the Government, were still working at that time) and union leader Marlon Vinicio Avalos. In addition, noting that the Government had not replied to the allegation that the mayor of Chinautla refused to negotiate the collective agreement, the Committee requested the Government to take measures to promote collective bargaining in Chinautla Town Hall. The Committee also requested the Government to ensure that the civil service bill that emerged from the consultation process would be fully compatible with Conventions Nos. 87 and 98, and reminded the Government that it could avail itself of ILO technical assistance. The Committee also requested the Government to send a copy of the bill when the process was complete, and to reply without delay to the following allegations: (1) 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; (2) 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; and (3) the Directorate General for Migration refused to set up the mixed (joint) committee as set out in the collective agreement. The Committee requested the complainant organization (FENASTEG) to transmit the names of the 16 members of the Union of Workers of the "José de Pineda Ibarra" National Centre for Textbooks and Educational Material who had been dismissed as a result of an allegedly illegal reorganization, without consultation, ordered by the Ministry of Education (FENASTEG communicated the full names of the workers concerned, which are given at the beginning of this case and which were transmitted to the Government), and to indicate the court dealing with the actions to dismiss all members of the union's executive committee.

832. *As regards the alleged process of reorganization of the departments of the Ministry of Education with the possible elimination of posts with the aim of destroying the union that operates there, the Committee notes the information from the Government to the effect that the executive committee of the Trade Union of Workers of the Department of Education of Guatemala (SITRADDEG) has brought an action before the judicial authority against the State of Guatemala. In this regard, the Committee expects that the judicial authority will soon issue a ruling, and requests the Government to keep it informed of the final outcome of the proceedings.*

833. *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 notes the Government's statement that it requires the names of the dismissed workers and information on which court is hearing the legal case before being able to initiate an in-depth investigation. In this regard, noting that FENASTEG communicated the full names of the workers concerned, which were provided in its communication of 3 November 2005 and which are given at the beginning of this case, and that this information was transmitted to the Government, the Committee requests the Government to send its observations concerning these allegations without delay. In addition, the Committee requests the complainant organization (FENASTEG) to indicate the court dealing with the actions to dismiss all members of the executive committee of the Union of Workers of the "José de Pineda Ibarra" National Centre for Textbooks and Educational Material.*

834. *Lastly, as regards the other pending allegations, the Committee notes with deep regret that the Government has not communicated the further observations and information requested of it, reiterates its previous recommendations and urges the Government to undertake the above without delay.*

The Committee's recommendations

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

(a) ***As regards the socio-economic dispute at the Chinautla Town Hall that is before the judicial authority, the Committee once again requests the Government to inform it of any decisions handed down by the conciliation and arbitration court regarding the 14 dismissed union members (who, according to the Government, were still working at that time) and union leader Marlon Vinicio Avalos.***

(b) The Committee once again requests the Government to take measures to promote collective bargaining in Chinautla Town Hall and to supply information in this regard.

(c) The Committee once again 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 so that the Committee can assess its compatibility with the principles of freedom of association.

(d) As regards the alleged process of reorganization of the departments of the Ministry of Education with the possible elimination of posts with the aim of destroying the union that operates there, the Committee notes the information from the Government to the effect that the executive committee of the Trade Union of Workers of the Department of Education of Guatemala (SITRADDEG) has brought an action before the judicial authority against the State of Guatemala, expects that the judicial authority will soon issue a ruling, and requests the Government to keep it informed of the final outcome of the proceedings.

(e) 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 allegedly 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, noting that FENASTEG communicated the full names of the affected workers in its communication of 3 November 2005, which were transmitted to the Government and are given at the beginning of this case, requests the Government to send its observations concerning these allegations without delay.

(f) As regards the alleged action taken by the Ministry of Education to dismiss all members of the executive committee of the Union of Workers of the "José de Pineda Ibarra" National Centre for Textbooks and Educational Material, the Committee requests the complainant organization (FENASTEG) to indicate the court dealing with this action.

(g) The Committee, deeply regretting that since the start of this case, no observations have been communicated by the Government concerning the following allegations: (1) 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; and (2) the Directorate General for Migration refused to set up the mixed (joint) committee as set out in the collective agreement, urges the Government to reply without delay.

CASE NO. 2413

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

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

Allegations: The complainant alleges that the forces of law and order violently repressed trade union demonstrations in March 2005, as a result of which four workers died (including a peasant worker leader) and a further 11 were injured, and that arrest warrants were issued for trade union leaders. In addition, the complainant alleges anti-union dismissals at Ingenio Magdalena S.A., Finca El Cóbano, in the municipality of El Tumbador, San Marcos, in the municipality of San Juan Chamelco, department of Alta Verapaz, and at the San Vicente Tuberculosis Sanatorium. Lastly, the complainant alleges a lockout at the enterprise Bocadelli S.A., following the submission of a draft collective agreement

836. The Committee last examined this case at its meeting in March 2006 [see 340th Report, paras. 890 to 908]. The UNSITRAGUA sent new allegations in a communication dated 29 May 2006.

837. The Government sent certain observations in communications dated 7 February, 6 April and 10 May 2006.

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

A. Previous examination of the case

839. In its previous examination of the case, the Committee made the following recommendations [see 340th Report, para. 908]:

(a) Given the contradictory accounts of the events that occurred during the demonstration of 14 March 2005 (according to the complainant, the national civil police intervened during the event and started to fire tear gas at the demonstrators while, according to the Government, a disturbance of public order occurred during the demonstration and private property was damaged), the Committee requests the Government to take measures to carry out an independent, in-depth investigation of the events that occurred and to keep it informed in this respect.

(b) As regards the alleged arrest warrants against the leaders who organized the protest of 14 March 2005, the Committee requests the Government to provide information as to

whether the judicial authority had indeed issued search warrants and, if so, to provide information on the status of the trials of the persons involved.

(c) As regards the alleged repression on 15 March 2005 by members of the national army and of the national civil police of demonstrators from trade unions and other organizations, on the SELEGUA V Bridge at kilometre 287.5 of the Interamerican highway, in the village of Los Naranjales, municipality of Colotenango, Department of Huhuetenango, killing Juan Esteban López, leader of the Committee of Peasant Unity and member of the National Coordination of Peasant Organizations and the workers José Sánchez Gómez, Pedro Pablo Domingo García and Miguel Angel Velásquez Díaz, and gravely wounding a further 11 workers (the complainant organization lists their names), the Committee deplores the death of a leader and other workers and the injuries suffered by a number of demonstrators and urges the Government to take the necessary measures to conduct promptly an independent inquiry into the alleged facts in order to ascertain responsibilities and, where appropriate, to punish those responsible and to keep it informed in this respect.

(d) As regards the alleged disrespectful statements by the President of the Republic in the media about trade union leaders and violence against participants in the demonstrations, the Committee, observing the contradictory statements made, requests the Government to carry out an investigation into these allegations and to keep it informed in this respect.

(e) As regards the allegation that the coordinator of the UNSITRAGUA Commission and Legal Office was prevented from leaving the country on 16 March 2005, the Committee requests the Government to carry out an investigation and to send its observations in regard to this allegation.

(f) Lastly, the Committee regrets that the Government has not sent its observations on the following allegations: (1) the dismissal of 23 workers who attempted to establish a trade union in the Finca El Cóbano (it is alleged that court orders exist for reinstatement that have been ignored by the enterprise); (2) dismissal of five workers belonging to the Trade Union of Workers of the municipality of San Juan Chamelco, department of Alta Verapaz (it is further alleged that the judicial authorities ordered the reinstatement of the dismissed workers, but that the municipality refused to comply with the order); (3) dismissal of a worker belonging to the Trade Union of Workers of the San Vicente Tuberculosis Sanatorium, in violation of the provisions of the collective agreement; (4) dismissal of two workers belonging to the Trade Union of Workers of the municipality of El Tumbador, San Marcos, in the context of a collective dispute during the negotiation of a collective agreement; and (5) lockout at Bocadelli S.A. following the submission of a draft collective agreement by the enterprise's trade union. In this respect, the Committee requests the Government: (1) where orders exist for the reinstatement of dismissed trade union members, to take steps to ensure that these orders are immediately enforced; and (2) promptly to send its observations on all pending allegations.

B. New allegations by the complainant

840. In its communication of 29 May 2006, the Trade Union of Workers of Guatemala (UNSITRAGUA) made the following allegations:

– *Anti-CAFTA demonstration on 14 March 2005.* The complainant states that it does not concur with the arguments communicated by the Government with regard to these allegations, and once again sets out the details of the events that took place during the demonstration. The UNSITRAGUA again asserts that police actions cost human lives, and states that, to date, no independent investigation has been undertaken to establish responsibility for these incidents, owing to the fact that the President's Office and the Ministry of Governance are directly responsible. However, there is currently no organization in Guatemala, with the exception of the Office of the Human Rights Prosecutor, capable of carrying out such a task, at least not independently.

– *Anti-CAFTA demonstrations on 15 March 2005.* The UNSITRAGUA states that, to date, no independent investigation has been carried out to establish responsibility for the incidents that occurred during the demonstration because the President's Office and the Ministry of Governance are directly responsible. However, it is the complainant's opinion that there is currently no organization in Guatemala, with the exception of the Office of the Human Rights Prosecutor, capable of carrying out such a task, at least not independently.

– *Disrespectful statements by the President of the Republic against trade union leaders and violence against demonstrators.* To date, no independent investigation has been undertaken to establish responsibility for these incidents, owing to the fact that the President's Office and the Ministry of Governance are directly responsible. In the opinion of the complainant, there is currently no organization in Guatemala, with the exception of the Office of the Human Rights Prosecutor, capable of carrying out such a task, at least not independently. The President's statements are reproduced in the press editions for the days on which they were spoken and can also be found in national television and radio archive footage for the days in question.

– *San Vicente Tuberculosis Sanatorium*. The worker Héctor Salvador Mendizábal Vega has been dismissed. An application for reinstatement is currently being considered by the Sixth Labour and Social Security Court of the First Economic Zone and its progress has been slowed by the delaying tactics employed by the Office of the Attorney-General of the Nation.

– *Municipality of El Tumbador, San Marcos*. The municipality of El Tumbador, San Marcos, in order to evade liability with regard to the reinstatement of workers, has chosen to keep them in work for no wages, imposing forced or unpaid labour practices in an effort to generate desperation and force them to back down. Those workers who have resisted have been dismissed again.

– *Finca El Cóbano*. With regard to the Government's comments, the UNSITRAGUA indicates that, at no point in the resolution ordering the modification of the name of the trade union, is the inspection carried out by the General Labour Inspectorate cited as proof or as a supporting argument. The UNSITRAGUA therefore considers the Government's allegations to be untrue. Moreover, although an inspection may have been conducted, the names of the affected workers were not given, constituting an absolute violation of their fundamental right to a defence and further highlighting the bias of the Ministry of Labour and Social Security in this case.

– *Bocadelli de Guatemala S.A.* This enterprise was established with capital from the Salvadorian multinational Productos Alimenticios Bocadelli S.A. de C.V., which issues labour policy directions for Guatemala. In this case, the enterprise has illegally maintained the cessation of activities for a total of nine months to date, without any ruling from the courts to resolve the workers' situation. In order to avoid being affected, the Salvadorian multinational has continued to operate in Guatemala via the enterprise KARANTE S.A.. Given the documentary evidence of the existence of directions issued by the Salvadorian multinational, the workers urged the court to call Productos Alimenticios Bocadelli S.A. de C.V. as a co-defendant. The case of the illegal cessation of activities, identified under the case No. 33-2005 and being heard by the Second Labour and Social Security Court of the First Economic Zone, is currently at a standstill and it is not known whether the delay is the result of negligence on the part of the Supreme Court of Justice of Guatemala, the Ministry of Foreign Relations of Guatemala, the judiciary in El Salvador or the Ministry of Foreign Relations of that country. During this time, the Salvadorian multinational has sought rapprochement with the trade union but to no avail, owing to the multinational's decision not only not to reinstate workers but also to grant them only

about 30 per cent of their total severance payments (currently the subject of a claim in the courts of the Republic of Guatemala). Similarly, the multinational has sought to negotiate individually with certain workers with the aim of persuading them to sign a document changing arrangements for worker representation. In this regard, the UNSITRAGUA requests the Committee to urge the Government to hasten the progress of the proceedings and ensure that decisions are impartial and that the rulings issued are acted upon.

C. The Government's reply

841. In its communication of 6 April 2006, the Government provides information with respect to the allegations concerning Bocadelli S.A., to the effect that on 8 August 2005, the Ministry of Labour received documents reporting on the difficulties at Bocadelli Guatemala. This document was sent to the Labour Dispute Resolution Unit of the Ministry of Labour and Social Security (RAC). The date was set for 10 August and both parties were invited to a meeting early on 12 August. On 11 August, the head of the RAC ordered an inspector to accompany two UNSITRAGUA members to the enterprise to assess the workers' employment situation. At one of the meetings, the employer and worker groups had set out proposals and had accordingly been invited to a subsequent meeting. The employer group changed its position, making different proposals and indicating that talks should not be concluded. The trade union members broke off dialogue on hearing the new proposal from the employer. Attempts were made to agree on a new meeting but this was not possible because of the parties' failure to attend, and the case was consequently withdrawn owing to lack of interest. The Government states that the Ministry of Labour and Social Security, through the inspection section of the General Labour Inspectorate, the RAC and the Office of the Second Vice-Minister, have made every possible effort within the law to resolve the difficulties that have arisen at Bocadelli.

842. As regards the allegations concerning Finca El Cóbano, the Government reports that the General Labour Directorate was requested to report on the administrative procedures initiated to authorize the registration of the Trade Union of Workers of *Finca El Cóbano, Ingenio Magdalena, Sociedad Anónima*, the name of which was partially modified for reasons considered at the appropriate time and which are described in official notice No. 48-2005, dated 6 July of the current year (the official document has been sent in incomplete form). The Government requests that this case be closed, since the Ministry of Labour and Social Security complied fully with the law and has made serious efforts to safeguard the free exercise of trade union rights.

843. In its communication of 10 May 2006, the Government declares, with regard to the allegation concerning denial of freedom of movement to the coordinator of the UNSITRAGUA committee and legal office, that the Ministry of Labour requested the General Department for Migration to supply information on the trade union leader Jorge Estrada y Estrada's inability to leave the country. The Department reported that, on 16 March 2005, the union leader in question had been prevented from travelling to Nicaragua because of a restriction order banning him from leaving the country, issued by the Second Lower Criminal Court and in force on the date of the trip. Mr. Estrada y Estrada had visited the "restriction orders unit" on 16 March 2005 and requested information on the restriction order to which he was subject. On that occasion, it was found that he had indeed been subject to a restriction since 2 February 1999, although a further order dated 31 March 2000 was later found, releasing Mr. Estrada from the abovementioned restriction order. An IT problem had prevented registration of the later order until 17 March 2005.

844. In its communication of 7 February 2006, the Government requests the complainant to supply the names of the trade union leaders for whom arrest warrants are alleged to have been issued with a view to undertaking a more effective investigation.

D. The Committee's conclusions

845. *The Committee observes that the matters still pending in this case concern allegations relating to the violent repression by the forces of law and order of trade union demonstrations in March 2005 against the signing of a free trade agreement, and to various other acts of anti-union discrimination.*

846. *The Committee takes note of the new allegations of UNSITRAGUA, dated 25 May 2006, and observes that the Government's response does not refer to these allegations since its response predates them. Nonetheless, the Committee underlines that the new allegations concern issues already raised since the complaint was submitted (March-August 2005) and the Committee had requested the Government to send its observations in the last examination of this case.*

Trade union rights and public freedoms

847. *As regards the events that took place during the demonstrations on 14 March 2005 (according to the complainant, the national civil police intervened during the event and started to fire tear gas at the demonstrators while, according to the Government, a disturbance of public order occurred during the demonstration and private property was damaged), the Committee had requested the Government to take steps to carry out an independent, in-depth investigation and to keep it informed in this respect. The Committee notes the complainant's statement to the effect that it does not share the Government's view of the events that took place and that the investigation requested by the Committee has not been conducted. Under these circumstances, the Committee regrets that the independent investigation it requested has not been carried out and urges the Government to take immediate steps to initiate one. The Committee requests the Government to keep it informed of the outcome of this investigation.*

848. *As regards the allegations that arrest warrants were issued against the leaders who organized the protest of 14 March 2005, the Committee had requested the Government to provide information as to whether the judicial authority had indeed issued arrest warrants and, if so, to provide information on the status of the trials of the persons involved. In this regard, the Committee observes that the Government has requested the complainant to communicate the names of the trade union leaders in question in order to enable the appropriate independent investigation to be carried out. The Committee requests the complainant to communicate the information requested by the Government.*

849. *As regards the alleged repression on 15 March 2005 by members of the national army and of the national civil police of demonstrators from trade unions and other organizations, on the SELEGUA V Bridge at kilometre 287.5 of the Interamerican highway in the village of Los Naranjales, municipality of Colotenango, Department of Huhuetenango, resulting in the death of Juan Esteban López, leader of the Committee of Peasant Unity and member of the National Coordination of Peasant Organizations, and of the workers José Sánchez Gómez, Pedro Pablo Domingo García and Miguel Angel Velásquez Díaz, and in serious injuries to a further 11 workers (mentioned by name by the complainant), the Committee in its previous examination of the case deplored the death of the leader and other workers and the injuries suffered by a number of demonstrators, and urged the Government to take the necessary measures to conduct promptly an independent inquiry into the alleged facts in order to ascertain where responsibility lies and, where appropriate, to punish those*

responsible, and to keep it informed of the outcome of that inquiry. The Committee notes the report from the complainant that the investigation has not been carried out. The Committee deeply regrets that, with alleged events as serious as these, the investigation it requested has still not been launched, and urges the Government to take steps to initiate such an investigation immediately.

850. *As regards the alleged disrespectful statements by the President of the Republic in the media about trade union leaders and violence against participants in the demonstrations, the Committee, observing the contradictory statements made by the complainant and the Government, requested an independent investigation into these allegations to be carried out and to be kept informed in this respect. The Committee notes the report from the complainant that the investigation has not been carried out. The Committee once again requests the Government to take steps to initiate the investigation it requested and to keep it informed of the outcome.*

851. *As regards the allegation that the coordinator of the UNSITRAGUA Commission and Legal Office was prevented from leaving the country on 16 March 2005, the Committee had requested the Government to carry out an investigation and to send its observations on this allegation. The Committee notes the Government's report that, according to the General Department for Migration: (1) on 16 March 2005, Mr. Jorge Estrada y Estrada was banned from leaving the country by order of the criminal judicial authority and that, although the order was lifted in March 2000, this was not logged in the computer records; and (2) on 17 March 2005, the order lifting the ban on Mr. Estrada y Estrada leaving the country was entered into the computer records. The Committee regrets this incident which prevented the trade unionist for technical faults from leaving the country.*

Acts of anti-union discrimination

Finca El Cóbano Ingenio Magdalena S.A.

852. *As regards the allegations concerning the appeal lodged by the enterprise against the resolution recognizing legal personality and approving the by-laws of the Trade Union of Workers of the Finca El Cóbano Ingenio Magdalena S.A. (SITRAFECIMASA), and the resolution of the Ministry of Labour which, disregarding the rules of due process, modified the name of the trade union by deleting the reference to Ingenio Magdalena S.A., the Committee noted the Government's statement that the enterprise Ingenio Magdalena had argued in an appeal that the workers who had established the trade union in question were not employees of the enterprise and that this was confirmed by means of an inspection, for which reason the change in the trade union name had been ordered. In this regard, the Committee notes that the complainant alleges that, in the resolution ordering the change in the trade union name, no reference is made to an inspection by the General Inspectorate of Labour and that, although such an inspection may have been carried out, there was no reference to the affected workers, constituting an infringement of the right to a defence. The Committee notes the Government's information to the effect that the trade union name was partially modified for the reasons set out in official notice No. 48-2005 (sent in an incomplete form). Under these circumstances, the Committee requests the Government to send it a copy of Order No. 48-2005, together with a copy of the resolution referred to by the complainant and the relevant labour inspection report, indicating why the workers who formed the trade union were not interviewed during the inspection.*

853. *As regards the allegations concerning the dismissal of 23 workers who attempted to establish a trade union at the Finca El Cóbano (it is alleged that court reinstatement orders have been disregarded by the enterprise), the Committee regrets that the Government has not sent its observations on this matter. The Committee requests the Government to carry out an investigation without delay and, if judicial orders for the*

reinstatement of dismissed trade union members are found to exist, to take steps to ensure immediate compliance with these orders and to keep it informed in this regard.

Municipality of San Juan Chamelco, Department of Alta Verapaz

854. *As regards the allegations concerning the dismissal of five workers belonging to the Trade Union of Workers of the municipality of San Juan Chamelco, Department of Alta Verapaz (it is also alleged that the judicial authorities ordered the reinstatement of the dismissed workers, but that the municipality refused to comply with the order), the Committee regrets that the Government has not sent its observations on this matter. The Committee urges the Government to carry out an investigation without further delay and, if judicial orders for the reinstatement of dismissed trade union members are found to exist, to take steps to ensure immediate compliance with those orders and to keep it informed in this regard.*

San Vicente Tuberculosis Sanatorium

855. *As regards the alleged dismissal of a worker belonging to the Trade Union of Workers of the San Vicente Tuberculosis Sanatorium, in violation of the provisions of the collective agreement on working conditions, the Committee regrets that the Government has not sent its observations on this matter. At the same time, the Committee notes that, according to the complainant, the worker Héctor Salvador Mendizábal Vega remains dismissed and that the progress of the legal proceedings to secure his reinstatement has been slowed because of the delaying tactics employed by the Office of the Attorney-General of the Nation. In this regard, the Committee expects that the legal proceedings currently under way will soon be concluded and urges the Government to keep it informed of the outcome.*

Municipality of El Tumbador, San Marcos

856. *As regards the alleged dismissal of two workers belonging to the Trade Union of Workers of the municipality of El Tumbador, San Marcos, in the context of a collective dispute during the negotiation of a collective agreement on working conditions, the Committee regrets that the Government has not supplied its observations on this matter. At the same time, the Committee notes that, according to the complainant, the municipality has chosen to keep workers on in unpaid work in order to force them to back down and those workers who have resisted have been dismissed again. The Committee requests the Government to take steps to conduct an investigation into the alleged events and to keep it informed in this regard.*

The enterprise Bocadelli S.A.

857. *As regards the alleged lockout at Bocadelli S.A. following the submission of a draft collective agreement by the enterprise's trade union, the Committee notes the efforts made by the authorities to resolve the dispute (Labour Inspectorate, Alternative Dispute Resolution Unit and the Office of the Second Vice-Minister) and the fact that an inspector was ordered to accompany the UNSITRAGUA representatives to the enterprise to assess the employment situation of the workers; according to the Government, after various meetings at which the parties made proposals and failed to reach an agreement, or which they did not attend, it was decided to withdraw the case. At the same time, the Committee notes that according to the complainant: (1) the illegal cessation of activities at the enterprise continues, without any ruling from the courts to resolve the workers' situation (the complainants state that the legal proceedings are at a standstill); (2) the enterprise has sought rapprochement with the trade union but to no avail, owing to the refusal to reinstate workers and the proposal to grant them only about 30 per cent of their total severance pay; (3) the enterprise has sought to negotiate individually with workers. Under these circumstances, the Committee requests the Government to continue taking steps to bring about an agreement between the parties, expects that the abovementioned legal*

proceedings currently under way will soon be concluded, and requests to be kept informed in this regard.

The Committee's recommendations

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

(a) As regards the events that took place during the demonstrations on 14 March 2005 (according to the complainant, the national civil police intervened during the event and started to fire tear gas at the demonstrators while, according to the Government, a disturbance of public order occurred during the demonstration and private property was damaged), the Committee regrets that the independent investigation it requested has not been carried out and urges the Government to take immediate steps to initiate such an investigation. The Committee requests the Government to keep it informed of the outcome of this investigation.

(b) As regards the alleged arrest warrants against the leaders who organized the protest of 14 March 2005, the Committee requests the complainant to communicate the names of the trade union leaders in question to enable the Government to carry out the appropriate investigation.

(c) As regards the alleged repression on 15 March 2005 by members of the national army and of the national civil police of demonstrators from trade unions and other organizations, resulting in the death of Juan Esteban López, leader of the Committee of Peasant Unity and member of the National Coordination of Peasant Organizations, and of the workers José Sánchez Gómez, Pedro Pablo Domingo García and Miguel Angel Velásquez Díaz, and in serious injuries to a further 11 workers (named by the complainant), the Committee deeply regrets that, with alleged events as serious as these, the investigation it requested has still not been launched, and urges the Government to take steps to initiate such an investigation immediately.

(d) As regards the alleged disrespectful statements by the President of the Republic in the media about trade union leaders and violence against participants in the demonstrations, the Committee once again requests the Government to take steps to initiate the investigation it requested and to keep it informed of the outcome.

(e) As regards the allegations with regard to the appeal lodged by the enterprise to revoke the resolution recognizing legal personality and approving the by-laws of the Trade Union of Workers of the Finca El Cóbano Ingenio Magdalena S.A. (SITRAFECIMASA) and the resolution of the Ministry of Labour which, disregarding the rules of due process, modified the name of the trade union by deleting the reference to Ingenio Magdalena S.A., the Committee requests the Government to send it a copy of Order No. 48-2005, together with a copy of the resolution referred to by the complainant and the relevant labour inspection report, indicating why the workers who formed the trade union were not interviewed during the inspection.

(f) As regards the allegations concerning the dismissal of 23 workers who attempted to establish a trade union at the Finca El Cóbano (it is alleged that court reinstatement orders exist and have been ignored by the enterprise), the Committee regrets that the Government has not sent its observations on this matter and requests the Government to carry out an investigation without delay and, if judicial orders for the reinstatement of dismissed trade union members are found to exist, to take steps to ensure immediate compliance with these orders. The Committee requests the Government to keep it informed in this regard.

(g) As regards the allegations concerning the dismissal of five workers belonging to the Trade Union of Workers of the municipality of San Juan Chamelco, department of Alta Verapaz (it is also alleged that the judicial authorities ordered the reinstatement of the dismissed workers, but that the municipality refused to comply with the order), the Committee regrets that the Government has not sent its observations on this matter and urges the Government to carry out without further delay an investigation and, if orders for the reinstatement of dismissed trade union members are found to exist, to take steps to ensure immediate compliance with these orders and to keep it informed in this regard.

(h) As regards the alleged dismissal of a worker belonging to the Trade Union of Workers of the San Vicente Tuberculosis Sanatorium, in violation of the provisions of the collective agreement on working conditions, the Committee regrets that the Government has not sent its observations on this matter, expects that the judicial proceedings currently under way will soon be concluded, and urges the Government to keep it informed of the outcome.

(i) As regards the alleged dismissal of two workers belonging to the Trade Union of Workers of the municipality of El Tumbador, San Marcos, in the context of a collective dispute during the negotiation of a collective agreement on working conditions, the Committee regrets that the Government has not supplied its observations on this matter and requests it to take steps to conduct an investigation into the alleged events and to keep it informed in this regard.

(j) As regards the alleged lockout at Bocadelli S.A. following the submission of a draft collective agreement by the enterprise's trade union, the Committee requests the Government to continue taking steps to bring about an agreement between the parties, expects that the abovementioned judicial proceedings currently under way will soon be concluded, and requests to be kept informed in this regard.

CASE NO. 2445

INTERIM REPORT

Complaint against the Government of Guatemala presented by the World Confederation of Labour (WCL)

Allegations: Murders, threats and acts of violence against trade unionists and their families; anti-union dismissals and enterprises' refusal to comply with judicial orders for reinstatement; ineffective functioning of the labour inspection services and judicial authorities

859. The complaint is contained in a communication from the World Confederation of Labour (WCL) dated 31 August 2005. The Government sent its observations in communications dated 7 September 2005, 1 February and 28 June 2006.

860. 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 complainant's allegations

861. In its communication dated 31 August 2005, the World Confederation of Labour (WCL) alleges that a number of Guatemalan trade union officials have been murdered, have had attempts on their lives or been subjected to pressures of all kinds in the exercise of their trade union activities.

862. The complainant organization states that, on 28 November 2004, Roland Raquec, secretary-general of the Rental Carriers Trade Union of Guatemala and secretary-general of the Trade Union Federation of Informal Economy Independent Workers, was murdered. He was shot upon arriving at his home, where members of the municipal fire brigade found him still alive. They transferred him to the San Juan de Dios General Hospital where he died from multiple and serious bullet wounds. Roland Raquec's house had already been broken into in March 2004 and he had been threatened with death if he informed the authorities. He was later attacked again in June, after which he lodged a verbal complaint to the former Minster of the Interior and requested perimeter security measures and ground surveillance around his home. After various death threats, he was warned that his daughters would be raped if he continued to defend the cause of workers; but those responsible for these threats were never identified. The National Civil Police failed to fulfil their responsibility to provide protection and therefore acted with negligence. They put all these actions down to common criminals, without taking into account the serious threats and violent crimes committed against trade union officials in Guatemala.

863. The WCL added that, on the day of the murder, the trade union official's wife confronted the criminals to try and save her husband's life, but her attempt failed. She was able to identify her husband's murderers, which resulted in her receiving death threats (against herself and her children). The murderers remain unpunished. It is suspected that they have a link with the police who are protecting them against any legal sanctions. The General Confederation of Workers of Guatemala (CGTG) has notified the Guatemalan authorities

of this matter. It has specifically lodged a complaint requesting that this act should not go unpunished with: the President of the Republic; the Minister of the Interior; the Public Prosecutor's Office; the Prosecutor General of Human Rights; and the Ministry of Labour and Social Security. The WCL and many organizations affiliated to the confederation have also approached the Government of Guatemala. They have received no reply. On the contrary, the act remains unpunished and there is much fear for the life of Roland. Raquec's relatives. The only solidarity shown towards Roland Raquec's widow has been that provided by the CGTG. Both she and her family have received new threats from those who murdered this trade union official. Regrettably, she has not received the slightest protection for herself or her children.

864. The WCL also alleges that Luis Quinteros Chinchilla, member of the Trade Union Association of Municipal Market Vendors of Chiquimulilla in the Santa Rosa Department, was murdered by José Barú Valle, Mayor of the Municipality of Chiquimulilla, on 28 February 2005. There is an arrest warrant against this municipal official, but the authorities have not carried it out, because he has immunity. It is presumed that the authorities are afraid of intervening in the case of a person with such authority in the region. The proceedings are at present under discussion at the Cuilapa Court, in the Santa Rosa Department.

865. Furthermore, in January 2003, an attempt was made on the life of the 59-year old trade unionist, Marcos Alvarez Tzoc. At that time, Marcos Alvarez Tzoc was a member of the advisory committee of the Trade Union of Workers of the El Arco Estate. He is now an executive member. The CGTG later blamed Julio Enrique de Jesús Salazar Pivaral, owner of the El Arco Estate, Chicacao, Suchitepéquez, for hassling workers who have had problems after joining a trade union and claiming their rights. The incident occurred because Marcos Alvarez Tzoc, overcome by hunger, tried to sell a bunch of bananas to someone who happened to be passing by. Salazar Pivaral then appeared and, after insulting and hitting Marcos Alvarez Tzoc, took out his revolver and fired two shots at his head. Before taking the wounded trade unionist to the Mazatenango National Hospital to receive medical care, the Estate owner kept him locked up in an office for seven hours, along with the truck driver purchasing the bananas. This case was brought to the attention of the National Civil Police of Mazatenango and the Criminal Court of the First Instance of this municipality. On 14 October 2004, the Sentencing Court of Suchitepéquez, handed down a judgement acquitting Salazar Pivaral of the charge of causing slight injuries and unlawful detention, but convicted him to ten years' prison without parole for attempted homicide. Salazar Pivaral subsequently lodged various appeals that were declared irreceivable. On 4 March 2005, he lodged an appeal of *amparo* (enforcement of constitutional rights) with the Supreme Court of Justice which, on 14 March 2005, granted provisional *amparo* in a resolution. This resolution was contested by the Public Prosecutor's Office and, to date, this request is still pending.

866. Similarly, the complainant organization stated that five attempts have been made on the life of Imelda López de Sandoval, secretary-general of the Civil Aeronautical Trade Union and member of the executive committee of the CGTG. These murder attempts remain unpunished, despite the fact they were reported to the authorities. The two most serious attempts were as follows: (1) on 1 December 2004, the trade union official was in a moving vehicle when the front left wheel came off after the nuts on the wheel had loosened; the car did not overturn but it is assumed that the intention was for the trade union official to be involved in an accident and injured; and (2) on 25 January 2005, the steering wheel of the same vehicle was damaged and the car overturned, with Imelda López de Sandoval at the wheel. The car was completely destroyed and the trade unionist was hurt. After a nervous breakdown, she was obliged to turn to social assistance and is continuing her treatment. These acts were brought to the attention of the authorities (including the Public Prosecutor's Office).

867. On 19 March 2005, a number of trade unionists were assaulted by the municipal tourist police of Antigua Guatemala: Higinia Concepción López, 19 years of age; Moisés Gonzáles Buc, 20 years of age; Sonia Sofía Buc Sajvin, 12 years of age; Gladis Judith Cúmez Tash, 10 years of age; and Albina Cúmez Tash, 25 years of age. Those assaulted belong to the Trade Union Association of Itinerant Vendors of Antigua Guatemala. Approximately 20 members of the municipal police violently beat up this group of workers, amongst whom several were minors. In addition to the assaults, they confiscated the vendor's goods.

868. Another serious case occurred on 21 March 2005 at 9 a.m. The secretary-general of the trade union was verbally threatened with death by two policemen who had also assaulted other members of the trade union.. Various authorities were approached (Public Prosecutor's Office, Prosecutor-General of Human Rights, director of the tourist police, the mayor and the municipal judge) but these steps led nowhere.

869. The WCL also alleges selective surveillance and the theft of laptop equipment containing files on national, Central American, Latin American and world trade union matters, belonging to the secretary-general of the CGTG and CCT, José E. Pinzón. The theft occurred on 17 April 2005. A report was made to the National Civil Police and the Prosecutor-General of Human Rights, which described the theft as political; indeed, although the door of the vehicle had forcefully been broken into, only the laptop had been stolen and not a briefcase and other articles that were in the car. Furthermore, it was part of a series of computer thefts that had occurred in peasant farmers' trade union and people's organizations. The offence was categorized as a common crime, a view that was not shared by the trade union movement.

870. Finally, the complainant organization sent a document concerning infringements of labour and trade union laws by the authorities and employers, giving details on the defects in the institutional system and the various state authorities; it alleged corruption, cronyism, partisanship, taking advantage of insider knowledge, all of which undermine the professional integrity of the judicial authority and demonstrate shortcomings in the labour inspection services.

871. The complainant organization gave details on the following cases.

Mi Tierra Estate

872. Judgement No. 166-2001, Fifth Labour Court of the Suchitepéquez Department. Those concerned: seven indigenous women workers at the Mi Tierra Estate, members of the Trade Union Workers of the Mi Tierra Estate: Elicia Ramírez Quiacain, Argelia López Pretzentín, María Ramírez Quiacain, Victoria Quiacain Quiejú, Cristina Sarat Reinoso, Herlinda Chovojay Simón and Catarina Eulalia Hernández Tzoc; they are claiming labour benefits because the judge declared their reinstatement irreceivable. Although the application for the payment of benefits has been granted by a court order, it cannot, in practice, be implemented.. The claim was made against the entity Mi Tierra S.A.; the company immediately changed its name to Desarrollo La Villa, S.A. and the ruling is therefore no longer applicable.

Municipality of Chiquimulilla

873. Judgement handed down by the Labour Court of Cuilapa, Santa Rosa Department, against the Municipality of Chiquimulilla, Santa Rosa Department. Those concerned: Francisco César Gutiérrez Barrientos, Narciso Romero, Emilio Morales Sánchez, Genaro Arrecis Herrera, Luis Felipe Hernández and Pablo Juventino Revolorio Estrada, dismissed on

15 March 2004; the six were members of the Trade Union of Workers of the Municipality of Chiquimulilla. They are requesting benefits after their reinstatement was judicially turned down, on the basis of the San Salvador protocol which establishes the right of reinstatement even if the employer has not been ordered by a court to comply with this.

Los Angeles Estate

874. Incident of dismissal No. 92-2004, Labour Court of the Suchitepéquez Department. This was instigated against eight members of the Trade Union of Workers of the Los Angeles and La Argentina Estates, in the Municipality of Chicacao. This trade union is made up of workers from both Estates; 29 workers in La Argentina Estate have already been finally dismissed after their order of reinstatement was overturned by the "honourable" constitutional court, following an ordeal of five years of judicial wrangles. If the judge of Suchitepéquez authorizes the dismissal of the eight workers in the Los Angeles Estate, the trade union loses its legal membership and will automatically cease to exist.

Municipality of Río Bravo

875. Request for reinstatement as part of the proceedings of collective dispute No. 90-2003, Third Court of the First Instance of Labour, Social Welfare and the Family of Suchitepéquez. The application was made against the Municipality of Río Bravo, Suchitepéquez Department. Those concerned: five workers dismissed for having tried to set up a trade union of workers in the said municipality; the Ministry of Labour and Social Welfare refused to register the trade union on the grounds that, among its members, a number of workers carried out surveillance or municipal police services. The Trade Union Act of State Workers (Decree No. 71-86) prohibits any workers undertaking such services from belonging to a trade union.

Municipality of Samayac

876. Request for reinstatement within the framework of collective dispute No. 46-2003, Sixth Court of the First Instance of Labour, Social Welfare and the Family of Suchitepéquez. The application was made against the Municipality of Samayac, Suchitepéquez Department. Those concerned: José Rumualdo Tax Vicente, Rosario Ajmac Pop and Aura Leticia Ramírez Gómez, dismissed for having submitted a list of claims to their employers requesting negotiations on these claims and a collective agreement on working conditions.

El Tesoro Estate

877. Application for reinstatement brought in April 1997 against Agropecuaria El Tesoro, S.A.; Agropecuaria San Román, S.A.; and Agropecuaria San Gerardo, S.A.; the owners of the El Tesoro Estate in the Municipality of Santa Barbara, Suchitepéquez Department, by the workers: Julio César Chachal Matzar; Salvador Chachal Culan; Rigoberto Batan Rojop; Jacinto Cumatzil Navichoc; Nicolás Batan Soc and Ernesto Batan Rojop. On 18 March 1997, the workers gave notice of a collective dispute with the Sixth Court of Labour and Social Security with a view to negotiating working conditions by means of a collective agreement. The judge ordered that any termination of a labour contract (dismissal) should be authorized by the court; however, the workers were dismissed. The case was transferred to the Seventh Court of Labour and Social Security on 18 April 1997, before which the dismissed workers requested their reinstatement; the judge ordered their reinstatement and payment of wages that had been withheld; on appeal, the Fourth Chamber of the Appeals Court of Suchitepéquez upheld the order of reinstatement in a ruling dated 26 May 1998. The enterprise brought an action of *amparo* (enforcement of constitutional rights) before

the Supreme Court of Justice against the Fourth Chamber, and in a ruling dated 26 May 1998, the Supreme Court declared the petition for *amparo* inadmissible; the enterprises appealed to the constitutional court, which declared the appeal inadmissible in a ruling dated 8 November 1999 and upheld the ruling against which the appeal had been made. However, the enterprises submitted an application against the collective proceedings, as a point of law, and the judge of the First Instance of Labour of Suchitepéquez upheld the point of law; the workers then appealed to the Fourth Chamber of the Appeals Court, which upheld the resolution they challenged; they then brought an action of *amparo* (enforcement of constitutional rights), before the Supreme Court of Justice, which, once again, upheld the challenged ruling; they subsequently appealed to the constitutional court, which finally upheld the challenged ruling, which left the workers without the exercise of the collective right to work and without the possibility of being reinstated and of being able to negotiate a collective agreement on working conditions. The controversial issue at stake is why the courts changed their opinion in a case which first came out fully on the side of the workers and then fully against the legal rights of the workers. The workers, taking the first proceedings as a basis, are claiming that the rulings handed down during the initial proceedings should be enforced by means of a special executive judgement; the Labour Court of the First Instance of Suchitepéquez has stated that this is not the legal way to proceed because it does not have jurisdiction to deal with this case. Hence the employers enjoy impunity in labour matters.

Municipality of Puerto Barrios

878. Application for reinstatement, within the framework of the collective dispute No. 15-2003, submitted to Clerk of the Court No. 2 of the Labour Court of Izabal Department, against the Municipality of Puerto Barrios, on the grounds that it dismissed 22 trade unionists listed by name. The court ordered the reinstatement under resolutions dated 24 and 27 May 2004, but, to date, none of the workers have been reinstated or received their wages due.

El Carmen Estate

879. Application for reinstatement No. 8-2003, submitted to Clerk of the Court No. IV, Press Server No. 1, of the Labour Court of the Municipality of Coatepeque in Quetzaltenango Department. Those concerned: 20 members (listed by name) of the Trade Union of Agricultural Workers of the El Carmen Estate, in the Municipality of Colomba, Quetzaltenango Department. Since it was first set up, the trade union has never been able to negotiate a collective agreement on working conditions because of a series of obstacles created by the employers; given that a new labour court has been established in the Municipality of Quetzaltenango, upon an order from the Supreme Court of Justice, the case was submitted to this new court. However, the enterprise Petra S.A. refuses to give a new address where it might receive notifications, precisely because it wants to avoid being notified, and the judicial resolutions have no legal effect in its case.

Municipality of Livingston

880. Application for reinstatement, within the framework of the collective dispute No. 77-99, submitted to the Clerk of the Court No 2 at the Labour Court of Izabal Department, made against the Municipality of Livingston, Izabal Department. Those concerned: seven members of the Trade Union of Workers of the Municipality of Livingston. Dismissed on 17 January 2000, the trade union members were reinstated, almost four years later, on 31 December 2003; but they have still not been paid their wages and other benefits that they failed to receive during their period of dismissal. They were without work for a total of 1,442 days, while the law states that they should be reinstated within 24 hours. To date, they are owed: wages withheld, end of year bonuses and the annual allowance for workers

in the public and private sectors. Until now, the judge of Puerto Barrios has not pronounced on the application to approve the settlement of wages and other benefits that the workers failed to receive during their period of dismissal.

Municipality of San Miguel Pochuta

881. Department of Chimaltenango, Labour Court of the Escuintla Department. Those concerned: 21 workers (listed by name). The workers demanded their reinstatement after having been dismissed for submitting a list of claims to the municipality through a court, with a view to negotiating a collective agreement on working conditions; in addition to submitting a list of claims, they also established a trade union and were immediately dismissed; they have not yet been reinstated, despite the law that stipulates they should be reinstated within 24 hours.

El Arco Estate

882. Application for reinstatement submitted by 20 trade unionists (listed by name) to the Labour Court of Suchitepéquez, for dismissals in 1994 or in 2001.

San Lázaro Estate

883. Judgement No. 38-2000, Labour Court of the Sololá Department. Those concerned: 79 workers listed by name. This upholds the ruling that readjustments to wages or wages withheld should be paid; however, this has not been implemented because the entity San Lázaro S.A., owner of the San Lázaro u Olas de Mocá, refuses to receive notifications or challenges those that do get through; in other words, the administration of justice is neither fair, rapid nor enforced..

Clermont Estate

884. Application for reinstatement before the Labour Court of the Municipality of Malacatán, San Marcos Department. The defendant in this case is. Silvia Eugenia Widmann Lagarde, close relative of President Berger, owner of the Clermont, Ucubuya and Valdemar Estates. Those concerned are 50 workers (listed by name), dismissed for having created a trade union and submitting a list of claims to their boss with a view to negotiating a collective agreement on working conditions. They were dismissed on 17 November 2001 and 11 September 2001; the judge of the Labour Court of Quetzaltenango ordered their reinstatement which, to date, has been considerably delayed because there have been a series of arguments challenging the claimants or the summons notices; the matter of enforcement of the reinstatement order is now before the Labour Court of the Municipality of Malacatán in the San Marcos Department. The wages withheld, calculated from 17 November 2001 and 31 May 2003, amount to 991,308.45 quetzales.

Workers of the Municipality of Cuyotenango, Suchitepéquez

885. Judgement No. 122-2002, Labour Court of Suchitepéquez. The 26 persons concerned, members of the Trade Union of Workers of the Municipality of Cuyotenango, Suchitepéquez Department, have suffered discriminatory treatment as follows: the trade union members do not benefit from the monthly incentive of 250 quetzales, as laid down in Decree No. 37-2001 of the Congress of the Republic; despite the ruling pronounced in favour of these workers, the mayor refuses to comply with it on the grounds that the municipal assets cannot be impounded and that the ruling cannot be enforced, unless the

goods of the municipality are impounded. Furthermore, the members of the executive committee of the trade union do not enjoy trade union prerogatives, as laid down in section 61(n)(6) of the Labour Code; hence they may not carry out their trade union functions.

B. The Government's reply

886. In its communication dated 7 September 2005, the Government states, in connection with the allegations of selective surveillance and the theft of laptop equipment containing files on national, Central American, Latin American and world trade union matters, belonging to José E. Pinzön, (secretary-general of the Confederation of Workers of Guatemala (CGTC) and of the CCT), that the account of facts given by the WCL in its complaint does not contain enough precise information or sufficient evidence to carry out an inquiry into the complaint and subsequently, to adduce responsibilities. The Special Public Prosecutor for Offences Against Journalists and Trade Unionists, upon request, provided information to the effect that this office is not dealing with any case concerning surveillance and the theft of José Pinzon's computer equipment as no complaint had been lodged on the matter, despite the fact that all the procedural channels are still open in accordance with the legislation.

887. In its communication of 1 February 2006, the Government states, in reference to Case No. 38-2000 concerning the San Lázaro Estate brought before the Labour Court of the Sololá Department by Luis Felipe Cetino Chic and colleagues against the entity San Lázaro S.A., that all the procedural stages were conducted in accordance with the law, as a ruling was handed down on 25 May 2001 in favour of the complainants; the plaintiff was informed of the judicial decision in October 2002 but, as the enterprise did not settle the amount indicated at the time of the application (251,608 quetzales), the case was referred to the Public Prosecutor's Office in October 2004, with a view to instigating criminal proceedings for disobedience; the defendant was also automatically given a fine of 5,000 quetzales for failure to comply with the ruling. It is now for the complainants to instigate executive proceedings for the enforcement of the ruling.

888. The Government states that the services of the labour inspectorate uphold the values contained in the law and ratified international labour Conventions and that its approach in various labour disputes, occurring both in the private and public sectors, is impartial. The Government encloses information on the Ministry's intervention in hundreds of cases, through the labour inspectorate, in various disputes that arose in a number of different state departments and in the private sector in 2005.

889. In its communication of 28 June 2006, the Government states that the Ministry of Labour requested the cooperation of the Ministry of Interior's Special Public Prosecutor of Offences Against Journalists and Trade Unionists of the Ministry of the Interior; in connection with the attempts against the life of Imelda López de Sandoval, the Special Public Prosecutor's Office informed the Government that once it had received the respective complaint it had carried out the corresponding inquiries; for instance, it had called in an expert from the Toyota company in Guatemala to make a thorough investigation of the vehicle driven by the victim to establish the alleged facts and to be able to identify the guilty party. As regards the repression, persecution and harassment of officials and members of the trade union of the informal sector in the City of Antigua Guatemala by the municipal tourist police, the Public Prosecutor's Office is only dealing with the complaint submitted by Miguel Angel Buc Cotzal in relation to these events; the Office carried out inquiries to ascertain the facts as presented by the complainant but it came up with no serious grounds to establish that a crime had been committed, given that the municipal tourist police had acted in accordance with an ordinance of the municipality in question This ordinance bans the sale of merchandise on pavements and provides for its confiscation and penalties if this ban is violated. Concerning the assassination of Luis

Quinteros Chinchilla, the Public Prosecutor's Office points out that no complaint had been lodged on this matter and therefore it has not carried out inquiries and is unable to give any information in this respect.

890. As regards the case of the El Carmen Estate reinstatement application No. 8-2003, First Labour Court with its headquarters in the Municipality of Coatepeque, in Quetzaltenango Department, the Government points out that the judicial authority handed down a decision in favour of the complainants; however, it had been unable to notify the defendant (El Carmen Estate) of the decision because the plaintiffs (those concerned), had not given an address where the defendant could be reached.

891. With respect to the case concerning the Municipality of Livingston (application for reinstatement submitted to the Second Labour Court of the Izabel Department), the Government states that on 16 December 2003, the Court ordered the Municipality of Livingston to reinstate the complainants; on 30 December 2003, the complainants were reinstated in their original jobs. As regards the request for approval of the settlement of wages and other benefits, the Court issued the respective order on 3 October 2003, which was duly notified to the parties in question.

C. The Committee's conclusions

892. *The Committee notes that, in this case, the complainant organization alleges the murder of two trade union officials, death threats hanging over the wife and children of one of these officials, the attempted murder of a trade union official and a trade union member, assaults on five members of an itinerant vendors' trade union with confiscation of their goods, a death threat against a trade union official of this trade union, the theft of a laptop with trade union files belonging to a CGTG official, as well as shortcomings in the institutional system of protection of trade union and labour rights, evidenced by a number of cases in which judicial orders of reinstatement or others failed to be implemented, that would have benefited very many trade unionists.*

893. *Concerning the allegations referring to the murder of the trade union official Rolando Raquec, the Committee notes that, according to the complainant organization, this trade union official had requested the protection of the authorities after receiving death threats and threats against members of his family but that the police had allegedly been negligent. The Committee notes that, according to the allegations, this trade union official's wife had been able to identify the murderers, which prompted death threats against herself and her children, without the authorities providing the least protection.*

894. *The Committee deplores the murder of the trade union official Rolando Raquec, as well as the fact that the Government has not sent observations on this allegation, and requests it to take the necessary measures immediately to safeguard the lives of his wife and children, given the death threats they have allegedly received. The Committee also requests the Government to inform it of developments in the proceedings concerning this murder and expects that those guilty will be severely punished.*

895. *As regards the allegations concerning the murder of the trade union official Luis Quinteros Chinchilla by the Mayor of the Municipality of Chiquimulilla, the Committee notes that, according to the Government, the Special Public Prosecutor for Offences Against Journalists and Trade Unions has not received any complaint; consequently, it has not carried out inquiries on which it might provide information. The Committee expresses its concern at the content of the Government's reply, especially since the complainant organization communicated the name of the court dealing with this case (Guilapa Court – Santa Rosa Department). The Committee deplores the murder of this trade union official*

and requests the Government to inform it of developments in the proceedings and expects that those responsible will be severely punished.

896. *Generally speaking, taking into account the seriousness of these allegations of trade unionists' murders, as well as the allegations that will be examined here below, concerning other murder attempts, threats and acts of violence against trade unionists, the Committee expresses its deep concern at this climate of violence and those acts which it deplores. The Committee points out 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, are fully respected and guaranteed" and 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, paras. 46 and 47].*

897. *As regards the alleged attempt on the life of the trade unionist Marcos Alvarez Tzoc by the owner of the El Arco Estate, and of the trade union official Imelda López de Sandoval when her car was tampered with on two occasions, the Committee notes that the complainant organization states that in the first case, proceedings are under way with the judicial authority and that in the second case, the matter has been brought to the attention of the Public Prosecutor. The Committee deeply regrets that the Government did not send observations on the attempted murder of the trade unionist Marcos Alvarez Tzoc but takes note of the Government's reply with respect to the trade union official Imelda López de Sandoval, that the Special Public Prosecutor's Office for Offences Against Journalists and Trade Unionists is carrying out the corresponding inquiries.*

898. *The Committee requests the Government to provide it urgently and without delay with information on the developments in the inquiries and proceedings concerning these trade unionists and expects that those responsible for the murder attempts will be severely punished.*

899. *As regards the alleged assaults by the municipal tourist police of Antigua against five members of the Trade Union Association of Itinerant Vendors of Antigua and the confiscation of their goods, the Committee notes the Government's statements to the effect that: (1) a municipal ordinance bans the display of merchandise on the street and, in the event of violation of this order, provides for the confiscation of goods and penalties; (2) after carrying out inquiries on these allegations, the Public Prosecutor's Office concluded that no offences had been committed. Concerning the death threats by two policemen against the secretary-general of the Trade Union Association of Itinerant Vendors of Antigua, the Committee regrets that the Government has not sent specific observations, and requests the Government to take measures to ensure that an independent inquiry is carried out without delay and to keep it informed in this respect.*

900. *As regards the allegation concerning the selective surveillance and theft of laptop equipment belonging to José E. Pinzón, secretary-general of the CGTG, together with the trade union files, the Committee notes the Government's statement to the effect that the complaint does not contain specific enough information to carry out an inquiry and that the Special Public Prosecutor's Office for Offences Against Journalists and Trade Unionists has not received any complaint on the matter. The Committee notes, however, that according to the allegations, these matters were reported to the National Civil Police and the Prosecutor-General of Human Rights and requests the Government to communicate to it the findings of the inquiries carried out by these institutions.*

901. *A number of allegations were made concerning the shortcomings of the institutional system (labour inspectorate, judicial authorities) to guarantee trade union and labour rights. These specifically concerned: (1) the failure to comply, both in the public and private sectors, with the judicial orders for reinstatement or on other matters (for example compensation pay) in the case of dismissed trade unionists; (2) dismissals on the grounds of having established trade unions or submitting lists of claims to negotiate a collective agreement; (3) refusals to negotiate collectively with the trade union; and (4) the refusal to grant trade union licences to trade union officials. The Committee regrets that the Government only sent partial information according to which: (1) the labour inspectorate and other services of the Ministry of Labour had intervened in hundreds of cases in the public and private sectors; (2) in the case of the El Carmen Estate (the enterprise's refusal to negotiate), the legal authority handed down a resolution in favour of the workers but was not able to notify the employer because the plaintiff had not given an address where the defendant could be notified; (3) in the case of the San Lázaro Estate (refusal to pay wages ordered by the judicial authority), the Estate had been fined 5,000 quetzales; (4) in the case of the Municipality of Livingston (failure to pay statutory benefits to seven trade unionists reinstated under a judicial order), the judicial authority ordered the reinstatement in December 2003, which duly occurred; concerning the settlement of wages and other benefits, the judicial authority issued the corresponding order to the municipality – but, according to the allegations, this was not enforced.*

902. *The Committee requests the Government to take all appropriate steps to resolve the question of payment of wages and other benefits ordered by the judicial authority in favour of the trade unionists from the San Lázaro Estate and the Municipality of Livingston, as well as to promote collective bargaining between the El Carmen Estate and the trade union.*

903. *The Committee requests the Government, without delay, to send its observations on the allegations to which it did not reply, which are listed here below:*

- *dismissals for attempting to establish a trade union (Municipality of Río Bravo, Clermont Estate – where, furthermore, there was failure to comply with the judicial order for the reinstatement of dismissed workers – and the Municipality of San Miguel Pochuta);*
- *dismissals for having submitted a list of claims to negotiate a collective agreement (Municipality of Samayac, El Tesoro Estate – where there was a judicial order for reinstatement);*
- *dismissal of trade unionists (Los Angeles and El Arco Estates) and non-compliance with judicial orders for the reinstatement of trade unionists (Municipality of Puerto Barrios);*
- *failure to pay statutory benefits to trade unionists as ordered by the judicial authority (Mi Tierra Estate, Municipalities of Chiquimulilla and Cuyotenango Suchitepéquez); and*
- *refusals by the Municipality of Cuyotenango Suchitepéquez to grant trade union licences as provided for under the legislation.*

904. *The Committee recalls that, as in this case, it has examined relatively frequently cases of non-compliance (sometimes for years) with judicial orders for reinstatement (or for the payment of wages and other benefits) of dismissed trade unionists in Guatemala. The Committee would like to refer to the conclusions of June 2006 in Case No. 2295, in which it examined allegations concerning the rising number of fines for non-compliance with judicial orders; at that time it pointed out that the existence of legal provisions prohibiting*

acts of anti-union discrimination is insufficient if they are not accompanied by efficient procedures to ensure their application in practice [see 342nd Report, Case No. 2295, para. 537]. Taking into account the high number of trade unionists who have not been reinstated despite a judicial order of reinstatement, as detailed in the allegations, the Committee reminds the Government that the ILO's technical assistance is at its disposal. The Government must ensure an adequate and efficient system of protection against acts of anti-union discrimination, which shall include sufficiently dissuasive sanctions and prompt means of redress emphasizing reinstatement as an effective means of redress.

The Committee's recommendations

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

(a) Recalling 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, are respected, the Committee deplores the murder of the trade union officials Rolando Raquec and Luis Quinteros Chinchilla, the attempt against the life of the trade unionist Marcos Alvarez Tzoc and the trade union official Imelda López de Sandoval, and requests the Government to inform it urgently and without delay of the developments in the inquiries and procedures under way and expects that those responsible will be severely punished.

(b) The Committee requests the Government to take immediately all the necessary measures to safeguard the lives of the wife and children of the murdered trade unionist Rolando Racquec, from the death threats that, according to the allegations, they have received.

(c) The Committee requests the Government to take measures to ensure that an independent inquiry is carried out without delay on the allegations of death threats against the secretary-general of the Trade Union Association of Itinerant Vendors of Antigua and to inform it in this respect.

(d) The Committee requests the Government to communicate the outcome of the inquiries carried out by the National Police and the Prosecutor-General for Human Rights on the allegation concerning the selective surveillance and theft of laptop equipment belonging to José E. Pinzón, secretary-general of the CGTG.

(e) The Committee requests the Government to take appropriate steps to resolve the question of payment of wages and other benefits ordered by the judicial authority in favour of the trade unionists from the San Lázaro Estate and the Municipality of Livingston, and to promote collective bargaining between the El Carmen Estate and the trade union.

(f) The Committee requests the Government to send, without delay, detailed observations on the allegations to which it did not reply, which are listed here below:

- ***dismissals for attempting to establish a trade union (Municipality of Río Bravo, Clermont Estate – where, furthermore, there was failure to***

comply with a judicial order of reinstatement of dismissed workers – and the Municipality of San Miguel Pochuta);

– *dismissals for having submitted lists of claims to negotiate a collective agreement (Municipality of Samayac, El Tesoro Estate – where a judicial order for reinstatement had been issued);*

– *dismissal of trade unionists (Los Angeles and El Arco Estates) and non-compliance with judicial orders for the reinstatement of trade unionists (Municipality of Puerto Barrios);*

– *failure to pay statutory benefits to trade unionists, as ordered by the judicial authority (Mi Terra Estate , Municipalities of Chiquimulilla and Cuyotenango Suchitepéquez); and*

– *refusals by the Municipality of Cuyotenango Suchitepéquez to grant trade union licences as provided for under the legislation.*

(g) The Committee reminds the Government that the ILO's technical assistance is at its disposal. The Government must ensure an adequate and efficient system of protection against acts of anti-union discrimination, which shall include sufficiently dissuasive sanctions and prompt means of redress emphasizing reinstatement as an effective means of redress.

CASE NO. 2451

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

Complaint against the Government of Indonesia presented by the Pharmaceutical and Health Workers' Union "Reformasi" (FSP FARKES/R)

Allegations: The complainant alleges that after the P.T. Takeda Indonesia enterprise failed to honour the collective agreement at the Bekasi worksite, including through failure to pay the required salary increase and notify/negotiate the transfer of a worker, it initiated dismissal proceedings and suspended 58 members and leaders of the plant-level FSP FARKES/R trade union in retaliation for their legitimate trade union activities (in particular, their request to negotiate with regard to the violations of the collective agreement), with the complicity of the local government Manpower Office and the local police

906. The complaint is contained in a communication from the Pharmaceutical and Health Workers' Union "Reformasi" (FSP FARKES/R) dated 15 September 2005.

907. The Government sent its observations in a communication dated 6 January 2006.

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

A. The complainant's allegations

909. The complainant alleged that the Government failed to enforce the rights to freedom of association and collective bargaining for the employees of the P.T. Takeda Indonesia enterprise and participated, through the involvement of the local government, the Manpower Office and the police, in the violation of Conventions Nos. 87 and 98 since January 2005.

910. According to the complainant, on 1 January 2005, the P.T. Takeda Indonesia enterprise refused to honour the legally enforceable collective agreement with the plant-level branch of the complainant trade union. The violations of the agreement included: failure to pay a required salary increase beginning 1 January 2005; failure to notify the union and negotiate the transfer of a worker, Dedy Haryono, from the Bekasi plant to the Jakarta head office of the enterprise, which was due to that worker's lawful trade union activities, whereas the collective agreement required both notice and negotiation over all transfers; and coercion of five employees to accept early retirement with only five days' notice.

911. The complainant added that, on 26 May 2005, workers held a meeting with management of the P.T. Takeda Indonesia enterprise for both day shift workers and second shift workers. The union requested to negotiate with the management regarding the abovementioned violations of the collective bargaining agreement. The management, in violation of the laws, locked out 58 union members from the company premises as of 26 May 2005 and issued suspension letters to 39 union members and "final" warning letters to 19 other union members on 6 June 2005. These 19 "final" warning letters were later converted to suspension letters for a total of 58 suspensions of union members. The company letters stated that the suspensions would become effective pending application by the company to dismiss all 58 workers. The suspensions and pending dismissals were coercive actions in retaliation for legitimate trade union activities of the workers. The complainant attached a list with the names of the suspended trade union officers and members.

912. According to the complainant, the employer thereafter hired replacement workers to carry out the jobs of the suspended workers. The local government Manpower Office colluded with the employer by providing names of available employees to serve as replacement workers in violation of national laws and Conventions Nos. 87 and 98. The complainant added that, on 25 June and 27 July 2005, at the request of the employer, the police of the Bekasi municipality required five suspended union members to appear for questioning. The five persons were the plant-level union president, vice-president, secretary, treasurer, and one other member. The police questioning was intended to intimidate and coerce union members because of their legitimate trade union activities.

913. The complainant cooperated with the local government Manpower Office by participating in mediation meetings regarding the employer's request for lay-offs, held on 20 and 29 June and 21 July 2005. These resulted in the issuing of a letter by the Manpower Office numbered 567/3851/III/VIII/2005 requesting the company to reinstate all workers to their positions as before the suspension. The employer immediately appealed the recommendation to the National Dispute Resolution Committee (P4P). On 10 August

2005, the complainant participated in a meeting with the employer, represented by the President Director and representatives of the Human Resources Department of the P.T. Takeda Indonesia head office. The employer refused to end the suspension of union members or discontinue the request for their dismissal.

914. According to the complainant, the actions of the Government and the employer were contrary to sections 5 and 28 of the Trade Unions Act, No. 21 of 2000, as well as sections 126, 146(2) and (3) and 148 of the Manpower Act, No. 13 of 2003. The complainant therefore requested the Committee on Freedom of Association to recommend the following remedies to the Government: (i) order the employer to end the lockout and suspension of union members at the Bekasi worksite with full back pay and benefits necessary to compensate the union members suffering from the lockout and the suspensions; (ii) order the end of the employment of any replacement workers carrying out the jobs of union members; (iii) order the local government Manpower Office to cease all cooperation with the employer in providing candidates for replacement workers; (iv) order the police to stop the harassment, coercion and intimidation of union members by calling them to the police offices for questioning; (v) reject the request to lay off union members at the Bekasi worksite of the P.T. Takeda Indonesia enterprise; (vi) order the employer to honour its obligation to implement the provisions of the collective agreement.

B. The Government's reply

915. In its communication dated 6 January 2006, the Government indicated the following efforts to handle the industrial relations at the P.T. Takeda Indonesia enterprise: (i) on 26 May 2005, the employer asked permission to dismiss Mr. Dedy Haryono and another 58 workers; (ii) on 6 June 2005, the workers filed a complaint at the local government Manpower Office in the District of Bekasi; (iii) on 3 June 2005, there was a strike, hostage-taking and intimidation at the P.T. Takeda Indonesia enterprise; (iv) on 2 August 2005, the suggestions made by the competent mediators were refused by the employer; (v) on 7 September 2005, the case was filed by the local government Manpower Office, Bekasi District, to P4P; and (vi) on 15 November 2005, the case was settled by a P4P decision which stated that the dismissals were allowed in line with the collective agreement and that both parties agreed to compensation which was beyond the maximum provided for in applicable provisions.

916. The Government added that the transfer of Dedy Haryono from the Bekasi branch to the Jakarta head office was based on the company's need for additional staff at the HRD Division. The employees disagreed with this decision and committed some acts of intimidation towards the employer (beating desks and walls, thrusting a pen at the general manager and making him withdraw the letter of transfer, cutting off the telephone used by the general manager and prohibiting the management to leave the manufacture area). This made the management suspend or dismiss 58 workers in order to avoid having some of them obstruct others from doing their work. This was in line with section 58(2) of the collective agreement signed between P.T. Takeda Indonesia enterprise and the complainant.

917. The Government added that when workers obstructed the management from leaving the meeting room, police personnel asked the workers to allow the managers to leave the room. Although the workers eventually let the managers go after being requested four times, the atmosphere was no longer conducive to negotiations. Moreover, the act of the workers who left their work for two and a half hours and prohibited the management to leave the meeting room made the management of P.T. Takeda Indonesia enterprise pass disciplinary sanctions in conformity with section 58(2) of the collective agreement, as follows: (i) 39 workers were suspended and procedures for their dismissal were initiated on 6 June 2005; (ii) 19 workers received final warning letters; and (iii) those who were absent

on 26 May 2005 did not get any sanction. The 19 workers refused to accept the final warning letters and the management suspended them as of 8 June 2005, bringing the total number of suspended workers to 58. As a result of the suspension, measures were taken to hold meetings chaired by mediators of the local government Manpower Office in the District of Bekasi, on 20, 23, 29 June and 21 July 2005. The mediators suggested, among other things, that the management of the P.T. Takeda Indonesia enterprise reinstate Dedy Haryono and another 58 workers. Although the workers accepted this suggestion, the management refused and appealed to the labour dispute settlement body at the central level (P4P). During the process before the P4P, the parties were still holding bipartite discussions and finally reached a collective agreement on the termination of Dedy Haryono and another 58 workers. On the basis of this agreement, the P4P issued decision No. 1676/1972/243-13/X/PHK/11-2005 of 15 November 2005. Thus, the issue of the dismissal was resolved and the complainant trade union continued its activities as previously.

918. With regard to the issue of replacement workers, the Government indicated that upon request, the local government Manpower Office of the District of Bekasi stated that during the suspension period the employer was called not to recruit new workers to replace the 58 suspended ones.

919. Finally, with regard to the allegations of infringement of the Manpower Act, sections 126 on the content of collective agreements, section 146(2) and (3) on lock-out, and section 148 on announcement of lock-out, the Government indicated the following: (i) in a meeting on the prolongation of the collective agreement, the employer proposed some amendments in line with the company's recent conditions and capacity; as noted above, the agreement was reached in the framework of the industrial relations settlement mechanism and a final decision was made by the P4P; (ii) the employer did not lock-out the workers but dismissed some of them in order to maintain an appropriate atmosphere in the workplace; and (iii) the employer did not make an announcement of a lock-out because it did not actually carry out a lock-out.

C. The Committee's conclusions

920. *The Committee notes that this case concerns allegations that, after the P.T. Takeda Indonesia enterprise failed to honour the collective agreement at the Bekasi worksite, including through failure to pay the required salary increase and notify/negotiate the transfer of a worker, it initiated dismissal proceedings and suspended 58 members and leaders of the plant-level FSP FARKES/R trade union in retaliation for their legitimate trade union activities (in particular, their request to negotiate with regard to the violations of the collective agreement), with the complicity of the local government Manpower Office and the local police.*

921. *The Committee notes that, according to the complainant after having requested at a meeting with the management of the P.T. Takeda Indonesia enterprise on 26 May 2005 to negotiate regarding the abovementioned violations of the collective bargaining agreement, the management, in violation of the laws, locked out 58 union members from the company premises on the same day and issued suspension letters to 39 union members and "final" warning letters to 19 other union members on 6 June 2005. These 19 "final" warning letters were later converted to suspension letters for a total of 58 suspensions of union members. The company letters stated that the suspensions would become effective pending application by the company to dismiss all 58 workers. Moreover, according to the complainant, on 25 June and 27 July 2005, at the request of the employer, the police of the Bekasi municipality required the plant-level union president, vice-president, secretary, treasurer, and one other member, who had been suspended, to appear for questioning in order to intimidate and coerce them because of their legitimate trade union activities.*

Finally, according to the complainant, mediation meetings regarding the employer's request for lay-offs, held on 20 and 29 June and 21 July 2005, resulted in the issuing of a letter by the Manpower Office numbered 567/3851/III/VIII/2005 requesting the company to reinstate all workers to their positions as before the suspension. The employer immediately appealed the recommendation to the National Dispute Resolution Committee (P4P) and refused, in a meeting of 10 August 2005, to end the suspension of union members or discontinue the request for their dismissal.

922. *The Committee notes that, according to the Government: (i) on 26 May 2005, the employer asked permission to dismiss Mr. Dedy Haryono and another 58 workers; (ii) on 6 June 2005, the workers filed a complaint at the local government Manpower Office in the District of Bekasi; (iii) on 3 June 2005, there was a strike, hostage-taking and intimidation at the P.T. Takeda Indonesia enterprise; (iv) on 2 August 2005, the suggestions made by the competent mediators were refused by the employer; (v) on 7 September 2005, the case was filed by the local government Manpower Office, Bekasi District, to P4P; and (vi) on 15 November 2005, the case was settled by a P4P decision.*

923. *The Committee notes that the Government adds that the transfer of one worker (Dedy Haryono) from the Bekasi branch to the Jakarta head office of the P.T. Takeda Indonesia enterprise was based on the company's need for additional staff at the HRD Division. The employees disagreed with this decision and committed some acts of intimidation towards the employer (beating desks and walls, thrusting a pen at the general manager and making him withdraw the letter of transfer, cutting off the telephone used by the general manager and prohibiting the management to leave the manufacture area). This made the management suspend or dismiss 58 workers in order to avoid having some of them obstruct others from doing their work. In particular: (i) 39 workers were suspended and processes for their dismissal were initiated on 6 June 2005; (ii) 19 workers received final warning letters; and (iii) those who were absent on 26 May 2005 did not get any sanction. The 19 workers refused to accept the final warning letters and the management suspended them as of 8 June 2005, bringing the total number of suspended workers to 58. In meetings at the local government Manpower Office in the District of Bekasi held on 20, 23, 29 June and 21 July 2005, the mediators suggested among other things that the management of the P.T. Takeda Indonesia enterprise reinstate Dedy Haryono and the other 58 workers. The management appealed to the labour dispute settlement body at the central level (P4P). During the process before the P4P, the parties were still holding bipartite discussions and finally reached a collective agreement on the termination of Dedy Haryono and the other 58 workers. The parties agreed to compensation beyond the maximum provided for in applicable provisions. On the basis of this agreement, the P4P issued decision No. 1676/1972/243-13/X/PHK/11-2005 of 15 November 2005 which stated that the dismissals were in line with the collective agreement which had just been signed. The issue was thereby resolved and the complainant trade union continued its activities as previously.*

924. *While taking note of this information, the Committee regrets that the Government provides no reply on the following allegations: (i) that among those suspended and eventually dismissed were the president, vice-president, secretary and treasurer of the trade union; (ii) that the police intimidated the president, vice-president, secretary and treasurer, as well as a member of the trade union who had been suspended, by summoning them for questioning on 25 June and 27 July 2005; and (iii) that the dismissals took place in the context of a collective dispute over the implementation and renegotiation of the collective agreement at the enterprise. Furthermore, the Committee notes that the Government does not indicate the grounds on the basis of which the mediator of the local Manpower Office recommended the reinstatement of Dedy Haryono and all other dismissed workers in letter No. 567/3851/III/VIII/2005 of July 2005 – a decision which does not seem consistent with*

the justification for the dismissals put forward in the Government's reply (disciplinary sanctions).

925. *The Committee recalls that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 724]. The Government is consequently responsible for preventing all acts of anti-union discrimination and it must ensure that complaints of anti-union discrimination are examined in the framework of national procedures which should be prompt, impartial and considered as such by the parties concerned [see* ***Digest****, op. cit., para. 738]. In particular, legislation must make express provision for appeals and establish sufficiently dissuasive sanctions against acts of anti-union discrimination to ensure the practical application of Articles 1 and 2 of Convention No. 98 [see* ***Digest****, op. cit., para. 743]. Finally, measures depriving trade unionists of their freedom on grounds related to their trade union activity, even where they are merely summoned or questioned for a short period, constitute an obstacle to the exercise of trade union rights [see* ***Digest****, op. cit., para. 77].*

926. *While taking note of the settlement reached by the parties in this case, the Committee regrets to observe that the authorities appear to have acted in this case uniquely as a mediator without fully investigating the allegations of acts of anti-union discrimination. The Committee therefore expects that the Government will ensure comprehensive protection against anti-union discrimination in the future.*

927. *Finally, the Committee notes that, although the Government indicates that the complainant trade union continued its activities as previously after the signature of a "collective agreement" putting an end to the dispute over the dismissals, it does not indicate whether the new "collective agreement" also addresses the central issue of the terms and conditions of employment in the enterprise, particularly as regards the previously negotiated agreement on a wage increase. The Committee therefore requests the Government to provide information on the actual state of collective bargaining in the P.T. Takeda Indonesia enterprise and to transmit a copy of the collective agreement in force. If there is no collective agreement, the Committee requests the Government to take all necessary measures so as to promote and encourage negotiations in good faith between the P.T. Takeda Indonesia enterprise and the plant-level FSP FARKES/R trade union with a view to the conclusion of a collective agreement. The Committee requests to be kept informed of developments in this respect.*

The Committee's recommendations

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

(a) ***While taking note of the settlement reached by the parties in this case, the Committee regrets to observe that the authorities appear to have acted in this case uniquely as a mediator without fully investigating the allegations of acts of anti-union discrimination. The Committee therefore expects that the***

Government will ensure comprehensive protection against anti-union discrimination in the future.

(b) The Committee requests the Government to provide information on the actual state of collective bargaining in the P.T. Takeda Indonesia enterprise and to transmit a copy of the collective agreement in force. If there is no collective agreement, the Committee requests the Government to take all necessary measures so as to promote and encourage negotiations in good faith between the P.T. Takeda Indonesia enterprise and the plant-level FSP FARKES/R trade union with a view to the conclusion of a collective agreement. The Committee requests to be kept informed of developments in this respect.

CASE NO. 2472

INTERIM REPORT

Complaints against the Government of Indonesia
presented by
— Building and Wood Workers' International (BWI) and
— the International Confederation of Free Trade Unions (ICFTU)
supported by
— the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF)

Allegations: The complainant organizations allege that since its establishment, the BWI's affiliate, the All-Indonesian Federation of Wood, Forestry and General Workers' Union (SP Kahutindo), has faced constant harassment and repeated violations of trade union rights by the employer, PT Musim Mas. In particular, it alleges the employer's refusal to recognize the SP Kahutindo; establishment of a rival "yellow" union by the employer; dismissal of 701 workers and eviction of these workers and their families from their housing on the plantation estate, following a legal strike; non-renewal of contracts of 300 contract workers following the same strike; arrest of six trade union leaders; intimidation, harassment and disciplinary transfer of trade union members and officials. The complainant asserts that these violations took place with the complicity of the police forces and that the labour authorities failed to intervene to protect workers' rights

929. The complaint is contained in communications from the Building and Wood Workers' International (BWI) dated 15 February and 19 June 2006. In its communication dated 27 February 2006, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) associated itself with the case. In communications dated 27 June and 25 July 2006, the International Confederation of Free Trade Unions (ICFTU) also associated itself with the case and sent additional allegations.

930. The Government sent its observations in communications dated 17 March, 2 June and 20 July 2006.

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

A. The complainants' allegations

932. By its communication of 15 February 2006, the Building and Wood Workers' International (BWI) lodged a complaint on behalf of its affiliate, the All-Indonesian Federation of Wood, Forestry and General Workers' Union (SP Kahutindo). By way of background, the BWI explains that in 2003, the PT Musim Mas workers established a local Indonesian Prosperous Workers' Union (SBSI). In mid-2003, a rival "yellow" union called the Musim Mas Workers' Union (SP MM) was established by the enterprise management. Throughout 2004, the SBSI officers, including its chairperson, were harassed, arbitrarily transferred from their posts and eventually dismissed by PT Musim Mas. The remaining SBSI officers voted to disband the union rather than face further harassment. Also in 2004, Mr. Hadi Surya and four other workers were transferred to new posts situated about 15 km from their homes after they refused to sign a document stating that they were members of the SP MM. As the company refused to provide transport for the workers concerned, they were not able to report to work and were fired for absenteeism on 10 August 2004. On 24 February 2005, the Riau Province Committee for Industrial Dispute Settlement (P4D) ruled in favour of the dismissal of Mr. Hadi Surya. The complainant organization states that while the P4D was not convinced by the company's argument that the transfer of Mr. Hadi Surya was a part of a normal rotation of staff and found that it was "very natural" that the workers could not report for work due to the lack of transport, it nevertheless authorized the dismissal. The complainant provides excerpts of this decision. The BWI then explains that the local union SP Kahutindo was established at PT Musim Mas oil palm plantation and processing plant in October 2004 and was registered on 9 December 2004. The union had 1,183 members out of a total workforce of 2,000, including 300 contract workers. The following events led to the lodging of the complaint.

933. On 15 January 2005, Mr. Marlin Sutari, member of the SP Kahutindo, was beaten up by his supervisors, including the Chief of Security, Mr. Sanusi Hasibuan. When Mr. Sutari attempted to defend himself, he was taken to the local police station and charged with assault on the person of Mr. Hasibuan. Contrary to regulations, Mr. Sutari's family was not informed of his arrest and detention. Mr. Sutari lodged a complaint with the police regarding the assault by Mr. Hasibuan and his associates, but the police never gave a follow-up to his complaint.

934. Throughout January 2005, the requests of the SP Kahutindo officers to have union leave to attend to various union duties, including meetings at the local Manpower Office, were ignored by the management of PT Musim Mas, which refused to recognize the union. At first, it made deductions from their salaries for attending trade union activities and then, transferred these workers to new jobs. On 14 February 2005, the SP Kahutindo requested an intervention by the Riau province Department of Manpower to compel PT Musim Mas

to cease the intimidation, harassment and punitive transfer of union officers that occurred in January 2005, but to no avail.

935. On 19 February 2005, PT Musim Mas requested an authorization for dismissal of Mr. Robin Kimbi, the SP Kahutindo's Chairperson on grounds of absenteeism (his dismissal was approved by the P4D on 28 July 2005).

936. The complainant further alleges that along with Mr. Robin Kimbi and Mr. Hadi Surya, two other SP Kahutindo officers, Mr. J. Siallagan and Mr. Lambok Siallagan, were dismissed by the company and five other trade union officers were forced to resign in February 2005. On 24 February 2005, the trade union once again made a formal request for an intervention by the local Manpower Office in the matter of the dismissed workers. As previously, no response was ever received. In April 2005, after serving the company and the local authorities with due notice, the SP Kahutindo's members went on strike demanding the reinstatement of their dismissed union leaders and respect for the minimum labour standards.

937. On 13 June 2005, the Pelalawan Manpower Office, following field visits to PT Musim Mas to investigate working conditions at the request of the local parliament, issued a letter addressed to PT Musim Mas calling upon the management of the enterprise to respect minimum labour standards. However, the management ignored the appeal of the Manpower Office and a second strike took place from 1 to 5 August. On 5 August, following negotiations between PT Musim Mas management and the leaders of the SP Kahutindo, the Pelalawan Manpower Office issued a statement calling upon the workers to return to work and the company to accept their return without intimidation. On 10 August, the trade union and the management signed an agreement recognizing the legality of both strikes and dealing with the dismissals of another nine trade union members that had occurred since February. The complainant submits copies of these three documents.

938. On 22 August 2005, the Manpower Office ordered PT Musim Mas for the second time to implement minimum labour standards with regard to annual, maternity and sick leave, working hours and overtime and occupational safety. On 6 September, following the management's refusal to comply with the order, the SP Kahutindo once again lodged a notice of intention to strike.

939. On 9 September 2005, in spite of specific recommendations by the local parliament that PT Musim Mas recognize and negotiate with the SP Kahutindo and the ruling of the Manpower Office of 13 June, the company concluded an agreement on the upcoming annual leave with the SP MM, without involving or informing the SP Kahutindo. After the PT Musim Mas management's clear demonstration of bad faith and learning of the company's intention to bring in replacement workers for the planned strike, the SP Kahutindo decided to bring the date of the strike forward to 13 September. Over 1,000 workers participated in the strike. At 10 a.m., PT Musim Mas brought in 100 newly hired replacement workers. On the following day, a company truck drove into the picket line, injuring two union members. When workers tried making a police report, the police requested medical proof of the injuries suffered. However, when the workers returned to the hospital for their medical records, they found that their records were already in the enterprise's possession. The police therefore refused to process the workers' complaint.

940. On 15 September, a crowd of workers pushed the refinery gate off of its rails. The company's management lodged a complaint with the police naming five SP Kahutindo leaders (Messrs. Robin Kimbi, the Chairperson of the union, Safrudin and Akhen Pane, the two Vice-Chairpersons, Suyahman, the union secretary, and Masri Sebayang, the secretary of a branch union) as being responsible for the damage to the gate. A few hours later, the five leaders were invited by the police to enter the refinery's office under the pretext that

the management wished to negotiate. However, as soon as they had entered the office, they were arrested by the police, taken to the police station and later charged with violation of article 170 of the Criminal Code.

941. On 16 September, the remaining demonstrators were forcibly removed by the police and were not allowed to return to their homes on the company housing estate. The complainant adds that on 18 October, a sixth trade union officer, Vice-President Mr. Sruhas Towo, was arrested, charged and detained along with the five other trade union leaders in Bangkinang prison. Five of the six arrested trade union leaders were convicted of crimes against public order for causing damage to persons or property and sentenced to prison terms ranging from between 14 months and two years. The sixth person was undergoing trial on the same charges.

942. On 22 September 2005, the company initiated dismissal proceedings against 701 workers, which were officially authorized by the P4D on 16 December. On 26 December, the company employed armed local and paramilitary police to forcibly evict workers and their 1,000 family members, including about 350 children from the plantation housing estate; 300 children were expelled from the plantation schools.

943. The complainants consider that the above chronology demonstrates that PT Musim Mas consistently refused to recognize or negotiate with unions other than the union established by the management itself. Officers and members of independent unions, first the SBSI and later, the SP Kahutindo, as well as workers who refused to join the SP MM, were intimidated, harassed, transferred from their posts and, in some cases, dismissed. Despite these clear violations of workers' rights, instead of fulfilling its obligations to uphold respect for freedom of association and the right to collective bargaining, the Pelalawan District Manpower Office ignored the SP Kahutindo's repeated complaints of harassment of union officials. Only after the intervention of the local District Parliament (which also reacted only following the strike and demonstration outside the Parliament buildings) did the District Manpower Office undertake to investigate conditions at PT Musim Mas. They found several breaches of basic labour standards. Rather than ensuring that its rulings of 13 June and 22 August were implemented by the enterprise, the Chief of the District Manpower office joined instead the Riau Provincial Manpower Department Chief in absolving PT Musim Mas of any wrongdoing in the joint public statement on 24 October 2005.

944. Furthermore, according to complainants, the P4D and the Central Labour Dispute Settlement Committee (P4P) have played their usual role in legitimizing employer's attacks on trade unions, by consistently rubberstamping the dismissals of the SP Kahutindo leaders and trade union members. The local police has also been complicit in many of the events involving violation of freedom of association and the right to collective bargaining and has failed to investigate or refused to process complaints of violence by the company made by the SP Kahutindo members.

945. The union leaders were repeatedly denied bail, despite the relatively minor nature of the offences with which they were charged. During the trial of the five union leaders, the prosecution argued that the five union leaders "and 1,000 other workers" pushed down the gate, which in turn caused minor injuries to two persons. At no point in his submission did the prosecutor prove, or even allege, that the actions of the five union leaders, and their actions alone, led to the gate being derailed and pushed over. Rather than arrest and prosecute all 1,000 workers for their actions in pushing the gate over, the police, the Public Prosecutor and the Bangkinang State Court judges chose to hold the six union leaders individually responsible. They were charged and sentenced for their union activity and their role as union leaders.

946. Despite repeated appeals by the FSP Kahutindo, the BWI and the IUF, the central Ministry of Manpower has failed to intervene and protect the freedom of association and collective bargaining rights of the PT Musim Mas workers and their trade union leaders. They therefore urge the Government of Indonesia to undertake appropriate measures to resolve this case in a manner consistent with its obligations as a signatory of Conventions Nos. 87 and 98, by ensuring the immediate and unconditional release of the six trade union officials and the dropping of all charges against them, as well as a transparent investigation into the actions of the local authorities and police. The Government must also act to guarantee the safety and security of the trade union leaders after their release and to ensure the immediate reinstatement of the 701 union members and their families' return to plantation housing and schools.

947. In communications of 19 and 27 June 2006 received respectively from the BWI (jointly with the IUF) and the ICFTU, the complainant organizations allege that on 7 June 2006, the company agreed to pay a group of 211 workers US$123 (the equivalent of six weeks' salary), in return for which the workers dropped their right to appeal the illegal dismissals and agreed to call upon the BWI to drop the ILO complaint. Part of this so-called "settlement" involved a separate written renunciation by the six prisoners of their right to appeal their criminal convictions to the Indonesia Supreme Court. The BWI and the ICFTU consider that this "settlement", which seeks to legitimize mass retaliatory dismissals and brutal repression and to criminalize trade union activity, brings no justice to the dismissed workers or to the prisoners. Therefore, the BWI, the IUF and the ICFTU strongly reject the terms of this "settlement" and question the legitimacy of the circumstances behind its negotiation and of the agreements with the imprisoned trade union leaders.

B. The Government's reply

948. In its communication dated 17 March 2006, the Government states that an inspection conducted by the labour inspector on 11 and 12 November 2005 revealed that 2,016 persons were employed at PT Musim Mas. Four trade unions were established within the company, namely: the PUK SPSI NIBA, the FKUI SBSI, the SP Musim Mas (SP MM) and the SP Kahutindo. Mr. Robin Kimbi, the Chairperson of the SP Kahutindo was dismissed for exercising activities in contravention of the company rules, following three warning notices served to him. His dismissal was legalized by the Regional Dispute Settlement Committee's (P4D) decision dated 28 July 2005. A copy of this decision was served on him on 20 August and on 6 September 2005, Mr. Robin Kimbi filed an appeal to P4P. On 7 October 2005, the P4P rejected his appeal as the 14-day time limit to file an appeal had expired. To express their solidarity, about 701 workers of PT Musim Mas went on strike alleging violation by the company of minimum labour standards and forced the management of the enterprise to re-employ Mr. Robin Kimbi. The management requested workers to return to work. Faced with their refusal, the management decided to recruit new employees and proceeded to process the dismissal of 701 workers before the P4P. Furthermore, during the strike on 15 September 2005, some workers caused damage to the company's property, some office employees were injured and, as a consequence, the whole palm oil refinery stagnated. The local police had taken some measures to overcome the chaos by arresting five trade union leaders, namely Messrs. Robin Kimbi, Masri Sebayang, Suyahman, Akhen Pane and Safrudin.

949. The Government further indicates that an inspection carried out on 14 and 15 November 2005 by the Provincial House of Representatives and the Provincial and Regional Manpower Offices concluded that the company did not violate the minimum labour standards.

950. On 3 February 2006, the Judge Board of the Regional Court found the five arrested trade union leaders guilty of causing injuries to persons and damaging the company's property. Mr. Masri Sebayang and Mr. Robin Kimbu were sentenced to two years in prison. Mr. Suyahman, Mr. Akhen Pane and Mr. Safrudin were sentenced to 14 months. The Government points out that it is not allowed to interfere with the court decision.

951. In its communication dated 2 June 2006, the Government indicates that while PT Musim Mas did turn down the request of the SP Kahutindo to amend the still valid collective labour agreement negotiated with the SP MM, representing over 50 per cent of the workforce, it has never had any objections to the establishment and to the existence of the SP Kahutindo. The Government also denies that a rival "yellow" trade union was established by the management and indicates that before the establishment of the SP Kahutindo, three other trade unions, all established according to the legislation in force, were already active at the enterprise.

952. As to the alleged non-renewal of 300 contracts, the Government indicates that PT Musim Mas employs 2,000 workers under undetermined period of time working contracts and does not employ workers under contracts of determined periods of time.

953. By its communication of 20 July 2006, the Government informs that the two parties, the SP Kahutindo and PT Musim Mas, have reached a settlement agreement, witnessed by the local government, which resolved the dispute between them. The Government provides the following details in this respect. The case on the dismissal of 701 workers has been decided by the P4P on 6 December 2005, and has been settled by both parties through collective agreement on 7 June 2006. Pursuant to the same verdict of the P4D, Messrs. Masri Sebayang, Robin Kimbu, Suyahman, Akhen Pane and Safrudin sentenced to imprisonment by the District Court of Bangkinang decision of 3 February 2006 (as confirmed by the High Court of Riau on 18 April 2006), as well as Mr. Sruhas Towo, sentenced to imprisonment by the District Court of Bangkinang decision of 17 March 2006, received compensation. Furthermore, there was a settlement agreement between PT Musim Mas and these workers, according to which, the criminal case has been processed and decided by the courts. It was therefore considered that the dispute between PT Musim Mas and the SP Kahutindo was now settled.

C. The Committee's conclusions

954. *The Committee notes that the complainants in this case, the Building and Wood Workers' International (BWI), the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) and the International Confederation of Free Trade Unions (ICFTU), allege systematic violation by the management of PT Musim Mas of the freedom association and collective bargaining rights of the All-Indonesian Federation of Wood, Forestry and General Workers' Union (SP Kahutindo), the BWI's affiliate.*

955. *In particular, the complainants allege that the enterprise management refused to recognize the SP Kahutindo, preferring to deal with the Musim Mas Workers' Union (SP MM), a "yellow" union. The complainants also allege that trade union leaders were constantly denied union leave to attend various trade union duties. The Government for its part, merely refutes this information by indicating that the SP MM, along with two other unions, existed at the enterprise prior to the establishment of the SP Kahutindo and that the SP MM could in no way be considered as a "yellow" union. The Government adds that while on one occasion, the enterprise management did deny the SP Kahutindo's request to change the terms of a collective agreement, the refusal was based on the fact that this collective agreement negotiated with the SP MM, the union representing over 50 per cent of workers, was still valid. The Committee must note, however, that the complainants claim*

that the SP Kahutindo represented 1,183 of the 2,000 workers at the workplace, a claim, which the Government has not directly refuted. In these circumstances, it is unclear to the Committee which union is the most representative union for collective bargaining purposes. It requests the Government to provide information in this respect, in particular as to the precise representation of both the SP MM and the SP Kahutindo at the time that the bargaining was taking place.

956. *The complainants have also alleged that the members of the SP Kahutindo suffered intimidation and harassment. By way of example, they refer to the case of Mr. Marlin Sutari, who was beaten up by his superiors and the Chief of Security, and subsequently arrested and charged himself with assault. Although he filed a complaint, it was never followed up. The complainants also allege that the SP Kahutindo trade union members suffered salary deductions for attending trade union activities, transfers to new jobs, dismissals and forced resignations. The BWI forwards excerpts of the P4D decision confirming the dismissal of Mr. Hadi Surya who allegedly was among four workers transferred to a new post, situated about 15 km from his house, and later dismissed for absenteeism, as a retaliation measure against his refusal to sign a document stating that he was a member of the SP MM.*

957. *The Committee notes the excerpts of the P4D decision in the case of Mr. Hadi Surya, which, while authorizing the dismissal, also appears to find that the rotation was "improper because the distance between the post where the employee was to work and employee's place of residence was roughly 15 km and the employee walked this distance as the employer did not provide transport, and so it was natural that the employee did not report to work as hoped by the employer". The P4D finding, however, that there was no longer "harmonization" between the employee and the employer, authorized the dismissal but obliged the employer to pay double compensation. Noting that Mr. Surya has alleged that his transfer was due to his refusal to join the SP MM, an element apparently not examined by the P4D in its review of the dismissal, the Committee recalls that workers shall have the right to join organizations of their own choosing without any interference from the employer and emphasizes the importance that it attaches to the fact that workers and employers should in practice be able to establish and join organizations of their own choosing in full freedom [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 274]. The Committee requests the Government to conduct an independent investigation into these allegations of retaliation and if they are found to be true, to provide appropriate redress for the damages suffered, including through the possible reinstatement of Mr. Surya.*

958. *The Committee notes that the Government has not provided any contradictory information in respect of the following further events related by the complainants. Following several unfruitful appeals to the authorities, members of the SP Kahutindo, went on strike in April 2005 to contest the violation of trade union rights and minimum labour standards. On 13 June 2005, the Manpower Office instructed PT Musim Mas to redress several violations of labour rights. However, in light of the management's unwillingness to do so, another strike took place from 1 to 5 August 2005. Following a statement issued by the Manpower Office, the trade union and the management of the enterprise signed an agreement on 10 August recognizing the legality of both strikes and dealing with the dismissals of nine trade union members. On 22 August 2005, the Manpower Office once again instructed PT Musim Mas to respect certain labour rights. On 6 September, following the management's refusal to comply, the SP Kahutindo once again lodged a strike notice. Learning of the company's intention to hire replacement workers, the union began the strike on 13 September. The complainant reports that 100 replacement workers were hired by the company. During the course of the strike, two trade union members were injured as a company truck drove through the picket line. Unable to get hold of the medical proof of*

their injuries and hospitalization, which appeared to be in the company's hands, these two workers were unable to lodge a complaint.

959. *On 15 September, the crowd of workers pushed the refinery gate off of its rails. The company's management lodged a complaint with the police naming five SP Kahutindo leaders (Messrs. Robin Kimbi, the Chairperson of the union, Safrudin and Akhen Pane, the two Vice-Chairpersons, Suyahman, the union secretary, and Masri Sebayang, the secretary of a branch union) as being responsible for the damage to the gate. A few hours later, the five leaders were arrested by the police, taken to the police station and later charged with violation of article 170 of the Criminal Code. On 16 September, the remaining demonstrators were forcibly removed by the police and were not allowed to return to their homes on the company housing estate. On 18 October, a sixth trade union officer, the Vice-President Mr. Sruhas Towo, was arrested, charged and detained along with the five other trade union leaders in Bangkinang prison. All six trade union leaders have been convicted of crimes against public order for causing damage to persons or property and sentenced to prison terms ranging from between 14 months and two years. In this respect, the Committee recalls that the principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike. It further recalls that penal sanctions should only be imposed as regards strikes where there are violations of strike prohibitions which are themselves in conformity with the principles of freedom of association. All penalties in respect of illegitimate actions linked to strikes should be proportionate to the offence or fault committed and the authorities should not have recourse to measures of imprisonment for the mere fact of organizing or participating in a peaceful strike [see* ***Digest****, op. cit., paras. 598 and 599].*

960. *On 22 September 2005, the company initiated dismissal proceedings against 701 workers, which were officially authorized by the P4D on 16 December. On 26 December, the company employed armed local and paramilitary police to evict workers and their 1,000 family members, including about 350 children from the plantation housing estate; 300 children were expelled from plantation schools. While the complainants also allege the non-renewal of the labour contracts of 300 workers, the Government refutes this allegation by stating that the company did not employ fixed-term contract workers.*

961. *The Committee further notes that a settlement agreement was reached between PT Musim Mas and the SP Kahutindo on 7 June 2006. According to the information provided by the complainants, the company agreed to pay a group of 211 workers US$123 (the equivalent of six weeks' salary), in return for which the workers dropped their right to appeal the illegal dismissals and agreed to call upon the BWI to drop the ILO complaint. Part of this settlement involved a separate written renunciation by the six prisoners of their right to appeal their criminal convictions to the Indonesia Supreme Court. According to the Government, these six trade union leaders also received compensation in accordance with the December 2005 decision of the P4D on the dismissal of 701 workers. The Government further indicates that according to the terms of the settlement agreement, the criminal case against the six trade union leaders being already decided by the courts, the dispute between PT Musim Mas and the SP Kahutindo was now considered settled.*

962. *The Committee notes that while the Government considers that the dispute between the SP Kahutindo and PT Musim Mas is now resolved, the BWI, the IUF and the ICFTU consider that this "settlement" seeks to legitimize mass retaliatory dismissals and brutal repression, criminalizes trade union activity and brings no justice to the dismissed workers or to the prisoners. These organizations therefore strongly reject the terms of this settlement and question the legitimacy of the circumstances behind its negotiation and of the agreements with the imprisoned trade union leaders.*

963. *The Committee regrets that neither the complainants nor the Government provide a copy of the said settlement agreement. Furthermore, the Committee notes that while the complainants question the legitimacy of the agreement and the circumstances of its negotiation, they do not provide any details to assist the Committee's understanding in this regard. It is, however, unclear from the information received whether the agreement was signed on behalf of all 701 dismissed workers or only 211, the number referred to by the complainant. The Committee therefore requests the Government and the complainants to provide information in this respect and a copy of the agreement. In addition, the Committee is particularly concerned, in light of the serious allegations in this case, about the purported settlement agreement with the imprisoned union leaders who are apparently serving out sentences of up to two years in prison for having derailed the enterprise gate. The Committee requests the Government to carry out an independent investigation immediately into the circumstances under which this agreement was reached and to report back on the outcome. As regards the allegation of the non-renewal of 300 labour contracts following the strike action, the Committee requests the complainants to provide additional information in response to the Government's assertion that there are no fixed-term contracts at PT Musim Mas.*

964. *The Committee expresses its concern over the number of serious allegations related to the events at PT Musim Mas to which the Government has not replied other than referring to the settlement agreement. It refers in particular to the allegations of assault on Mr. Sutari and his complaint in this respect which was allegedly not followed up by the police, the violent intervention by the police and the employer during the course of the strike, leading to the injury of two workers, the hiring of replacement workers by the employer during the strike, the dismissal of 701 workers who participated in the strike and finally, the allegation that numerous complaints and requests for intervention submitted to the authorities to remedy violations of trade union rights by the enterprise were left unanswered or were not followed through.*

965. *As concerns the allegation of physical assault on Mr. Sutari, the Committee requests the Government to institute immediately an independent judicial inquiry into this allegation with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts. It requests the Government to keep it informed in this respect.*

966. *With regard to the strike carried out by the trade union in September 2005, the Committee draws the attention of the Government to the following principles.*

With regard to the complainant report that 100 replacement workers were hired by the company:

- *The hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association if the strike is legal, recourse to the use of labour drawn from outside the undertaking to replace the strikers entails a risk of derogation from the right to strike, which may affect the free exercise of trade union rights [see **Digest,** op. cit., paras. 570 and 571].*

With regard to the police intervention during the strike and the forcible removal of demonstators:

- *The authorities should 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 and governments should take measures to ensure that the competent authorities receive adequate instructions so as to avoid the*

danger of excessive violence in trying to control demonstrations that might undermine public order [see ***Digest****, op. cit., para. 582].*

With regard to the dismissals of workers who participated in the strike:

- *No one should be penalized for carrying out a legitimate strike. The dismissal of workers because of a strike, which is a legitimate trade union activity, constitutes serious discrimination in employment and is contrary to Convention No. 98 [see* ***Digest****, op. cit., paras. 590, 591 and 597].*

967. *The Committee expects that the Government will ensure full respect for these principles in the future. The Committee requests the Government to carry out an independent inquiry without delay into the conduct of the various parties during the strike action including the allegations of injuries suffered by two workers when a company truck drove through the picket line, with a view to fully clarifying facts, determining responsibility, punishing those responsible and preventing the repetition of such acts. It requests the Government to keep it informed in this respect.*

The Committee's recommendations

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

(a) The Committee requests the Government to provide information on the precise representation of both the SP MM and the SP Kahutindo at the time that the bargaining was taking place.

(b) The Committee requests the Government to conduct an independent investigation into the allegations of anti-union dismissal of Mr. Surya and if they are found to be true, to provide appropriate redress for the damages suffered, including through his possible reinstatement.

(c) The Committee requests the Government and the complainants to clarify whether the settlement agreement was signed on behalf of all 701 dismissed workers or only 211, the number referred to by the complainant, and to provide a copy thereof. In addition, the Committee requests the Government to carry out an independent investigation immediately into the circumstances under which the settlement agreement with the imprisoned union leaders was reached and to report back on the outcome.

(d) As regards the allegation of the non-renewal of 300 labour contracts following the strike action, the Committee requests the complainants to provide additional information in response to the Government's assertion that there are no fixed-term contracts at PT Musim Mas.

(e) As concerns the allegations of physical assault on Mr. Sutari, the Committee requests the Government to institute immediately an independent judicial inquiry into these allegations with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts. It requests the Government to keep it informed in this respect.

(f) ***The Committee draws the attention of the Government to the following principles:***

With regard to the complainant report that 100 replacement workers were hired by the company:

- ***The hiring of workers to break a legal strike in a sector, which cannot be regarded as an essential sector in the strict sense of the term, constitutes a serious violation of freedom of association.***

With regard to the police intervention during the strike and the forcible removal of demonstrators:

- ***The authorities should 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 and governments should take measures to ensure that the competent authorities receive adequate instructions so as to avoid the danger of excessive violence in trying to control demonstrations that might undermine public order.***

With regard to the dismissals of workers who participated in the strike:

- ***No one should be penalized for carrying out a legitimate strike. The dismissal of workers because of a strike, which is a legitimate trade union activity, constitutes serious discrimination in employment and is contrary to Convention No. 98.***

With regard to the sentencing of six trade union leaders to between 14 months and two years' imprisonment for causing damage to persons or property:

- ***The principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike. It further recalls that penal sanctions should only be imposed as regards strikes where there are violations of strike prohibitions which are themselves in conformity with the principles of freedom of association. All penalties in respect of illegitimate actions linked to strikes should be proportionate to the offence or fault committed and the authorities should not have recourse to measures of imprisonment for the mere fact of organizing or participating in a peaceful strike.***

(g) The Committee requests the Government to carry out an independent inquiry without delay into the conduct of the various parties during the strike action, including the allegations of injuries suffered by two workers when a company truck drove through the picket line, with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts. It requests the Government to keep it informed in this respect.

CASE NO. 2348

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

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

Allegations: Restrictions on the right to organize

969. The Committee examined this case at its November 2005 meeting where it presented an interim report to the Governing Body [see 338th Report, paras. 984-998, approved by the Governing Body at its 294th Session].

970. As a consequence of the lack of a response on the part of the Government, at its June 2006 meeting [see 342nd Report, para. 10, approved by the Governing Body at its 296th Session] 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 have not been received in due time. To date, the Government has not sent its observations.

971. Iraq has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) and the Workers' Representatives Convention, 1971 (No. 135).

A. Previous examination of the case

972. When it last examined this case, the Committee formulated the following recommendations [see 338th Report, para. 998]:

(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 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.

B. The Committee's conclusions

973. *While taking note of the very serious situation of instability in the country and the ongoing process of reconstruction and rebuilding of national institutions, the Committee is compelled to insist on the importance it places on the right of workers to exercise freely their trade union rights and regrets the fact that despite the time that has elapsed since the case was last examined, the Government has not replied to 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.

974. *Under these circumstances, and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body], 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.*

975. *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.*

976. *The Committee recalls that, in its previous examination it had asked the complainant to provide it with more information concerning the threats and attacks against Iraqi trade unionists. The Committee deeply regrets that neither the complainants nor the Government have provided it with any additional information. In these circumstances, the Committee considers that this aspect of the case does not call for further examination.*

977. *As regard Decree No. 16, the Committee urges the Government, once again, to take the necessary measures for its amendment so as to ensure that workers 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. The Committee also requests the Government to review its legislation and, if necessary, to take measures to amend it so as 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 in line with the requirements of Conventions Nos. 87 and 98.*

The Committee's recommendations

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

(a) While taking note of the very serious situation of instability in the country and the ongoing process of reconstruction and rebuilding of national institutions, the Committee, insisting on the importance of the right of workers to exercise freely their trade union rights, regrets that the Government has not replied to the Committee's interim recommendations, despite the fact that it was invited to do so on several occasions, including by means of an urgent appeal.

(b) The Committee 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 and requests the Government to keep it informed of the progress made in this regard.

(c) The Committee once again requests the Government to review its legislation and, if necessary, to take measures to amend it so as 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 in line with the requirements of Conventions Nos. 87 and 98.

CASE NO. 2319

DEFINITIVE REPORT

Complaint against the Government of Japan presented by
— the National Confederation of Trade Unions (ZENROREN) on behalf of the Zenroren National Union of General Workers' Union (ZENROREN-ZENKOKUIPPAN) and
— the Zenroren National Union of General Workers' Union Tokyo (ZENROREN-ZENKOKUIPPAN, TOKYO)

Allegations: The complainant organization alleges that the employer violated trade union rights by dismissing ten trade union members, refusing to enter into meaningful negotiations and attempting to break the union; and that the Government violated related Conventions by condoning the employer's stance

979. The complaint is contained in communications dated 14 January 2004, 15 September 2004 and 2 August 2005 from the Zenroren National Union of General Workers' (ZENROREN-ZENKOKUIPPAN).

980. The Government provided its observations in communications dated 15 September 2004, 13 September 2005 and 19 September 2006.

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

A. The complainants' allegations

982. In its communications of 14 January and 15 September 2004, the complainant organization ZENROREN states that the dispute in the present case arose between the Tokyo Hilton Hotel and some of its non-regular "Haizennin" (waiters, who also carry out a wide range of related duties in a restaurant) introduced to the hotel by a "Haizennin Shohkaijo" or "Haizenkai" (specialized employment agencies that put Haizennin into relation with hotels and restaurants).

983. The complainant organization alleges that, on 9 March 1999, the Tokyo Hilton Hotel proposed to the union representing Haizennin a monthly wage reduction of 14 per cent (i.e. 20-50,000 yen depending on the situation of individual plaintiffs), warning at the same time that union members who refused that proposal would be discharged, effective 10 April 1999. The union members were thus facing a dilemma: give up the right to bargain collectively and accept a wage reduction, or lose their jobs. ZENROREN Tokyo

wrote on 10 May to management, stating that they agreed to the wage reduction but reserving the right to dispute the case. The hotel management considered that this conditional acceptance did not constitute agreement and dismissed the ten ZENROREN members who had accepted only conditionally. Thereafter, the management refused to enter into meaningful negotiations and tried to break up the union.

984. The Tokyo District Court ruled in March 2002 that the dismissals were invalid, reasoning that, although the employees were not regular workers, they had been employed in the same workplace continuously, and that if such dismissals were authorized, employers could freely change working conditions. The union tried to negotiate with the management based on the Tokyo District Court ruling, but the hotel did not rehire any of the ten workers and negotiations ended. On appeal, the Tokyo High Court overruled the District Court, and decided in November 2002 that to give legal protection to workers who had accepted the management offer only conditionally would be an excessive requirement for an employer that has to survive through rationalization and cost-reduction measures. The union appealed the High Court judgement to the Supreme Court.

985. ZENROREN argues that, as the situation stands, workers who raise objections may be dismissed. If such unreasonable dismissals were allowed, employers would have the right freely to change pay and working conditions, which would deprive workers of all means of expression. It would also deny the fundamental principles and the right to collective bargaining contained in the Labour Code and in the Constitution of Japan, which provide that working conditions are to be decided on an equal footing between labour and management.

986. The complainant organization also submits that the Government has violated Conventions Nos. 87 and 98 by siding with the Hilton Hotel. The High Court decision not only permitted violation of ILO Conventions by the hotel management, but also restricted or prevented the free fixing of wages by means of collective bargaining. The Government has endorsed the rationalization and cost-reduction measures taken by the hotel as part of the economic situation stabilization, rather than protecting workers' rights, thus failing to promote collective bargaining.

987. The complainant organization refers to the Committee's decision in Case No. 2186 [330th Report, para. 382] as supporting its position. It attaches to its arguments an unofficial translation of the judgements of the District Court and the High Court, upon which it bases the above allegations.

988. In its communication of 2 August 2005, following a request by the Committee for the complainant organization to provide more information regarding its allegations [see 337th Report, para. 7], the complainant organization stated that it is continuing its efforts to provide further information concerning the dismissals at the Hilton, as well as any information linking the dismissals of the workers to their union activities.

989. In its communication of 15 January 2006, the complainant supplies further information in support of its allegations. The complainant states that a number of communications between itself and the management of the Tokyo Hilton Hotel confirm the existence of a labour agreement; documents such as the confirmation letters of the minutes of 21 July 1988 and 17 November 1994, which refer to night work pay and transportation allowances for the Haizennin, are duly established labour agreements that are binding and valid until mutual cancellation becomes effective.

990. The complainant alleges that, under the Trade Union Law, if the management wishes to cancel a labour agreement, it must do so in writing and provide the trade union with a 90-day notice period. Otherwise, the management must hold a bargaining session with the

trade union and the two parties must both agree to cancel the existing agreement; should no consensus on cancellation of the agreement be reached, the management must establish a new labour agreement with the trade union. Moreover, the management is not allowed to force labour union members, under threat of dismissal, to agree to lower working conditions. The complainant states that the management of the Hilton Hotel failed to properly cancel the existing labour agreement, as it failed to observe the requisite formalities; the Hilton Hotel management also failed to gain the complainant's consent to annul the agreement.

991. Finally, the complainant alleges that, following the Tokyo Hilton Hotel's initial proposal to reduce the Haizennin's working wages, it had sought to bargain collectively with the employer on several occasions. On 13 January 1999, the complainant sent a counterproposal letter to the employer stating that it could not agree to the employer's proposed reductions. On 9 March 1999, a collective bargaining session between the complainant and the employer was held, at which the employer handed out documents entitled "Notification to change working conditions" and warned that it would discharge union members who refused to accept its proposal by 10 April 1999. In addition to these attempts at collective bargaining, mediation was sought before the Tokyo Labour Board: the first mediation session was held on 8 March 1999, and the last on 30 April 1999. Said sessions failed, however, as the employer refused to change its basic stance and did not withdraw its request to change the Haizennin's working conditions.

B. The Government's reply

992. In its communication of 15 September 2004, to which is attached the position of the Hilton Hotel, the Government states that the hotel notified the Haizennin that it was going to change their working conditions (pay for actual working hours only, and not for breaks and meals; change in transportation expenses; reduction of premium pay for work done after or before certain hours). While the majority of Haizennin accepted the changes, some of them accepted under condition, reserving the right to dispute the case. The hotel refused to renew their contract, and they filed a lawsuit requesting inter alia confirmation of their rights under the labour contract and challenging the validity of the non-renewal of their contracts.

993. In its communication of 31 August 2004, the management of the hotel explains that there exists a Japanese legal entity, called Nihon Hilton KK, established in 1983 as a joint venture between Tokyo Toshikaihatsu KK (40 per cent, and owner of the building), Hilton International (40 per cent) and Nipponkoa Insurance Co. Ltd. (10 per cent), etc. Nihon Hilton KK manages a single hotel (the Hilton Tokyo) through the operator it has retained, Hilton International. The ten workers subject of the complaint ("the Ten") were employed by Nihon Hilton KK; therefore, the Hilton Tokyo was not their employer in a strict sense. It was Nihon Hilton KK that was sued by the Ten and their union. The fact that the management replies to the complaint does not mean that it accepts that it employed them.

994. Hilton disagrees entirely that it dismissed the ten employees because of their trade union activities, that it tried to break up the union and that it violated freedom of association principles. The contractual basis on which Haizennin were engaged is a matter of dispute between the hotel and the union. While the latter argues that all Haizennin were long-term employees, Hilton considers that it employed Haizennin, including the Ten, on a day-to-day basis. The Tokyo District and High Courts have both heard the parties' arguments on this issue and have found against the union; the case is pending before the Supreme Court. The union's characterization of the cessation of the relationship between the Ten and Hilton as "dismissal" depends on the success of their argument above. Hilton considers that argument invalid and has twice been vindicated by the courts. As employees

who worked for Hilton on a day-to-day basis, these workers could not be dismissed as there was no engagement from which to dismiss them.

995. Independently of the proper characterization of the cessation of employment, Hilton submits that it has properly and consistently engaged in collective bargaining with the union and at no time sought to break it up. Hilton's decision not to engage the Ten beyond 11 May 1999 was not due to their trade union activities, but rather to the negative economic circumstances and the inability of the parties to reach an agreement on revised working conditions.

996. Since the burst of the bubble economy in the early 1990s, the Japanese economy has suffered a long and severe recession that has particularly affected the high end of the hotel industry, forcing the closure of several famous hotels. Hilton was not exempt from these factors: after six consecutive years of deficit, by the end of the 1998 fiscal year it had 3.7 billion yen of accumulated losses and a debt of 5.59 billion yen, 2.9 billion of which were financed through short-term loans that needed to be continually rolled over to meet operating costs. In September 1998, the banks refused to roll the loans over unless Toshikaihatsu KK underwrote bonds to secure the loans, which it refused, cancelling Hilton's lease as of 30 November 1998. From then on, Hilton thus had to focus all its energies on negotiations: with the banks to reinstate loans; with shareholders to provide more capital; and with the lessor of the hotel building to withdraw the cancellation notice, reduce the rent and allow further deferred payments. Almost all of these negotiations were successful and avoided closure, on condition that Hilton cut its operating costs, including those associated with staff.

997. Hilton initially cut costs through the contracting-out of some food and cleaning services, reduced by 64 the hiring of new regular employees in 1999, and negotiated a reduction in the compensation package with the union representing full-time regular employees (freeze in wage increase in the 1999 fiscal year; reduction in annual bonuses from five to 3.45 months of salary; reduction in special paid leave). Negotiations with ZENROREN however ran a different course.

998. On 16 October 1998, the union and Hilton met for their annual collective bargaining session. The union asked for a pay rise and an annual lump-sum bonus for Haizennin. Hilton explained that it could not accede to these demands due to severe financial circumstances, and that it could not remain viable unless it reviewed the working conditions of Haizennin and rationalized all aspects of its business, failing which it might be forced to reduce, transfer or close it, in which case it would not be able to employ any Haizennin. On 27 October, the hotel stated its position in writing to the union (freeze in wage increase from 1 October 1998; impossibility of paying the lump-sum bonus). The union reiterated its demands on 19 November 1998.

999. At a second collective bargaining session on 27 November 1998, Hilton again explained the whole situation, and the steps taken to reduce costs, including the possibility of outsourcing all tasks performed by Haizennin. This idea was abandoned following further discussions with the union and Hilton conceived a compromise offer, along the lines of working conditions offered in similar hotels (pay for actual working hours only, and not for breaks and meals; change in commuting allowance; reduction of premium pay for late and early work hours) for an estimated annual saving of 40 million yen. The union refused this offer in writing on 13 January 1999, reiterating its demands for a pay increase.

1000. The deadlock persisted at a third bargaining session on 26 January 1999. A fourth bargaining session was held on 9 March 1999, where Hilton informed the union in writing that it would implement the change in Haizennin working conditions from 10 April 1999:

"Please note that Hilton Tokyo cannot employ Haizennin who do not consent to the changed working conditions by April 10, 1999".

1001. Hilton rejects the complainant's allegation that it acted contrary to the collective bargaining process in force. Rather, it followed the procedures existing in Japan and negotiated in good faith for as long as mutual agreement seemed possible, and continued to negotiate after 9 March 1999, engaging in mediation before the Tokyo Metropolitan Government Local Labour Relations Commission with sessions being held on 8, 20 and 30 April 1999, without success however. A fifth bargaining session was held on 7 May 1999, where the union informed the management that its members accepted Hilton's offer but "… reserved the right to dispute the disadvantageous change of working conditions". Hilton considered that this was a counter-offer rather than an acceptance and, on 10 May 1999, informed the union in writing that a conditional acceptance was no acceptance but rather a rejection of its offer. Hilton also posted a notice at the workplace entrance, stating: "The due date for written acceptance of the change in working conditions is midnight of today, May 11. Please note that Haizennin who do not consent in writing will not be engaged on and after May 11". The Ten did not consent and Hilton did not engage them from that date.

1002. Hilton concludes that the cessation of engagement of the Ten was not due to their trade union activities; it explained several times the severe financial situation to the union and at no time attempted to break it. Indeed, it negotiated at all times with the union and compromised on some of its concerns; even after 11 May 1999, the collective bargaining continued periodically up to the present time; Hilton's current employees are members of various unions, including the complainant; Hilton does not discourage such membership and freely engages in collective bargaining, as it did with the complainant. At no time did Hilton violate freedom of association principles.

1003. As regards the Tokyo High Court decision, Hilton submits that the translation provided by the complainant contains many inaccuracies and that, in any event, the Court ruled that the hotel had valid reasons not to renew these contracts as it considered: that the change in working conditions was motivated by cost savings; that the hotel bargained collectively with the union and repeatedly explained the reasons for the change; that the Haizennin conditional acceptance amounted to a rejection of the hotel offer; and that to force the hotel to renew the daily working contracts would be unduly burdensome.

1004. In its communication of 13 September 2005, the Government sent a copy of the Supreme Court judgement dismissing the appeal of ZENROREN-ZENKOKUIPPAN, since no ground for the appeal could be found. The judgement by the Tokyo High Court was made final and binding. In a communication of 19 September 2006, the Government affirmed the observations it had transmitted in its previous communications.

C. The Committee's conclusions

1005. *The Committee notes that the present complaint concerns allegations of dismissals of trade union members in the context of an alleged refusal, by a private employer, to enter into meaningful collective bargaining, a situation that the Government allegedly condoned by endorsing the employer's stance, thereby violating freedom of association Conventions. The employer denies that it dismissed the employees for their trade union activities, tried to break up the union or violated freedom of association principles.*

1006. *As regards the Hilton's arguments on the legal structure of the joint venture created for the operation of the hotel and their possible impact on the employment relationship between the Hilton and the Haizennin (waiters), the Committee notes that the employer's identity was not a turning point in the relevant court's decisions, including the Tokyo High*

Court's judgement that upheld the Hilton's views; rather, the issue in both instances was the nature of the contract and whether the cessation of employment amounted to unlawful dismissal or was a non-renewal of individual contracts justified in the particular circumstances. The District Court found in favour of the complainants; the High Court overturned that decision; and the Supreme Court dismissed the appeal of the ZENROREN-ZENKOKUIPPAN, which made the Tokyo High Court judgement final and binding. On the basis of the evidence submitted, it appears to the Committee that the Hilton was at the very least the de facto employer of the Haizennin: for several years, there had been collective bargaining on working conditions between the union representing them and the hotel management; and workers who wait tables in a Hilton establishment may legitimately consider that they are being employed by the Hilton. The Committee further notes that, while the complainant maintains that the Hilton's actions were uniquely motivated by anti-union animus, the Hilton alleges that they arose out of a need to cut costs, and that it negotiated with the union on several instances. From a freedom of association perspective, therefore, the Committee considers that the complainant organization has not established (irrespective of how the Supreme Court would qualify the cessation of work – unlawful dismissal in the context of a labour contract, or lawful non-renewal of day-to-day employment) that these measures were anti-union motivated, e.g. that Haizennin members of ZENROREN were singled out for termination. Taking into account the judgement of the Supreme Court, the Committee concludes that this aspect of the case does not call for further examination.

1007. *As regards the complainant's allegation that the employer refused to enter into meaningful negotiations, the Committee recalls that, while the question as to whether or not one party adopts an amenable or uncompromising attitude towards the other party is a matter of negotiation between the parties, both employers and trade unions should bargain in good faith, making every effort to reach an agreement [**Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 817]. The evidence adduced shows that there were at least five direct bargaining sessions between the parties and three mediation meetings before the competent Labour Relations Commission, all of which could not resolve the deadlock. The Committee further notes that the employer made some concessions and counter-proposals that the trade union rejected, sticking to its initial demands throughout the process. In the circumstances, the Committee concludes that, unfortunate as the results may be for the workers concerned, the collective bargaining process ran its course, both in direct negotiating sessions and with the help of the conciliation/mediation machinery existing at national level. Related to this, the Committee considers that the allegations of partiality and violation of freedom of association Conventions made against the Government are not sufficient.*

1008. *Concerning the employer's alleged attempts to break up the union, the Committee notes that these are allegations only, not backed up by evidence. Collective bargaining has continued up to the present time at Tokyo Hilton with various unions, including the complainant.*

1009. *As regards the complainants' reference to Case No. 2186, which concerns another country, the Committee points out that all complaints are dealt with on a case-by-case basis taking into account individual circumstances, and that the evidence in that case showed interference and anti-union actions by the employer [see 330th Report, paras. 377-378], which has not been established here.*

The Committee's recommendation

1010. ***In the light of its foregoing conclusions, the Committee invites the Governing Body to decide that this case does not call for further examination.***

CASE NO. 2432

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

Complaint against the Government of Nigeria presented by the Academic Staff Union of Universities (ASUU)

Allegations: The complainant organization alleges that the Government's 2005 amendments to the Trade Union Act, adopted without proper tripartite consultation, violates established freedom of association principles on strikes, essential services and the right to organize

1011. The complaint is contained in a communication dated 6 June 2005 from the Academic Staff Union of Universities (ASUU).

1012. The Committee has been obliged to postpone its examination of the case on two occasions [see 338th and 340th Reports, paras. 5 and 6, respectively]. At its meeting in May-June 2006 [see 342nd 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.

1013. Nigeria has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

1014. In its communication of 6 June 2005, the Academic Staff Union of Universities (ASUU) alleges that the Trade Union (Amendment) Act, passed in 2005 without proper tripartite consultation, violates workers' freedom of association and collective bargaining rights. Specifically, the complainant draws the Committee's attention to sections (6)(a) and (b) and 9 of the new Act, all regarding the right to strike. The complainant further alleges that the new Act denies to workers in the army, navy, air force, police force, customs and excise, immigration, prisons and preventive services the right to form trade unions.

1015. According to the complainant, section (6)(a) of the Amendment Act bans strikes in essential services, which include services not constituting essential services in the strict sense of the term. More specifically, the complainant submits that the following services are considered essential under the Trade Dispute Act of 1990 (Cap 432, Laws of the Federation), to which the new Act refers: radio and television; postal services; ports; services involving "fuel of any kind"; transport of persons, goods or livestock by road, rail, sea, river or air; aircraft repairs, the Mint, banking and metropolitan transport.

1016. The complainant further draws the Committee's attention to section 6(b) of the new Act, which limits strikes to concerns constituting a "dispute of right". The amended Act defines "dispute of right" as "any labour dispute arising from the negotiation, application,

interpretation or implementation of a contract of employment or collective agreement under the Act or any other enactment of law governing matters relating to terms and conditions of employment". According to the complainant, the new Act deprives workers of their right to promote their interests and to protest against social and labour consequences of the Government's economic policy such as poverty, malnutrition and huge-scale unemployment.

1017. The ASUU adds that section 9 of the Act amending section 42(1)(B) requires that "no trade union or registered federation of trade unions or any member thereof shall in the course of any action compel any person who is not a member of its union to join and strike or in any manner whatsoever, prevent aircrafts from flying or obstruct public highways, institutions or premises of any kind for the purpose of giving effect to the strike" and therefore grants the Government broad discretion to widely define otherwise legal strike activity within the vague and over-broad language of the law. The complainant infers from the above that any group of workers on strike who have gathered on the premises or on the streets, however peaceful, may be accused of obstructing premises and highways just for grouping themselves there.

1018. The complainant further alleges that the new Act denies to workers in the army, navy, air force, police force, customs and excise, immigration, prisons and preventive services the right to form trade unions.

1019. The complainant believes that the motive behind the new amendment was to weaken the united workers of Nigeria and continue to allow the Government to impose the same economic and social policies that have caused Nigerian workers to suffer in the past. Furthermore, the complainant considers that this new Act amounts to an abortion of the process of comprehensive review of Nigeria's labour laws backed up by the ILO.

B. The Committee's conclusions

1020. *The Committee deeply regrets that, despite the time that has elapsed since the complaint was first presented, the Government has not replied to 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 strongly urges the Government to be more cooperative in the future.*

1021. *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.*

1022. *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].*

1023. *The Committee notes that the allegations in this case concern restrictions imposed by the Trade Union (Amendment) Act, 2005, upon the workers' right to form and join the organization of their own choosing as well as their right to strike. The Committee also notes the complainant's allegation that this legislation was adopted without prior tripartite consultations. In this respect, the Committee must emphasize the value of consulting organizations of workers and employers during the preparation and application of*

*legislation, which affects their interests [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 929 and 930]. It requests the Government to take note of this principle in the future.*

1024. *Regarding the definition of essential services, the Committee emphasizes that any law banning strikes in essential services should limit the definition of such services to its strict sense, i.e. to services the interruption of which would endanger the life, personal safety or health of the whole or part of the population. The principle regarding the prohibition of strikes in essential services might lose its meaning if a strike were declared illegal in one or more undertakings which were not performing an essential service in the strict sense of the term [see **Digest**, op. cit., para. 542]. While the Committee has previously noted that what is meant by essential services depended to a large extent on the particular circumstances prevailing in a country and that a non-essential service could become essential if a strike lasted beyond a certain time or extended beyond a certain scope, thus endangering the life, personal safety of the whole or part of the population [see **Digest**, op. cit., para. 541], it has considered that the following services are not essential services in the strict sense of the term: radio and television, the petroleum sector, ports (loading and unloading), banking, transport generally, postal services, the Mint, metropolitan transport and aircraft repairs. Therefore, the Committee requests the Government to amend the definition of "essential services" so as to limit them to situations where there is a clear and imminent threat to the life, personal safety or health of the whole or part of the population. The Committee recalls in this respect that the Government could, following full and frank consultations with the social partners, establish a system of minimum service in services which are of public utility rather than impose an outright ban on strikes, which should be limited to essential services in the strict sense of the term. It further recalls that the establishment of minimum services in the case of strike action should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services in the strict sense of the term); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and (3) in public services of fundamental importance [see **Digest**, op. cit., para. 556].*

1025. *With regard to the allegation of restrictions relating to the objective of strikes, the Committee notes that section 6 of the new Act limits legal strikes to disputes constituting a dispute of right, defined as "a labour dispute arising from the negotiation, application, interpretation or implementation of a contract of employment or collective agreement under the Act or any other enactment of law governing matters relating to terms and conditions of employment, as well as to a dispute arising from a collective and fundamental breach of employment or collective agreement on the part of the employee, trade union, or employer". It appears from this definition that the legislation would therefore exclude any possibility of a legitimate strike action to protest against the Government's social and economic policy affecting workers' interests. The Committee recalls that organizations responsible for defending workers' socio-economic and occupational interests should be able to use strike action not only to support their position regarding better working conditions or collective claims of an occupational nature, but also in the search for solutions posed by major social and economic policy trends that have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living [see **Digest**, op. cit., para. 480]. Therefore, the Committee requests the Government to amend section 6 of the new Act so as to ensure that workers' organizations may have recourse to protest strikes aimed at criticizing the Government's economic and social policies without sanctions, as well as in disputes of interest.*

1026. *As concerns amended section 42(1)(B), requiring that "no trade union or registered federation of trade unions or any member thereof shall in the course of any action compel any person who is not a member of its union to join and strike or, in any manner whatsoever, prevent aircraft from flying or obstruct public highways, institutions or premises of any kind for the purpose of giving effect to the strike", the Committee notes that, according to the complainant, such a wording could potentially restrict the exercise of an otherwise legal strike or any peaceful meeting. The Committee notes that this section provides for two prohibitions: firstly, with regard to compelling non-union members to participate in a strike action and, secondly, the prohibition to obstruct public highways, institutions or premises of any kind for the purpose of giving effect to the strike. The Committee considers that taking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful. The case is different, however, when picketing is accompanied by violence or coercion of non-strikers in an attempt to interfere with their freedom to work [see* ***Digest****, op. cit., para. 586]. As to the second prohibition, the Committee considers that the broad wording of this section could potentially outlaw any gathering or strike picket and recalls that the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and, in any event, not such as to place a substantial limitation on the means of action open to trade union organizations [see* ***Digest****, op. cit., para. 498]. In addition, given that aircraft-related services, with the exception of air traffic controllers, are not in themselves considered to be essential services, a strike of workers in that sector or related services should not be the subject of an overall ban, as could be implied from the wording of this section. The Committee requests the Government to amend its legislation so as to bring it into conformity with the above principles and so as to ensure that any restrictions placed on strike actions aimed at guaranteeing the maintenance of public order are not such as to render any such action relatively impossible.*

1027. *As regards the allegation that workers employed in the army, navy, air force, police force, customs and excise, immigration and prisons, preventive services are denied the right to establishing their organizations, the Committee notes that, in fact, section 11 of the Trade Union Act (1973) denies the right to organize to employees in the abovementioned services, as well as to those employed in the Nigerian Security Printing and Minting Company, the Central Bank of Nigeria, Nigerian External Telecommunications and other establishments as the minister may from time to time specify. The Committee emphasizes that workers, without distinction whatsoever, shall have the right to establish and to join organizations of their choosing. It recalls that the only exceptions authorized by Convention No. 87 are the members of the police and armed forces, who should be defined in a restrictive manner and should not include, for example, civilian workers in the manufacturing establishments of the armed forces [see* ***Digest****, op. cit., para. 222]. Furthermore, the Committee is of the opinion that the functions exercised by employees of customs and excise, immigration, prisons and preventive services should not justify their exclusion from the right to organize on the basis of Article 9 of Convention No. 87. The Committee therefore requests the Government to amend section 11 of the Trade Union Act (1973) so that these categories of workers are granted the right to organize and to bargain collectively.*

1028. *The Committee asks the Government to keep it informed of measures taken or envisaged in respect of the above-requested legislative amendments. It reminds the Government that it may avail itself of the technical assistance of the Office if it so desires. It draws the legislative aspects of the case to the Committee of Experts on the Application of Conventions and Recommendations.*

The Committee's recommendations

1029. ***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 complainant's allegations. The Committee strongly urges the Government to be more cooperative in the future.

(b) The Committee expects the Government to ensure in the future that full and frank consultations with workers' and employers' organizations are held before the adoption of any legislation affecting their interests.

(c) The Committee requests the Government to amend its legislation in line with the provisions of Conventions Nos. 87 and 98 so as to:

- ***limit the definition of "essential services" to the strict sense of the term, i.e. to services the interruption of which would endanger the life, personal safety or health of the whole or part of the population;***
- ***ensure that workers' organizations may have recourse to protest strikes aimed at criticizing the Government's economic and social policies that have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living, as well as in disputes of interest, without sanction;***
- ***ensure that peaceful incitement of workers to participate in a strike action is not forbidden;***
- ***ensure that the wording of section 42(1)(B) is not used to declare illegal peaceful strike actions, including picketing, workplace occupations and gathering and that any restrictions placed on strike actions aimed at guaranteeing the maintenance of public order are not such as to render any such action relatively impossible; and***
- ***amend section 11 of the Trade Union Act (1973) so that employees in the Customs and Excise Department, the Immigration Department, the prison services, the Nigerian Security Printing and Minting Company, the Central Bank of Nigeria and Nigerian External Telecommunications, are ensured the right to organize and to bargain collectively.***

It requests the Government to keep it informed of the measures taken in this respect.

(d) The Committee reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.

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

CASE NO. 2248

INTERIM REPORT

Complaint against the Government of Peru presented by the General Confederation of Workers of Peru (CGTP)

Allegations: Dismissal or transfer of trade union members at the following enterprises: Petrotech Peruana S.A.; the Santa Luisa Mining Company S.A.; Aceros Arequipa Corporación S.A.; and the Southern Peru Copper Corporation

1030. The Committee examined this complaint at its November 2005 meeting and on that occasion presented an interim report to the Governing Body [see 338th Report, paras. 1187-1210, approved by the Governing Body at its 294th Session in November 2005].

1031. The General Confederation of Workers of Peru (CGTP) sent additional information in communications dated 25 September 2005, and 6 and 13 January 2006. The Government sent new observations in communications dated 23 January and 8 March 2006.

1032. 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. Previous examination of the case

1033. In its previous examination of the case at its meeting in November 2005, the Committee made the following recommendations on the questions still pending [see 338th Report, para. 1210]:

– 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. 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.

– 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.

– 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.

– 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.

– 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.

– 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.

B. Additional information from the complainant organization

1034. In its communication of 26 September 2005, the General Confederation of Workers of Peru (CGTP) alleges that 11 months after the dismissal of its General Secretary, Mr. Ricardo José Quispe Caso, for his trade union activities, the judicial authorities have still not given a ruling. As a result of the dismissal, Mr. Ricardo José Quispe Caso's children were required to leave their school (run by the Southern Peru Copper Corporation) and lost their health-care benefits.

1035. In its communications of 6 and 13 January 2006, the CGTP states that a ruling of 14 December 2005 ordered the reinstatement of Mr. Ricardo José Quispe Caso in his post and payment of benefits owed to him.

1036. The CGTP adds that the Jorge Basadre district public prosecutor, in a written complaint on 15 November 2005, accused Mr. Ricardo José Quispe Caso of the criminal offence of disrupting public order by holding a disorderly meeting intended to damage the Southern Peru Copper Corporation (this differed significantly from a previous ruling, which had ordered that the case be filed), although there was no credible evidence that Mr. Ricardo José Quispe Caso had committed the offences of which he was accused. The conduct of the Jorge Basadre district judge, who accepted the prosecution case and 13 days later initiated preliminary criminal proceedings and issued a summons, was most regrettable. In the view of the CGTP, this constituted anti-union conduct.

1037. The CGTP states that, in all the proceedings involving Mr. Ricardo José Quispe Caso, the evidence presented included an expert's report on video footage of events which took place during a strike by the miners of Toquepala between 31 August and 12 September 2004. This video shows that Mr. Ricardo José Quispe Caso assisted and protected the occupants of a mining company vehicle and took no part in the violence alleged by the company.

C. New reply by the Government

1038. In its communications of 23 January and 8 March 2006, the Government states, with regard to the dismissals at Petrotech Peruana S.A., that legislation provides for the reinstatement of workers or trade union officials who are dismissed because of their union membership or union activities. It is for the judge to issue a ruling on this. The Regional Department of Labour and Employment Promotion (DRTPE-PIURA) carried out a special inspection on 28 October 2005, and it was confirmed on that occasion that Mr. Leónidas Campos Barranzuela (the union's general secretary) was reinstated in his post on 24 September 2004.

1039. As regards the alleged anti-union transfer of union officials from their main productive work to camp cleaning duties at the Santa Luisa Mining Company, the Government states that the judicial complaint lodged by the company union was ruled by the courts to be without foundation, since the case had been filed. According to documentation supplied by the Government, a number of different courts rejected the union's complaint on the grounds that it described as "dismissed" a worker who had chosen to leave the company and the complaint made no reference to specific workers or specific contraventions (inadequate procedural corroboration).

1040. As regards the collective dismissal of 132 unionized workers (including six trade union officials) at Embotelladora Latinoamericana S.A. (ELSA), the Government states that, on 2 September 2004, the Department for the Prevention and Settlement of Disputes of the Ministry of Labour and Employment Promotion (MTPE) gave a ruling rejecting a request by ELSA to authorize the collective dismissal of workers on structural grounds since there was no evidence of a structural cause that might justify such a measure. Subsequently, both the DRTPE-PIURA of Lima Callao and the National Department for Labour Relations endorsed that decision. It should be noted that the collective dismissal originally applied to 233 workers but, between 25 May and 12 July 2004, some 133 workers accepted voluntary retirement and another 32 were transferred and continue to work, so that only 68 workers of the original number would benefit from the refusal to authorize the collective dismissal; the company is thus obliged to reinstate those workers because the company's original application for authorization of the collective dismissal was not upheld. This suggests that there is no threat to or violation of the complainants' rights of freedom of association on the part of the Government. The Government also refers 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, by the Southern Peru Copper Corporation, for his part in assaulting a worker who had refused to join a strike between 31 August and 9 September 2004. The Government states that the proceedings are now at the decision stage.

1041. In order to ensure appropriate follow-up to the conclusions and the recommendations made in this case by the Freedom of Association Committee, the Government needs to have the definitive decisions of the courts on the questions referred to them. However, in the light of the examination of each of these questions so far, the Government considers that in view of the above, it does not threaten the complainants' rights of freedom of association, and has endeavoured in various ways to ensure that those rights are respected. Lastly, the Government states that it will continue to provide information on the other questions still pending.

D. The Committee's conclusions

1042. *The Committee takes note of the Government's replies on four of the six requests for information or action contained in the recommendations made at its meeting in November 2005.*

1043. *As regards the recommendation concerning the dismissal of trade union officials (the general secretary, Mr. Leónidas Campos Barranzuela, and deputy general secretary, Julio Purizaca Cornejo, in December 2002) at Petrotech Peruana S.A. immediately following the establishment of a trade union organization, the Committee notes the Government's statements to the effect that Mr. Leónidas Campos Barranzuela, the union's general secretary, was reinstated in his post, and that legislation provides that the judicial authorities should order the reinstatement of the other officials or members dismissed for anti-union reasons. The Committee requests the Government to indicate whether the trade union official, Mr. Julio Purizaca Cornejo, has applied to the courts for reinstatement and, if that is the case, to communicate the outcome of that application.*

1044. *As regards the alleged anti-union transfer of trade union officials by the Santa Luisa Mining Company, the Committee notes the Government's statements to the effect that the legal amparo action initiated by the union was not upheld by the judicial authority.*

1045. *As regards the alleged collective dismissal of 132 unionized workers (including six trade union officials) at Embotelladora Latinoamericana S.A., the Committee notes the Government's statements in this regard, and specifically those to the effect that: (1) the Ministry of Labour in September 2004 refused to authorize the request for a collective dismissal of workers on the "structural grounds" cited by the company, on the grounds that there was no evidence of any structural cause that might justify such action; (2) before this, some 133 workers had accepted voluntary retirement and a further 32 were transferred; and (3) as a result of the Ministry of Labour ruling, the company was obliged to reinstate the remaining 68 workers.*

1046. *As regards the dismissal of Mr. Ricardo José Quispe Caso, the Committee notes with interest that the complainant organization has reported that this union official has been reinstated in his post under the terms of a judicial ruling. The Committee regrets the dismissal of the official in question and the length of the judicial proceedings before he was reinstated, and the fact that his children had to be removed from their school and were without health-care coverage until he was reinstated. Noting the allegations concerning the criminal proceedings initiated against union official, Mr. Ricardo José Quispe Caso, by the Southern Peru Copper Corporation for disrupting public order ("disorderly meeting"), in the absence (according to the complainant organization) of any credible evidence and for anti-union motives, the Committee requests the Government to communicate any ruling handed down.*

1047. *The Committee reiterates its recommendations of November 2005 in relation to the questions to which the Government has not replied, and urges it to send its observations without delay, in particular:*

- *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.*
- *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.*

The Committee's recommendations

1048. ***In the light of the foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:***

(a) The Committee requests the Government to indicate whether the trade union official, Mr. Julio Purizaca Cornejo (Petrotech Peruana S.A.) has applied to the courts for a reinstatement order and, if he has done so, to communicate the outcome.

(b) Noting the allegations concerning the criminal proceedings initiated against the trade union official, Mr. Ricardo José Quispe Caso, by the Southern Peru Copper Corporation for disrupting public order ("disorderly meeting"), in the absence (according to the complainant organization) of any credible evidence and for anti-union motives, the Committee requests the Government to send a copy of any ruling handed down.

(c) As regards the alleged dismissal of more than 300 workers of the permanent workforce at the Corporación Aceros Arequipa S.A. and their replacement with workers hired on less favourable terms with a view to undermining the trade union, the Committee once again urges the Government, without delay, to communicate the outcome of the inspection visit carried out by the authorities to the enterprise and to send its observations on the dismissal of more than 300 workers.

(d) The Committee once again urges the Government without delay to send its observations on the allegations concerning harassment of Mr. Victor Alejando 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. 2452

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

Complaint against the Government of Peru presented by the Federation of Peruvian Light and Power Workers (FTLFP)

Allegations: Non-compliance with the provisions of the collective agreement and the legislation on remuneration and payments; refusal to grant union leave to union officials; actions preventing collective bargaining

1049. The complaint is contained in communications from the Federation of Peruvian Light and Power Workers (FTLFP) dated 30 May and 4 October 2005. The Government sent its observations in communications dated 30 March 2006 and 4 August 2006.

1050. 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

1051. In its communications of 30 May and 4 October 2005, the Federation of Peruvian Light and Power Workers (FTLFP) alleges that the enterprise Electro Sur Medio S.A.A. (ESM S.A.A.) is undergoing insolvency proceedings based on the General Act on the Insolvency System of 5 August 2002, jeopardizing the rights of 285 workers, the rights of freedom of association, collective bargaining, the right to employment and the labour entitlements of the workers. The aforementioned Act – which the complainant encloses – provides that "insolvency proceedings are intended to promote a conducive environment for negotiation between the creditors and the insolvent debtor, enabling them to reach an agreement on reorganization or, if not, to exit the market in an orderly fashion with low settlement costs". These insolvency proceedings are an attempt to cover up the failure of the privatization exercise carried out in 1997 under the Fujimori dictatorship, non-compliance with privatization and investment commitments, the plunder of the economic/financial resources of the enterprise and the dismantling and deterioration of its premises, headquarters and infrastructure.

1052. The FTLFP reports that the rights and benefits that have been systematically and illegally infringed upon include the following:

– failure to pay wage;; those that have been paid were up to a month late;

– failure to make Length of Service Compensation (CTS) payments; those that have been made were months late;

– failure to pay contributions to the Pension Fund Administrators (AFP); those that have been made were months late;

– failure to make timely payment of bonuses; those that have been made were a month late;

– delay in handing over the basic and national union dues, collected from union members through the check-off system;

– delay in handing over money deducted from workers' pay as loan repayments to banks and financial institutions;

– delay in handing over to beneficiaries sums deducted from worker's pay for pension contributions and to FINISTERRE (funeral services); and

– Argentine investors and the alleged creditors who are taking turns managing the enterprise ESM S.A.A., have established an alleged order of priority for settling its obligations, which places the payment of the labour entitlements and obligations last in order of importance.

1053. The FTLFP adds that an appropriate opportunity is being sought to dismiss unionized workers. In addition, the enterprise ESM S.A.A., under the pretext of the insolvency proceedings, is failing to observe the workers' fundamental rights of workers, in particular:

– it is not addressing the list of claims for the period from July 2004 to June 2005, disregarding the intervention of the Ministry of Labour;

– it is not addressing the list of claims for the period from July 2005 to June 2006, disregarding the intervention of the Ministry of Labour;

– it refuses to grant union facilities (union leave, travel expenses and travel allowances) to union leaders at local, regional and national levels from ESM S.A.A., as provided for in the collective agreements.

1054. The FTLFP states further that there has been a systematic and sustained effort by the management of ESM S.A.A. to undermine the union's legitimate activity and representation, and with this anti-union objective, and under the pretext of the insolvency proceedings, they are trying to reduce the number of unionized workers covered by collective bargaining.

1055. The documentation provided by the complainant shows that the union of the enterprise has filed a criminal proceedings with the public prosecutor's office and civil proceedings with the civil judicial authority, seeking to obtain the payment of to workers' entitlements.

B. The Government's reply

1056. In its communication of 30 March 2006, the Government encloses a communication from the enterprise Electro Sur Medio S.A.A. (ESM S.A.A.) dated 10 February 2006, which is reproduced below:

> In this matter, we would point out that these complaints fundamentally challenge the following:
>
> 1. The privatization process adopted by the Peruvian Government and in particular the sale of Electro Sur Medio S.A.A.
>
>   Regarding the privatization of ESM S.A.A., this was a process adopted by the Peruvian Government in March 1997, and responses have already been given in that regard by the relevant bodies. In any case, we cannot say that it has been a failure, as this enterprise is working very hard to recover from the economic mismanagement of previous administrations and, precisely on 25 November 2005, INDECOPI approved the ESM restructuring plan, in which it was agreed to give priority to the schedule of payments to creditors, which has been strictly complied with since 15 December 2005.
>
> 2. The alleged failure to make wage payments, failure to make Length of Service Compensation (CTS) payments, failure to pay contributions to the Pension Fund Administrator (AFP), and others; accusations made without any proof.
>
>   Regarding this aspect, we must say that both the current administration (Restructuradora de Empresas S.A.C.) and the previous ones (Consultoría "A" S.A.C. and TRECA S.A.C.), upon undertaking the administration of the enterprise, made tireless efforts between 31 October 2003 and January 2004 to update the CTS and AFP payments, and that since February 2004 these payments have been made on time in accordance with the payment schedule established by the relevant bodies.
>
>   Regarding the payment of wages, these are being paid on time. This can be shown easily using the information contained in our accounting records and the copy of the report of the scheduled visit of 11 October 2005 (Reference No. 083-2005-VPG-SDI-ICA), which prove that we are pursuing a policy of compliance with labour provisions.
>
> 3. Failure to address the list of claims corresponding to the periods from July 2004 to June 2005 and from July 2005 to June 2006.
>
> Regarding the accusation of unwillingness to address the list of complaints corresponding to the aforementioned periods, we would make the following clarifications:

The trade union organization presented the list of claims corresponding to the period 2004-2005 to the enterprise; which, after being examined, was, pursuant to article 54 of the Collective Labour Relations Act, returned for not meeting the legal requirements: for example, it did not enclose the general assembly record showing the election of the executive committee, the appointment in that assembly of a committee to negotiate the claims and its powers, and the corresponding notification to the enterprise of the new executive committee.

After it was sent back and the parties had expressed their views, the labour authority issued two subdirectorate orders on 17 and 20 June by which it would initiate collective bargaining, in spite of the company's observations. At the same time, the enterprise began investigations on the trade union and determined that, not only had it not complied with the requirements for valid commencement of collective negotiation, but that it had also not renewed its executive committee in accordance with the law and its own by-laws.

To reach these conclusions, two things happened: (i) the Ministry of Labour was asked for a copy of the current by-laws governing the trade union which, upon verification by the enterprise, was found to contain express provisions related to the election process of its executive committee, which had not been complied with by the trade union; and (ii) the Ministry was asked for a copy of the last union registration of the current executive committee to check whether they had in fact complied with their by-laws and with the procedure provided for in the Ministry's Compendium of Administrative Procedures (TUPA), there being reasonable doubt concerning the way in which the enterprise had been notified of the initiation of collective bargaining.

In the end it was concluded that the aforementioned collective bargaining had been brought to, a standstill by circumstances beyond the enterprise's control, caused by the lack of legitimacy of the union leaders who had assumed the representation of the Single Union of Workers of ESM S.A.A. in Ica Nazca and Allied Workers, without observing the requirements of their own by-laws, and non-compliance with the basic minimum standards for registration that are required by our current labour legislation, a situation that has warranted a statement, in the final instance, by the Dispute Prevention and Settlement Directorate of the Ministry of Labour and Employment Promotion of Ica, through Directorate Order No. 074-2005-DPSC/ICA, on 28 November 2005, of which we enclose a copy.

The effect of this resolution was to cancel the recognition of the executive committee, thus leaving the trade union without legal representation. All things considered, this proves that the enterprise has at no time displayed anti-union behaviour, in fact, on the contrary, it has acted pursuant to the resolutions issued by the administrative labour authority itself.

Therefore, considering that both collective bargaining processes were initiated at enterprise level, in accordance with article 5 of the single consolidated text of the Act on Collective Labour Relations approved by Presidential Decree No. 010-2003-TR, in strict compliance with the regulations in force, we have the obligation to ensure due process, negotiating with those who demonstrate that they have complied with the formalities required by our current labour legislation.

1057. The enterprise also sends a copy of the decisions of the Ministry of Labour showing that the bargaining committee did not enclose, with the record of the union assembly, with the agreements and decisions (collective bargaining proposals for 2004-05, amendment of by-laws, change in executive committee), that the union is made up of ten secretariats instead of 12 as established in its by-laws and that there is no record of any changes to the executive committee, to the by-laws or to the composition of the bargaining committee

1058. In its communication of 4 August 2006, the Government stated that the collective bargaining mentioned by the complainant could not be undertaken as the individuals comprising the complainant's executive committee could not legally represent it, according to Order No. 074-2005-DPSC/ICA of 28 November 2005, which nullifies Order

No. 030-2005-SD-NCRGP of 31 October 2005, which in turn had ruled that the union had respected the provisions of paragraph 40 of the Compendium of Administrative Procedures (TUPA) of the Ministry of Labour, which establishes the obligation of depositing relevant documentation, so that the labour authority may register unions' executive committees. The documents required of unions by the labour authority are: a copy of the union assembly record indicating the number of participant; a copy of the communication addressed to the employer and duly received; and a certified copy reflecting the assembly's approval of changes to the by-laws and the designation of a new executive committee – which would attest to the legitimacy of the officers representing the union in collective bargaining.

C. The Committee's conclusions

1059. *The Committee observes that in the present case (occurring within the context of insolvency proceedings involving the privatized enterprise, Electro Sur Medio S.A.A. (ESM S.A.A.)), the complainant alleges: (1) non-compliance or delays in compliance with the provisions of the collective agreement and legislation on remuneration and other payments; (2) refusal by the enterprise to grant facilities to union leaders (union leave, travel expenses and travel allowances); (3) refusal by the enterprise to negotiate the lists of demands since July 2004; and (4) the enterprise's intention to reduce the number of unionized workers covered by collective bargaining. The complainant points out that these insolvency proceedings and the economic downturn that the enterprise has experienced jeopardize not only the labour entitlements of the workers but also their right to employment.*

1060. *The Committee notes that the Government has only provided the point of view of the enterprise, which: (1) denies that the privatization was a failure, saying that it was in response to the economic mismanagement of previous administrations; (2) affirms that, since February 2004, the wage and other payments referred to by the complainant have been made on time in accordance with the payment schedule; (3) the lists of demands presented by the trade union of the enterprise were returned because they did not comply with legal formalities, which require the submission of the general assembly record showing the election of the executive committee of the union, the appointment in that assembly of the bargaining committee and the notification to the enterprise of the new executive committee; this was noted by the administrative authority in a resolution. The Committee observes that the enterprise has not made any comment on the allegations of refusal to grant union leave, travel expenses and travel allowances for union leaders, or the alleged intention of the enterprise to reduce the number of unionized workers, covered by collective bargaining or the enterprise's failure to deduct union dues.*

1061. *The Committee notes that, according to the Government, the union – before it is able to engage in collective bargaining – must fulfil certain requirements by submitting the following documents: a copy of the union assembly record indicating the number of participants; a copy of the communication addressed to the employer and duly received; and a certified copy reflecting the assembly's approval of changes to the by-laws and the designation of a new executive committee.*

1062. *In these circumstances, the Committee invites the complainant to rectify its non-compliance (noted by the administrative authority) with the legal requirements for collective bargaining, in particular, those relating to the submission of the union assembly record indicating the changes in the executive committee and in the by-laws, as well as of the appointment of the bargaining committee. The Committee observes that in the circumstances described, the Government and the enterprise do not recognize the union representation and, therefore, it is possible that the enterprise does not grant union leave and other facilities for union representatives.*

1063. *In addition, the Committee requests the Government to ensure that the deduction of union dues is carried out by the enterprise, and that wages and other payments provided for in law and in the collective agreement are paid to the workers of ESM S.A.A. effectively and without delay. The Committee hopes that once the trade union has complied with the legal requirements, it will be able to engage in collective bargaining and obtain union leave, which is extraordinarily important in the current insolvency proceedings affecting the enterprise. The Committee requests the Government to keep it informed in this respect.*

The Committee's recommendations

1064. ***In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:***

(a) The Committee invites the complainant to rectify its non-compliance (noted by the administrative authority) with the current requirements for collective bargaining, in particular, those relating to the submission of the union assembly record indicating the changes in the executive committee and in the by-laws, as well as the appointment of the bargaining committee.

(b) The Committee requests the Government to ensure that the deduction of dues is carried out by the enterprise and that wages and other payments provided for in law and in the collective agreement are paid to the workers of Electro Sur Medio S.A.A. effectively and without delay. The Committee hopes that once the trade union has complied with the legal requirements, it will be able to engage in collective bargaining and obtain union leave which is extraordinarily important in the current insolvency proceedings affecting the enterprise.

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

CASE NO. 2265

INTERIM REPORT

Complaint against the Government of Switzerland presented by the Swiss Federation of Trade Unions (USS)

Allegations: In respect of anti-union dismissals in the private sector, Swiss legislation is not in keeping with international labour standards, particularly Convention No. 98, which Switzerland has ratified, in that it does not provide for the reinstatement of trade union officials or representatives and only results in the payment of nominal compensation, which fails to act as a deterrent, amounting to approximately three months' salary and which may not in any event exceed six months' salary

1065. The Committee examined the substance of this case at its session in November 2004, when it submitted an interim report to the Governing Body [see 335th Report, paras. 1260-1356.]

1066. The Swiss Federation of Trade Unions (USS) supplied additional information in a communication dated 7 April 2006.

1067. The Government sent communications on the following dates: 30 November 2004; 8 March, 27 April, 25 August and 13 December 2005; 17 and 27 January, 21 April, 19 June and 5 October 2006.

1068. Switzerland 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

1069. At its November 2004 meeting, the Committee made the following recommendations:

> The Committee invites the Government, together with the employers' and workers' organizations, to examine the present situation in law and in practice as concerns protection against anti-union dismissals in order that, in the light of the principles set out above and if the tripartite discussion considers it necessary, measures are taken so that such protection is truly effective in practice. The Committee requests the Government to provide it with information on the evolution of the situation dealt with in the case.

B. Additional information

1070. In its communication dated 7 April 2006, the USS indicates that, following the report of the Committee, discussions were held in the Tripartite Federal Commission for ILO Affairs (hereinafter, the Federal Commission) between representatives of the Government, employers, the USS and *Travail.Suisse* (the second trade union confederation in the country). According to the USS, discussions are blocked, as the employer's representatives are opposed to any improvement in the protection of trade union officials and elected workers' representatives, despite the compromise proposals made by the USS (see Appendix 1). In view of this opposition, the Swiss Government appears to consider that it is not in a position to take action.

1071. In practice, the situation of trade union officials and of employees is continuing to deteriorate under the influence of the heightened competition resulting from the globalization of trade. Dismissals of those who defend workers' rights in enterprises are steadily increasing in Switzerland in the absence of any effective protection against the termination of their contract of employment. The USS gives further examples of unjustified dismissals of trade union officials and elected workers' representatives, in addition to the 11 cases to which it referred in its initial complaint:

- *Caran d'Ache SA*, Geneva: dismissal of Mr. Rémi Cottenceau and Mr. Jean-Marc Hochuli (dismissal of two of the three members of the Administrative and Technical Supervisory Staff Committee of *Caran d'Ache*). *Caran d'Ache SA* is an enterprise employing around 280 people. The operational staff, who number around 100, have their own staff committee and are covered by a different collective labour agreement from that of the technical and administrative staff, who number around 180 persons. The Administrative and Technical Supervisory Staff Committee was re-elected on 11 December 2003, following a ballot requested by the staff and accepted by the management. The results of the ballot were acknowledged, among others, by the

Director of Human Resources and the management representative on the electoral committee.

The staff committee has been active and met the management on several occasions in 2004 and 2005. In September 2005, the management dismissed four persons out of the 180 administrative and technical employees for economic reasons, including two of the three members of the staff committee, without referring to any fault on their part. The two dismissed members of the staff committee appealed to the labour court of the Canton of Geneva. During the conciliation hearing, *Caran d'Ache SA* agreed to pay Mr. Cottenceau the equivalent of six months' wages in compensation, which is the maximum compensation that can be obtained through legal action alleging unjustified dismissal of a staff representative. Mr. Hochuli's case is still pending with the labour court of the Canton of Geneva.

- *Nove, Impression et Conseil SA*, Nyon (Vaud): dismissal of Mr. Marc Boutin. In 2003, during the elections to the staff committee, Mr. Michel Python, the first employee to stand for election, was dismissed. A member of the staff, Mr. Marc Boutin, circulated a petition for signature against this dismissal. The trade union *Comédia* subsequently obtained compensation from the enterprise for Mr. Python. The elections were not held. At the beginning of the summer of 2003, Mr. Marc Boutin, who was approached for this purpose by the management, agreed to be appointed a member of the staff committee. He was also the representative (contact person) of the trade union *Comédia* in the enterprise.

  A record of a trade union meeting, during which Mr. Boutin described the difficult situation experienced by the staff in the *Nove* enterprise, reached the management of the enterprise in the second half of April 2004. On 10 May 2004, during a meeting of the staff committee of the *Nove* enterprise, which Mr. Boutin could not attend as he was engaged in shift work, the director of the enterprise reported that significant harm had been caused to the enterprise by an employee (who could only be Mr. Boutin) through the union, in the form of negative and destructive rumours. On 25 March 2004, Mr. Boutin was dismissed; the reason given was the business downturn and the unfavourable economic situation. Nevertheless, Mr. Boutin was replaced and, at the time of his dismissal, the working day was extended by three hours a day owing to the considerable volume of work to be carried out. In a ruling dated 11 January 2005, the labour court of La Côte (Vaud) set aside Mr. Boutin's case, giving the following two reasons: (i) it was not proven that he was the person who had strongly criticized the enterprise at a trade union meeting and that this was the reason for the dismissal; and (ii) he had been appointed to the staff committee of the enterprise, having been approached by the management for this purpose, but had not been formally elected by the staff, and did not therefore benefit from protection against unjustified dismissal. In his disgust at the ruling, Mr. Boutin refused to continue the legal action and to appeal to the cantonal court.

- *Etablissement médicosocial* (EMS), La Colline (Vaud): the dismissal of Mr. Damien Duplan, Mr. Merito Iglesias and Mr. Christophe Pariat (three staff representatives). A dispute arose in the enterprise between the management and the staff, who were supported by the trade union SSP, in 2005. The matter was referred to the Cantonal Conciliation Bureau, the state body responsible for the conciliation of collective labour disputes. The staff nominated three trade union members, all three of whom held positions of responsibility within the establishment, to represent them in negotiations with the management at the Cantonal Conciliation Bureau: Mr. Damien Duplan, Mr. Merito Iglesias and Mr. Christophe Pariat. Two days before the meeting at the Cantonal Conciliation Bureau, on 27 December 2005, the three representatives were dismissed by EMS La Colline. The Federal Councillor responsible for the Department of Health and Social Action delegated the chief of the public health

service to undertake an arbitration. In this context, as a precondition for the arbitration, the staff obtained the reinstatement of its three representatives.

- *Fondation de Nant* (Vaud): dismissal of Mr. Antonio Herranz and of the president of the staff committee. On 25 September 2002, the appeal chamber of the court of the Canton of Vaud issued a ruling sentencing Mr. Herranz's employer, the *Fondation de Nant*, to pay five months' gross wages in compensation for unjustified dismissal. The cantonal tribunal found that "a broad range of evidence shows that the appellant's membership of a trade union and the activities in defence of employees that he has undertaken during his employment have been of preponderant significance in the decision to dismiss him". The complainant organization specifies that Mr. Herranz, a nurse, worked for the *Fondation* from 1 March 1987 to 31 December 2000 and that he was dismissed, among other reasons, for drafting with other staff members a petition to protest against the dismissal of an employee who had over 20 years of service. The court further notes that in 1999 the president of the staff committee had been dismissed by the enterprise and that the whole committee had resigned.

- *Laiteries Réunies de Genève* (Geneva): the dismissal of Mr. Olivier Schürch, president of the workers' committee. *Laiteries Réunies de Genève* (LRG) is a consortium of eight food-processing companies, employing around 700 workers. In 2005, LRG adopted a hard-line position in negotiations for the renewal of the collective labour agreement, and then broke off negotiations, resulting in the absence of a collective agreement since 1 January 2006. In mid-February 2006, LRG dismissed Mr. Schürch, citing economic reasons. Mr. Schürch, who had been employed by the enterprise for 19 years, was accompanied that very day to his car, without even being allowed to collect his belongings and turn off his computer. A case for unjustified dismissal of a workers' representative is currently before the labour court of the Canton of Geneva.

- *Flasa SA*, *Filature de Laine Peignée d'Ajoie SA* (Jura): dismissal of Mr. Francis Leprince. The USS refers once again to the first case cited in the complaint of 14 May 2003, in which legal proceedings were pending when the complaint was submitted. The procedure in the labour court led to a conciliation hearing on 21 October 2003, which failed. During the course of the legal proceedings, the worker noted that he was being boycotted by employers in the region, who refused to hire him while he maintained legal proceedings to claim his rights. In view of these refusals, Mr. Leprince, who is the family breadwinner, felt obliged to accept a transaction under which he was paid CHF16,000, or over four months' wages. In an article in the publication *Evénement syndical* of 5 November 2003, the regional secretary of the Industrial, Construction and Service Trade Union (FTMH) noted that, in this enterprise, "of the six trade union representatives who worked at *Flasa SA*, there are now only two, as three of them have been dismissed for so-called economic reasons and a fourth left voluntarily indicating that he could no longer put up with the pressure exerted upon him".

1072. In view of the above, the USS requests the Committee on Freedom of Association to find that Switzerland is not in conformity with ILO standards, in particular Convention No. 98, which it has ratified, and Convention No. 135.

C. The Government's replies

1073. In its communication of 30 November 2004, the Government informs the Committee that various factors have had an influence on these cases (parliamentary debates; consultations at the administrative and ministerial levels; and information and possible consultation of

the Federal Commission), thereby obliging it to request additional time to provide its observations.

1074. In its communications of 8 March and 27 April 2005, the Government indicates that a draft additional report, in reply to the Committee's recommendation, was submitted to the Federal Commission on 4 March 2005. The Commission discussed the draft text and decided to give the social partners further time for consultation and to adopt their positions, at the request of the complainant organization, with the support of the employer and government members. It was agreed that the social partners would provide their written observations and specific proposals to the Secretariat of State for the Economy (SECO) by the end of June. A meeting of the Commission was scheduled for 18 August 2005 to discuss the various approaches, and another was planned towards the end of September 2005 to endeavour to finalize the report. These factors obliged the Government to request further additional time to provide its observations, which it would do in the autumn of 2005.

1075. In its communication of 25 August 2005, the Government provides information on the action taken to follow up the recommendations of the Committee on Freedom of Association and requests further time for the provision of its additional report. According to the Government, the consultations held at the end of June 2005 showed that the viewpoints of the social partners could not in principle be reconciled. While the employers confirmed their support for the text, the trade unions (USS and *Travail.Suisse*) supported the principle and purpose of the complaint and called for measures to be taken to provide effective protection against unjustified dismissal for anti-union reasons; expressed their opposition to certain passages of the draft report and called for substantial changes to it; and requested the establishment of a working group bringing together the social partners to discuss the measures to be taken.

1076. The Federal Commission met once again on 18 August 2005 to discuss the various options. At that meeting, it discussed the possible alternatives for the continuation of its work. It had before it two options: option 1 – to hold a tripartite discussion with a view to examining the situation in law and practice relating to protection against unjustified dismissal for anti-union reasons; this would provide a basis for reflection by the participants in the tripartite discussion with a view to determining the options which might be envisaged for the continuation of its work; and option 2 – to amend the text of the draft report according to the positions taken by the social partners and to continue working for the submission of the report to the Federal Council and then the ILO.

1077. The Federal Commission chose option 1, thereby complying with the interim conclusion of the Committee on Freedom of Association. The Federal Commission consequently decided that the Government's draft report would be adopted later, based on the outcome of the tripartite discussion. The outcome of the Federal Commission's discussions was immediately brought to the attention of the Swiss Government, which has noted the present information that is being provided to the Committee on Freedom of Association. Also as a consequence of the meeting of 18 August 2005, the State Secretariat for Economic Affairs (SECO) immediately invited the concerned members of the Federal Commission to designate representatives to participate in the tripartite discussion so that the work could begin as soon as possible, in accordance with the mandate given by the Commission.

1078. In its communication of 13 December 2005, the Government indicates that the Federal Commission met once again on Monday, 28 November 2005. The discussion was held in a calm and open atmosphere, with a view to examining the situation in law and practice concerning protection against unjustified dismissal for anti-union reasons. During the discussion, the social partners reiterated their convictions: the employers did not want to

see any change in law or practice, while the workers called for changes and put forward specific proposals, including a requirement to give prior notification to the competent authority (judge, conciliation bureau or labour office) of the employer's intention to dismiss the trade union representative and/or the development of a solution based on the Gender Equality Act (LEg).

1079. According to the Government, it was not possible at that stage to predict whether a solution agreeable to all parties would be found. Nevertheless, new avenues for reflection emerged which might allow, if such was the unanimous wish of the social partners, a continued exchange of ideas in the context of the tripartite discussion on possible measures to be taken in the event of unjustified dismissal for anti-union reasons. The social partners had until the end of December 2005 to state their views on whether to continue the exchange of ideas on the new avenues for reflection in the context of the tripartite discussion. The situation would be examined on the basis of the positions taken by the social partners at the beginning of 2006. In view of the above, the Government was not in a position to supply its observations in time for the meeting of the Committee on Freedom of Association in March 2006.

1080. In its communication of 17 January 2006, the Government clarifies the nature of its previous observations, which it sees as a regular update on the process followed at the national level to keep the Committee on Freedom of Association informed of the action taken in accordance with the principle of direct democracy. The Government also recalls that the draft report discussed in March 2005 by the Tripartite Commission was suspended at the request of the complainant organization and that it had not subsequently been possible to reach a solution during the tripartite discussions.

1081. In its communication of 27 January 2006, the Government assures the Committee that it is taking the necessary measures to produce the report as soon as possible, but that the decision-making process involves a series of formal procedures required by national law. A new version of the report could be finalized in March 2006. This text, accompanied by a draft government decision, then has to be submitted for consultation to the offices and services concerned in the federal administration for a period of seven weeks. Following this consultation process, a further consultation has to be held with the Federal Commission, although the date of its meeting has not yet been set in view of the circumstances. Only once the latter Commission has given its opinion can the matter be submitted for decision to the Swiss Federal Council, which would in turn decide, following a further consultation process involving the departments and general secretariats (ministries and ministerial cabinets), the duration of which is set at three weeks.

1082. In its communication of 21 April 2006, the Government notes that the communication by the USS, dated 7 April 2006, contains a political assessment of the situation and that, at its own initiative, the USS has transmitted proposals for modifications of the law to the ILO. The Government also recalls that, in a communication of 27 January 2006, it had informed the Committee of the manner in which this matter was being handled at the national level, in support of its request for an extension of the period for the submission of the Government's additional report. That communication specified that the Government was taking the necessary measures to draw up the additional report, as soon as possible, but that the decision-making process involved a series of formal procedures required by national law. These formal procedures had been described in detail, including the applicable time limits. As indicated, the draft additional report was finalized in March 2006, based on the situation described in the USS's complaint of 14 May 2003 and on the interim recommendation of the Committee on Freedom of Association of 17 November 2004. This text, accompanied by a draft government decision, has [now] been submitted for consultation to the offices and services concerned of the federal administration until the end of April 2006. The Federal Commission would be consulted on the text on 16 May

2006. The decision of the Swiss Government is scheduled for 28 June 2006. It is no longer possible to modify the current procedure in relation to the Government's political decision. Once it has taken its decision, the Government will provide the Committee with its additional report corresponding to the situation described above.

1083. According to the Government, it has to be recognized that the developments in the situation make it practically impossible for the Government's report to be finalized within a reasonable period of time. The examination of the USS's additional allegations will require a considerable amount of time in view of the need to obtain the necessary information from the local judicial bodies, in particular. Furthermore, the other elements contained in the USS's communication, namely the political assessment of the situation and the proposals for legislative amendments, will require in-depth examination. These consultations and the preparation of a separate government report covering the new developments will require many months of additional work. On this basis, the Government will provide the Committee with a separate report at the appropriate time. The Government adds that it will keep the Committee informed of developments, as it has always done since the beginning of the case.

1084. In its communication of 19 June 2006, the Government states that the Swiss Government delegation has accepted the recommendation of the Committee [see 335th Report, para. 1356] and that it confirms both the substance and the form of its initial report and the statement made by its representative on 17 November 2004 at the 291st Session of the ILO Governing Body.

1085. The USS informed the ILO of new developments concerning its complaint of May 2003. The ILO forwarded them to the federal administration offices on 12 April 2006, together with a list of ten new cases denounced by the USS. As the matter will never be dealt with if it is continually presented with new elements, the Government decided that its additional report of 19 June 2006 would refer to the situation described in the USS's 2003 complaint and to the interim decision of the Committee, dated 17 November 2004, and that it would provide the Committee with a separate report on the new developments in due time. In this regard, the Government indicates in a communication of 5 October 2006 that a separate draft report of the Federal Council was prepared in reply to the additional allegations submitted on 7 April 2006 by the USS in respect of its complaint. This draft report was sent after consulting with the federal administration services. The tripartite Federal Commission on ILO affairs was subsequently consulted in writing on 28 August 2006 and given an allowance period of up until 12 September 2006 in order to formulate its positions. The Government specifies that certain members of the tripartite Federal Commission on ILO affairs, notably the workers, had however asked for a formal convening of the Commission to debate the draft report of the Federal Council. The Government responded favourably to this request, in the spirit of the 17 November 2004 interim conclusions of the Committee on Freedom of Association. The meeting of the tripartite Commission has been scheduled for November 2006. At this meeting, the matter will again be submitted for the decision of the Federal Council, so that it may then be transmitted to the Committee on Freedom of Association.

1086. In communications of 8 March, 27 April, 25 August and 13 December 2005, 17 and 27 January 2006, the Government kept the Committee informed of developments with regard to the case at the national level, pending the preparation of the Federal Council's draft additional report. In the view of the Swiss Government, the objective, in so doing, was to provide regular updates on the process under way at the national level and, if possible and necessary, to establish dialogue with the Committee. The tripartite discussion initiated following the interim recommendation of 17 November 2004 is a complex process, which forms part of the broader political context and is in full compliance with the

principle of direct democracy, the founding principle of the Swiss constitutional and political system.

1087. The Federal Commission (an extra-parliamentary advisory commission established in 2000 following the ratification of Convention No. 144 concerning tripartite consultation procedures and composed of representatives of the federal administration and the social partners) has been consulted.

1088. A draft additional report by the Federal Council, in response to the recommendation of the Committee, was submitted to the Federal Commission on 4 March 2005, and then on 18 August 2005. The draft report covered in detail the issue of strengthening protection against unjustified dismissal for anti-union reasons, as discussed at the national level in relation to the accompanying measures to the Agreement on the free movement of persons concluded between Switzerland and the European Union. It described the action taken to follow up the various parliamentary interventions referred to in the Federal Council's first report or introduced subsequently. A section was devoted to the reactions of the social partners and the Government following the decision of the Governing Body of 17 November 2004. The draft report then described the case law which has developed concerning the cases of dismissal referred to in the complaint. Information was supplied on pending cases. The draft report described the additional means available through Swiss direct democracy to address the USS's principal claim. Finally, the draft report provided an assessment of the situation and reflected the conclusion of the Federal Council.

1089. On 4 March 2005, the Federal Commission discussed the draft report and, at the request of the complainant organization, decided to grant further time to the social partners to determine their positions and for consultation on the Government's draft report. The employer and government members of the Federal Commission supported the principle of this request for an extension. The time limit was set at the end of June 2005 and the social partners were requested to provide written comments on the draft report, with specific proposals, within that period. The viewpoints expressed by the social partners in the context of this consultation were, at first sight, irreconcilable. While the employers confirmed their support for the text of the Government draft, the trade unions (USS and *Travail.Suisse*) conveyed the following considerations:

– "support for the principle and purpose of the complaint, and a call for measures to be taken to provide effective protection against unjustified dismissal for anti-union reasons";

– "opposition to certain passages of the draft report and request for substantial changes to be made to it";

– "request for the establishment of a working group composed of the social partners to discuss the measures to be taken".

1090. The Federal Commission met once again, on 18 August 2005, to discuss the various options for dealing with the matter. On that occasion, the Federal Commission decided to hold a tripartite discussion to examine the situation in law and practice in relation to protection against unjustified dismissal for anti-union reasons. This examination was intended to serve as a basis for reflection by the participants in the tripartite discussion to determine the options that could be envisaged for the continuation of its work. The Federal Commission therefore decided that the observations of the Federal Council would be submitted later, based on the outcome of the tripartite discussion.

1091. Taking into account the interim conclusion of the Committee, the tripartite discussion was held on Monday, 28 November 2005, with a view to examining the situation in law and

practice relating to protection against unjustified dismissal for anti-union reasons. The discussion also covered possible measures to be envisaged with a view to strengthening protection against unjustified dismissal for anti-union reasons. The social partners confirmed their convictions: no change in law or practice for the employers, in contrast with the changes called for by the workers. Nevertheless, new avenues for reflection emerged which might have provided a basis, if such was the unanimous wish of the participants, for a continuation of the exchange of ideas in the context of the tripartite discussion.

1092. The workers made an oral presentation of two ideas for legislative changes [prior notification to the competent authority (judge or conciliation bureau) of the employer's intention to dismiss a trade union representative; adaptation of the solution envisaged in the LEg for matters relating to equality between men and women]. The employers were opposed to any proposed change in Swiss law and practice, and did not wish to enter into a discussion on the substance. As the proposals made by the workers were notified directly by the USS in writing to the Director-General of the ILO by a communication of 7 April 2006, and then brought to the attention of the Government by a communication of the ILO dated 12 April 2006, the Government will make its comments on this matter in the separate report referred to in paragraph 21.

1093. The social partners were invited to give their views up to the end of December 2005 on the continuation of the tripartite discussion. In this context, the employers expressed opposition to any change in the legislation in force in relation to protection against unjustified dismissal for anti-union reasons. They considered that the law and its application in practice constitute effective protection against such unjustified dismissal, and that it would not be desirable to codify in the law procedures established by collective agreement, as that would signify the end of social partnership and the system of freely negotiated collective labour agreements, to which they are very attached. The employers therefore indicated that they did not see the point of continuing the exchange of views on the subject.

1094. On the trade union side, the USS considered that the matter should be referred to the Federal Commission so that it could submit proposals to the Federal Council. *Travail.Suisse* wished to continue the exchange of views on new avenues in the context of the tripartite discussion.

1095. Under the terms of reference of the Federal Commission, it does not have the competence to make legislative proposals to the Federal Council. Moreover, the continuation of an exchange of views is only justified if all the social partners concerned can participate in tripartite discussions.

1096. It therefore has to be concluded that the tripartite discussion held through the good offices of the Government following the interim recommendation of the Committee has not, following an examination of the situation in law and practice, resulted in the proposal of new measures. In accordance with the Swiss constitutional and democratic system, it is for the authors of the complaint to refer the matter to Parliament, or to introduce a popular initiative.

1097. As indicated in the Federal Council's report of 31 March 2004, the political debate on strengthening protection against dismissal for anti-union reasons is not recent, and it will be continued despite the outcome of the above tripartite discussion. That report described the intense political debate in Parliament on the matter, and the action taken to follow up the various parliamentary initiatives. This political debate has since continued in two forms which offer important indications when assessing the present situation: the action taken to follow up the various parliamentary initiatives; and the debate on the accompanying

measures relating to the extension of the free movement of persons and the outcome of the referendum of 25 September 2005.

1098. On 22 September 2004, the National Council, in line with the long-standing policy of the Federal Council, decided not to give effect to and to set aside a parliamentary initiative relating to the strengthening of protection against unjustified dismissal for anti-union reasons: on 19 June 2003, National Councillor Pierre-Yves Maillard had introduced a parliamentary initiative (03.426) entitled "annulment of dismissal in cases of unjustified termination". This initiative called for the introduction of the possibility of annulling dismissal in such cases through an amendment to section 336(a)(1) and (2) of the Code of Obligations (CO) and, alternatively, the award of compensation of six months' wages if the employer can demonstrate that such annulment causes substantial harm or the worker opts not to continue the contract of employment. The arguments put forward by the author of the initiative are no different from those already used in the context of the other parliamentary interventions mentioned above.

1099. A parliamentary initiative to facilitate the extension of collective agreements, minimum wages and for the annulment of unjustified dismissals of trade unionists was submitted on 17 December 2004 by National Councillor Pierre Vanek. At the time of drafting the present report, the initiative had not yet been examined by the plenary of the National Council. In the report of its meeting on 22 August 2005, the competent parliamentary commission proposed, by 15 votes to 9, not to pursue the parliamentary initiative.

1100. On 6 October 2005, the National Council decided not to pursue a parliamentary initiative, submitted on 8 March 2004 by National Councillor Thanei (04.404: labour law, protection against dismissal), seeking greater flexibility in the payment of the compensation due in the event of unjustified dismissal.

1101. Moreover, the Federal Council's report of 31 March 2004 noted certain parliamentary interventions which were then being examined by the Swiss Parliament. Reference should be made to the situation in this regard:

– the Rennwald motion 97.3195: the motion was transformed into a "postulate" at the proposal of the Federal Council: the subject is considered to have been dealt with;

– the Rechsteiner Paul motion 02.3201: on 21 June 2002, the National Council decided to postpone discussion of the motion; the National Council rejected the motion on 10 March 2004;

– question by the Socialist group 03.3326: the discussion was postponed and, as the matter had remained pending for over two years, it has been shelved.

1102. The issue of strengthening legal protection against unjustified dismissal for trade union reasons was discussed in the context of the accompanying measures to the free movement of persons: these measures were approved by popular vote, in accordance with the principle of direct democracy.

1103. Following the decision of the European Community to accept ten new member countries as of 1 May 2004, negotiations commenced between Switzerland and the European Community concerning the extension of the Agreement on the free movement of persons concluded on 21 June 1999 between Switzerland and the then 15 Member States of the European Community, which entered into force on 1 June 2002. This Protocol to the Agreement was approved by Parliament in December 2004 and has been submitted to referendum. In this context, the trade union confederations (USS, *Travail.Suisse*) made their support to the extension of the agreement conditional upon the adoption of a series of

measures to supplement the accompanying measures adopted by Parliament in October 1999.

1104. The representatives of employers' organizations and trade unions met with the Chief of the Federal Department of the Economy in October 2003. SECO was then given the mandate to establish a working group of the various representatives of the social partners with the task of examining the trade unions' demands and providing a response on the issue of whether new accompanying measures were appropriate and, if so, the form that they might take.

1105. On 14 June 2004, SECO issued the report on the work and conclusions of the tripartite working group. This report was approved by the organizations represented on the working group and reflects a compromise of principle between the social partners at the highest level. It examines all the trade union demands and the various issues discussed within the group. The working group proposed a certain number of measures, essentially intended to strengthen the system established in 1999. As the trade unions considered that protection against unjustified dismissal for anti-union reasons was not adequate, measures were proposed by the Government in the context of the tripartite discussions to render such protection more effective or to strengthen protection in law and practice. The employers did not comment on these measures. As each party kept to its position during the discussion of the report, it was decided not to make a proposal on this subject. Nevertheless, the decision taken at that level has not, particularly for the trade unions, ended the discussion on protection against unjustified dismissal for anti-union reasons in a broader political context at the national level.

1106. Between 2 July and 17 September 2004, the report was submitted for consultation to the cantons, political parties and main economic organizations, as well as the social partners and other concerned parties. The draft document received the support of most of those consulted. The majority of political parties and confederations in particular welcomed the proposals. In contrast, the draft text was deemed disproportionate and inadequate, particularly by the Democratic Union of the Centre (UDC) and a number of occupational organizations, especially those active in the agricultural, market gardening and catering sectors. The Swiss Union of Arts and Crafts (USAM) expressed reservations. The trade unions supported the proposed measures, while regretting that several of their proposals had not been retained. From their point of view, the package constituted the strict minimum.

1107. Based on the report of the working group and the outcome of the process of consultation of interested parties, the Federal Council took up the key points of the report and submitted to the Swiss Parliament all the measures proposed on which there had been tripartite consensus. The general part of the message describes the political context and presents the trade union's demands, the report of the working group and the measures proposed for adoption by Parliament by means of the necessary legislative amendments; it also indicates that proposals have not been made on the specific issue of strengthening protection against dismissal.

1108. During the debates in the parliamentary committees and the plenary of the two houses of Parliament, no proposal was made to strengthen protection against unjustified dismissal for anti-union reasons, in a spirit of compromise to ensure a balance between all the measures proposed. However, the parties of the left did not abandon the idea of strengthening protection against unjustified dismissal for anti-union reasons.

1109. On 17 December 2004, Parliament adopted on final reading the whole text of the Federal Order approving and implementing the Protocol to extend the Agreement between the Swiss Confederation, on the one hand, and the European Community and its Member

States, on the other, on the free movement of persons to the new Member States of the European Community and approving the amendment of the accompanying measures respecting the free movement of persons; in the National Council, by 142 votes for, 40 against and no abstentions; and in the Council of States, by 40 votes for (unanimity), 0 against and 2 abstentions.

1110. Economic interest groups, the majority of the political parties and the social partners supported without reservation the extension of the agreement on the free movement of persons and the accompanying measures. The USS and the *Unia* trade union decided to support these two measures without reservation. In so doing, and in a spirit of compromise to ensure a balance between all the proposed measures, the trade unions as a whole gave up their demands to strengthen protection against unjustified dismissal for anti-union reasons. However, the decision adopted at this level does not bring to an end, particularly for the trade unions, the discussion on protection against unjustified dismissal for anti-union reasons in a broader political context at the national level. The extension of the agreement and the accompanying measures were opposed by the UDC and the extreme right, and by certain elements of the extreme left.

1111. In accordance with the principles of direct democracy, a referendum was requested on this subject and the holding of the referendum was accepted on 29 March 2005, with the time limit set at 20 April 2005. A popular vote was sought by 92,901 citizens, with the minimum requirement being 50,000 persons. The subject was submitted to popular vote on 25 September 2005. The sovereign people approved it by 1,458,686 votes for and 1,147,140 votes against, which corresponds to an acceptance rate of 56 per cent. The popular vote of 25 September 2005 on the extension of free movement thus indicates a trend in support of the Federal Council's position with regard to the extension and the accompanying measures, which do not contain specific measures to strengthen protection against unjustified dismissal for anti-union reasons. In this respect, it should be noted that, in various articles published following a press conference held by the USS at the end of November 2004, the trade unions specifically referred to the link between the complaint submitted to the Committee on Freedom of Association and the issue of the accompanying measures. The Swiss people, in its majority, approved the extension and accepted the accompanying measures as proposed, although the substantive debate on strengthening protection against unjustified dismissal for anti-union reasons could be pursued, particularly for the trade unions, in a broader political context at the national level.

1112. The Government recalls that the principle of direct democracy is founded in the Swiss constitutional and legal system. As indicated by the elements referred to above, the people is or may be called upon to decide on an issue through a democratic vote. The exercise of popular rights is regulated by federal legislation, which enumerates the means available for their implementation at the federal level. In the present case, the principle of Swiss direct democracy is pertinent in two respects:

(a) In the first place, the possibility is open to the USS to pursue the debate, through its representatives, at the parliamentary level through the submission of interventions in appropriate forms, as indicated in the Federal Council's reports and those of the Committee on Freedom of Association (such as a motion or a parliamentary initiative). In the event that a parliamentary motion calling for a strengthening of the legislation affording protection against unjustified dismissal for anti-union reasons were successful, the Federal Council would have to give effect to it by submitting draft legislative measures to Parliament. If a parliamentary initiative calling for a strengthening of the legislation affording protection against unjustified dismissal for anti-union reasons were successful, Parliament would address the subject directly (see paragraph 47). In view of the recent negative responses of the Federal Council and Parliament, there is little chance of the latter changing its position in the near future

on the issue of making provision in the CO for the possibility of the reinstatement of trade unionists who are victims of unjustified dismissal. A popular initiative could however offer an additional means of action.

(b) The whole range of democratic means offered by the Swiss legislation in force have not been exhausted with regard to a possible strengthening of the legislation respecting protection against unjustified dismissal for anti-union reasons: the Swiss system of direct democracy offers means to address the principal demand set out in the USS's complaint in a democratic manner. The USS can introduce a popular initiative in the form that it considers appropriate, which might include the following:

– a popular initiative (a popular initiative on a federal issue; a federal popular initiative): this consists of a written application through which 100,000 citizens with the right to vote may request the Federal Assembly to undertake the overall revision of the Constitution or to adopt, repeal or amend constitutional or legislative provisions;

– or a general popular initiative: this consists of a popular initiative through which 100,000 citizens with the right to vote may, in the form of a proposal formulated in general terms, call for the adoption, amendment or repeal of constitutional or legislative provisions. A general popular initiative is an innovation accepted by the referendum of 9 February 2003. The authors of a popular initiative would be free to refer to the principles of freedom of association.

1113. However, the recommendations adopted by the Committee on Freedom of Association are addressed exclusively and explicitly to the governments of the States against which complaints are made and not, in principle, to national legislators or the judicial authorities. The Committee's interlocutors when formulating its conclusions and recommendations are governments. Admittedly, in so far as certain of the Committee's recommendations advocate a revision of the legislation or the adaptation of the case law of judicial authorities or national administrative authorities, they may be considered to have an influence on these authorities. It nevertheless has to be recognized that, even in such cases, it is still for the Government to decide, in accordance with its own internal rules, whether or not it can intervene with these authorities.

1114. In Switzerland, and in the present case, with regard to the independent judicial authorities established in accordance with the principle of the separation of powers, the only possibility open to the Federal Council in principle is information through an exchange of views. In the event of a recommendation by the Committee on Freedom of Association proposing a legislative amendment within the remit of the ordinary legislator, the Federal Council would only in practice have a "right of initiative", which would amount to proposing the issue to Parliament, taking into account the text of the Committee's recommendation. Accordingly, whatever means is adopted (government draft, or a parliamentary motion or initiative), Parliament would examine the issue in complete independence, taking into account its assessment of any recommendation made by the Committee on Freedom of Association. Following the outcome of the parliamentary process, the issue could still be addressed by a referendum.

1115. Finally, with regard to the people, in accordance with the principle of direct democracy which is in force in Switzerland, any recommendation by the Committee on Freedom of Association advocating a revision of the legislation would not have democratic legitimacy, particularly as Convention No. 98 is not directly applicable in the Swiss constitutional and legal system. Indeed, the establishment of the Committee on Freedom of Association and the related complaint procedure is the result of a policy decision made by the Governing Body of the ILO in 1951. This decision emanates from a management body of the ILO, but

not its deliberative body, the International Labour Conference. When the Conference adopts new instruments or amendments to the ILO Constitution, these are submitted to the Swiss Parliament for information or for adoption and ratification, as the case may be. Although based on the principles of the ILO Constitution, the Committee on Freedom of Association is not explicitly part of the constitutional system for the supervision of standards governed by the provisions of the ILO Constitution of 1919, and the role and competence of the Committee on Freedom of Association are not governed by the statutes of the ILO. Nor does the supervision carried out by the Committee follow from the ratification of ILO Convention No. 98. In view of the above, and given that there has been no amendment to the ILO Constitution, the establishment of the Committee on Freedom of Association and the related complaint procedure have never been noted or formally adopted by the Swiss Parliament.

1116. The Government emphasizes that the case law of Swiss courts in relation to protection against unjustified dismissal is more flexible and more favourable to the interests of dismissed workers than is claimed by the complainant organization or the Committee on Freedom of Association. In its interim report, the latter confines itself to noting, with reference solely to the USS's allegations, but without verifying whether they are well founded or consistent, that the practice of Swiss courts in recent years has been to award a maximum of only three months' wages. Furthermore, the Committee on Freedom of Association refers to the 11 cases cited by the USS in support of its complaint, whereas the USS's claims are not in fact borne out in the majority of cases. Indeed, a recent positive trend has been observed in the case law of cantonal and federal courts, and this might judiciously be taken into account.

1117. The Federal Council requests the Committee on Freedom of Association to give due considered to this information, particularly taking into account the specific national features described in the Federal Council's first report, and not only in the light of the Committee's own practice in the non-authentic interpretation of the text of Convention No. 98. In this respect, the Federal Council refers in particular to the comments made by the Committee on Freedom of Association to the effect that as long as "protection against anti-union discrimination is in fact ensured, methods adopted to safeguard workers against such practices may vary from one State to another" [see *Digest*, 1985, para. 571].

1118. In Switzerland, disputes relating to cases of unjustified dismissal may be handled by different courts, depending on the value of the claim. In the first instance, they are examined by labour courts, the rulings of which are not necessarily published, but in which the deliberations are public, thereby allowing broad information. They may also be examined by cantonal high courts and, on appeal, by the Federal Court. Reference is made below principally to the rulings of the highest cantonal courts and the Federal Court.

1119. In the case of the Federal Court, the compensation granted by the judge has a dual function, as it is both punitive and compensatory, and is not dependent on the existence of damages (ATF 123 III 391; ruling 4c.239/2000 of 19 January 2001). It is determined on the basis of the circumstances in each case. In recent years, the Federal Court has developed its case law and now admits criteria for the establishment of the amount of compensation which were not previously taken into account, including the duration of the employment relationship and the economic effects of dismissal.

1120. The Federal Court has also recalled that constantly leaning towards the maximum penalty is contrary to the law; as the maximum is set at six months, the judge retains full discretion (ATF 119 II 161). Nor should compensation systematically be set at the minimum level. In this ruling, the Federal Court upholds a compensation award of four months' wages, despite the existence of a fault by the worker.

1121. In its ruling of 28 March 2002 (application for review, 4c.86/2001), the Federal Court recalls the amounts of compensation that it has granted: five months in July 1997, three months in August 1997, six months in January 1999, five months in July 2000 and, in this ruling, five months [see *Droit du travail, Revue du droit du travail et d'assurance-chômage* (DTA), 2002, pp. 146-147].

1122. In a particularly serious case of unjustified dismissal aggravated by sexual harassment (ruling of 8 January 1999, published in *Semaine judiciaire*, 1999, pages 277-282), the Federal Court granted compensation of six months' wages (CHF19,200), as well as compensation for moral damages under section 49 of the CO amounting to CHF5,000. In a ruling of 7 September 2004, in a case of dismissal relating to the protection of the personality of the worker (section 328, CO), the Federal Court recognized the injury caused to the personality of the worker and awarded damages with interest under section 49 of the CO. In a ruling of 13 October 2004, in addition to compensation of six months' wages for unjustified dismissal, the Federal Court awarded CHF25,000 in compensation for moral damages (4c.343/2004). The Federal Court has stated the following principles: compensation of six months' wages in principle covers material damages and compensation for moral damages resulting from unjustified dismissal; only in exceptionally serious cases can additional compensation be granted; with the exception of such cases, compensation can only be granted if it is justified by reasons other than unjustified dismissal.

1123. In ruling 130 III 699, the Federal Court dealt with the application of section 336(1)(b) of the CO (first exception), under which dismissal by reason of the exercise of a constitutional right by the other party to the contract is not unjustified where the exercise of the right violates of an obligation resulting from the contract of employment. Legal commentary admits that this justifying ground may, inter alia, be invoked by certain specific types of enterprises (*"entreprises à tendance"* – enterprises engaged in political, religious, trade union, scientific, artistic activities, etc.), in the case of certain employees who have a greater duty of faithfulness. In the case in point, dismissal occurred by reason of the exercise of constitutional rights by the worker (freedom of conscience and belief, freedom of opinion). The Federal Court, upholding the opinion of the cantonal court, found that dismissal was not therefore unjustified. The reference by the Committee on Freedom of Association to the voidability of dismissal in cases of violation of constitutional principles, in paragraph 1354 of its report, has accordingly to be viewed in perspective.

1124. Finally, confirming that the compensation awarded is not merely nominal, the Federal Court recently issued a ruling (ATF 132 III 115) allowing the award of a maximum amount of compensation to an employee who disputed the measures taken by the employer. The abrupt manner in which the employer acted, and the age and long service of the employee were also taken into account.

1125. At the cantonal level, there are differences between the 26 Swiss cantons in relation to unjustified termination of the employment contract for anti-union reasons. The compensation varies according to the situation, but is not systematically set at three months' wages; it may be lower or higher, according to the circumstances. In certain cases, compensation of up to six months' wages has been awarded (see, for example, the case law in this respect of the Canton of Neuchâtel between 1989 and 2003) [Jean-Philippe Dunand, "La jurisprudence de la Cour de cassation civile neuchâteloise en matière de licenciement abusif", in *Recueil de jurisprudence neuchâteloise*, 2003, pp. 51-90]. It should be recalled that the cantonal rulings examined were handed down by the appeal bodies of civil courts and do not therefore reflect the case law of first-level courts (labour courts), which is not systematically published in view of the fact that the parties often reach an amicable agreement. It should however be noted that the debates in labour courts are generally held in public and that everyone has access to them.

1126. In conclusion on this point, and in view of the fact that federal case law has a positive influence on cantonal courts, it may be noted that the case law of the Federal Court is increasingly taking into account all the circumstances of the dismissal. It attaches particular attention to protection of the personality of the worker, as it is possible to obtain compensation for moral damages (section 49 of the CO) over and above other compensation where it appears that the maximum compensation of six months' wages is not adequate to take into account the moral damages. In a recent publication (ARV/DTA 2/2005), Mr. Jean-Philippe Dunand, doctor of law, lawyer and professor at the University of Neuchâtel, has acknowledged, with reference to specific cases of unjustified dismissal, that the amounts of the compensation awarded by the courts in the country in respect of employment relations for moral damages have tended in overall terms to increase in recent years. He adds that this development is illustrative of the greater attention paid to the protection of the worker's personality and can only be welcomed. In the Swiss legal and economic context, and in comparison with the award of other forms of compensation by judges, whether for moral or other damages, the total compensation for unjustified termination of employment is not therefore merely nominal.

1127. With regard to cases that are still pending, on which the Committee on Freedom of Association requested to be kept informed, the Government indicates that, with reference to the enterprise *Flasa SA*, according to the information that has come to its knowledge, the compensation claimed by the complainant is contested by the defendant. With a view to bringing an end to the civil case, the parties decided to agree upon the payment by the defendant of compensation as a full and final settlement, without acknowledging any obligation or liability. The complainant has accordingly withdrawn the action taken against *Flasa SA* and the agreement concluded by the parties has been approved by the judicial authorities. No ruling was handed down by roll court and, as noted by the judge, the case has been settled and struck from the court roll.

1128. With regard to the *Usines Métallurgiques de Vallorbe SA*, according to the information available to the Government, conciliation was attempted, but failed. The complainant therefore requested an expert opinion concerning equality of treatment and remuneration between her position as operator and that of the adjuster who took over 20 per cent of her activities. The expert analysis has been carried out and the report by Professor Flückiger of the University of Geneva has been prepared. The report finds that there is a discriminatory wage policy, but it is contested by the employer, as the overall findings appear to be flawed by several major errors (failure to take into account the reduced working hours of the complainant, for example). The enterprise's comments were submitted to the president of the civil court of La Broye and North Vaud on 10 March 2006 and the parties are awaiting the president's findings. The dispute concerns unjustified dismissal and the existence of wage discrimination against the complainant. The complainant's submission to the court, dated 9 December 2002, does not indicate that the dismissal is contested on the basis of the violation of trade union rights. Her arguments are however based on her intense trade union activities in the enterprise. She contends that the enterprise dismissed her as a hidden reprisal under the pretext of termination for economic reasons. In the view of the Government, in this case, although the legal action involves an allegation of unjustified dismissal, it is not clear from the complainant's pleadings to the court that the dismissal is contested explicitly on the basis of violation of trade union rights, even though her arguments are based on her trade union activities. Moreover, there is currently no ruling establishing unjustified dismissal by reason of trade union activity.

1129. In brief, the Government states that:

– the tripartite consultation called for by the Committee on Freedom of Association in its recommendation of 17 November 2004 has taken place in two forms: firstly, in the Federal Commission at the various meetings cited in the report; and, secondly,

through a tripartite discussion held on 28 November 2005, which did not consider it necessary for additional measures to be taken.

– the political context has developed at two levels, which offer indications of significant trends:

  ■ the action taken to follow up the various parliamentary interventions has confirmed the policy of the Government and the parliamentary majority not to amend the legislation respecting protection against unjustified dismissal for anti-union reasons;

  ■ parliamentary and public debates on the accompanying measures to the extension of the free movement of persons and the outcome of the popular vote on 25 September 2005 expressed support for the position of the Federal Council on the issue of the extension and accompanying measures, which do not include specific measures to strengthen protection against unjustified dismissal for anti-union reasons. Nevertheless, the fundamental debate on strengthening protection against unjustified dismissal for anti-union reasons is not closed, and could continue, particularly among trade unions, in a broader political context at the national level.

– This fundamental debate is taking place in the context of Swiss democratic principles, and particularly that of direct democracy, which forms the basis of the Swiss constitutional and political system. These principles:

  ■ offer additional means of action, at the parliamentary and democratic levels, to achieve the central objective of the USS's claim, namely what it considers to be effective protection in practice against unjustified dismissal for anti-union reasons;

  ■ afford no democratic legitimacy to the procedure before the Committee on Freedom of Association, or to any recommendation by the Committee to the Government advocating a revision of the legislation, particularly since Convention No. 98 is not directly applicable in the Swiss constitutional and legal system.

– The case law of Swiss courts in relation to protection against unjustified dismissal is more flexible and favourable to the interests of dismissed workers than is claimed by the complainant organization, and it has recently undergone positive developments. Federal case law has a positive influence on that of cantonal courts, and is increasingly taking into account all the circumstances of the dismissal. This case law attaches particular importance to the protection of the personality of the worker, as it is possible to obtain compensation for moral damages (section 49 of the CO) in addition to the normal compensation, where it appears that the maximum amount of compensation of six months' wages is not adequate in regard to the moral damages suffered. In the Swiss legal and economic context, and in comparison with the award of other forms of compensation by courts, for both moral damages and on other grounds, the total amount of compensation for unjustified termination of employment is not therefore merely nominal. The Swiss system has thus achieved a sound balance between punishment and the need for labour market flexibility.

1130. The Government concludes that:

– the submission of a complaint to the Committee on Freedom of Association and the Committee's procedure have no direct relevance in a parliamentary and democratic process relating to a legislative amendment and governed by the principle of direct

democracy, given that the above procedure does not enjoy the necessary democratic legitimacy and that Convention No. 98 is not directly applicable in Switzerland;

– the assertions, arguments and reasons given by the complainant and the interim comments of the Committee on Freedom of Association, to the effect that the penalty established by Swiss law is not sufficiently dissuasive to provide truly effective protection in practice, are not well founded and are to be rejected, given that recent case law has evolved and that the Committee has not verified either the validity or the consistency of the practice of Swiss courts of awarding a maximum of only three months' wages in recent years;

– the Committee on Freedom of Association is therefore requested to set aside definitively and take no further action on the complaint registered under No. 2265 alleging violation of trade union rights.

1131. The Government adds that this draft report was submitted for discussion to the Federal Commission on 16 May 2006. This extra-parliamentary advisory commission consists of representatives of the federal administration and the social partners. The employers supported the Federal Council's draft additional report. The workers distanced themselves from it, which is understandable given the fact that they are the authors of the complaint that is before the Committee on Freedom of Association. The workers nevertheless noted that cases of unjustified dismissal for anti-union reasons were rare in Switzerland, as the great majority of employers do not take such measures. A number of drafting changes were made to the report following the discussion.

D. The Committee's conclusions

1132. *The Committee recalls that the complaint raises the issue of whether national law and practice guarantee trade union officials and representatives within enterprises adequate protection against anti-union dismissal, in keeping with Article 1 of Convention No. 98, which has been ratified by Switzerland.*

1133. *At its last examination of the case, the Committee had noted that the complainant organization alleged that national legislation does not meet the requirements of Convention No. 98, in that it does not provide for the possibility of ordering the reinstatement of trade union representatives who have been dismissed for anti-union reasons; that the compensation provided for in such cases, which cannot exceed six months' salary, is nominal and fails to act as a deterrent; that, under national legislation, reinstatement is provided for only in cases of unfair dismissal which violate the principle of equal treatment between women and men (section 10 of the Federal Act of 24 March 1995 on equality between women and men – Gender Equality Act (LEg)); and that the 11 examples presented show the extent of anti-union practices at the national level [see 335th Report, paras. 1336 and 1337]. The Committee further noted that the Government considered that national legislation provides adequate protection to trade union officials and representatives against acts of anti-union discrimination, in keeping with Article 1 of Convention No. 98; that the drafting of the relevant sections of the Code of Obligations (CO) demonstrates that the legislature had the specific intention of increasing the protection of workers against unfair dismissal; that the compensation provided for by the CO, of up to a maximum of six months' salary, is an effective deterrent given that a large majority of Swiss enterprises are small and medium-sized enterprises (SMEs); this compensation is set at the discretion of the judge, taking into account all of the relevant circumstances, and through a simplified, non-contentious and quick procedure when the sum involved does not exceed 30,000 Swiss francs; that the protection of workers' representatives against unfair dismissal, provided for in the CO, is greater than that provided in other cases of unfair dismissal since, in this case, dismissal is unfair when*

notice of dismissal is issued whilst the worker in question represents workers on a works council, and in the absence of justified grounds for termination, which must be provided by the employer [see 335th Report, para. 1338]. In its recommendations, the Committee invited the Government, together with the employers' and workers' organizations, to examine the present situation in law and in practice as concerns protection against anti-union dismissals in order that, if the tripartite discussion considers it necessary, measures are taken so that such protection is truly effective in practice. The Committee also requested the Government to provide it with information on the evolution of the situation dealt with in the case [see 335th Report, para. 1356].

1134. *Firstly, in regard to the procedural arguments put forward by the Government, the Committee notes that the latter states that Convention No. 98 is not directly applicable in the Swiss constitutional and legal system. In this respect, the Committee recalls that the obligation on all Members of the ILO under article 19, paragraph 5(d), of the Constitution of the ILO provides that States will take such action as may be necessary to make effective the provisions of ratified Conventions. The Committee has already had occasion to recall this obligation 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]. While the manner in which the application of a ratified Convention is ensured in law and in practice varies from one State to another depending on the national constitutional and legal system, the basis for this obligation cannot be challenged.*

1135. *Concerning the Government's statement to the effect that Swiss democratic principles afford no democratic legitimacy to the procedure before the Committee, 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 [see* ***Digest****, op. cit., para. 10]. The Committee's existence derives from this fundamental constitutional obligation and the desire of the ILO's constituents to contribute to the effective implementation of the principles of freedom of association [see* ***Digest****, op. cit., paras. 1, 2 and 3]. Moreover, the Committee recalls that the whole object of the special procedure on freedom of association is not to blame or punish anyone, but rather to engage into a constructive tripartite dialogue to promote respect for trade union rights in law and in fact [see 323rd Report, Case No. 1888, para. 199].*

1136. *Concerning the Government's statement to the effect that Swiss democratic principles afford no democratic legitimacy to any recommendation by the Committee to the Government advocating a revision of the legislation, the Committee recalls that its mandate consists in determining whether any legislation or practice complies with the principles of freedom of association laid down in the relevant Conventions [see* ***Digest****, op. cit., para. 6]. Following its examination of a complaint, the Committee has thus on a number of occasions requested the amendment of a country's legislation. The specific measures taken to give effect to these recommendations and the applicable internal procedure are clearly left to the discretion of the Government concerned.*

1137. *Concerning the allegations of the USS, the Committee notes that the latter confirms that discussions were held in the Tripartite Federal Commission for ILO Affairs between representatives of the Government, employers, the USS and Travail.Suisse. According to the USS, discussions are blocked, as the employer's representatives are opposed to any improvement in the protection of trade union officials and elected workers' representatives, despite the compromise proposals made by the USS. In view of this opposition, the USS believes that the Swiss Government appears to consider that it is not in a position to take action.*

1138. *The Committee notes that, according to the complainant, anti-union dismissals are steadily increasing in Switzerland. The Committee notes the new examples given by the USS in addition to the 11 cases mentioned in its initial complaint.*

1139. *The Committee takes note of the very detailed reply from the Government. It refers to the situation described in the complaint presented by the USS in 2003, as well as the Committee's interim report of 17 November 2004. The Committee notes that the Government will reply separately to the new allegations presented by the USS. The Committee expects that this will be done as soon as possible.*

1140. *The Committee notes that, according to the Government, the tripartite consultation requested by the Committee in its previous recommendation has taken place: firstly, in the Tripartite Federal Commission for ILO Affairs at several meetings referred to in detail by the Government; and secondly, in a tripartite discussion held through the good offices of the Government on 28 November 2005. That discussion has not, following an examination of the situation in law and in practice, resulted in the proposal of new measures concerning protection against unjustified dismissal for anti-union reasons.*

1141. *In general, the Committee recalls that legislation should lay down explicitly remedies and penalties against acts of anti-union discrimination in order to ensure the effective application of Article 1 of Convention No. 98 [see **Digest**, op. cit., para. 697]. More particularly, in the case of trade union officials and representatives, one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom [see **Digest**, op. cit., para. 724].*

1142. *The Committee recalls its conclusions during its previous examination of the case, when it noted that in many respects national legislation and practices are in keeping with the abovementioned principles, and that indeed national legislation provides protection against acts of anti-union discrimination, the issue having been carefully examined by the Swiss authorities during the ratification of Convention No. 98. Although the present case relates only to anti-union dismissals, the Committee noted that the Data Protection Act (LPD) provides workers with specific protection against acts of anti-union discrimination when they are appointed. The Committee also noted that there is also specific protection against anti-union dismissal and for elected workers' representatives. The Committee also duly noted the observations made by the Government on section 12 of the Employee Participation Act (Lpart) on the protection of elected workers' representatives at the enterprise, which is supplemented by section 336, paragraph 2(a) and (b), of the CO. Lastly, the Committee noted the reversal of the burden of evidence, stipulated by law, when an elected workers' representative is dismissed, and the reduction in the burden of evidence, accepted by the courts, for workers who claim to be the victims of anti-union dismissal but are not elected workers' representatives.*

1143. *As regards the penalty as such, the Committee recalled the following principles: (1) the Committee has stated that it would not appear that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is granted by legislation in cases where employers can in practice, on condition that they pay the compensation prescribed by law for cases of unjustified dismissal, dismiss any worker, if the true reason*

*is the worker's trade union membership or activities [see **Digest**, op. cit., para. 707; see also 326th Report, Case No. 2116, para. 592; 332nd Report, Case No. 2262, para. 394; 333rd Report, Case No. 2186, para. 351]; (2) legislation must make express provision for appeals and establish sufficiently dissuasive sanctions against acts of anti-union discrimination to ensure the practical application of Articles 1 and 2 of Convention No. 98 [see **Digest**, op. cit., para. 743]. With regard to the issue of reinstatement in cases of anti-union dismissal, the Committee recalled that: (1) no one should be subjected to anti-union discrimination because of his or her legitimate trade union activities and the remedy of reinstatement should be available to victims of anti-union discrimination [see **Digest**, op. cit., para. 755]; and (2) the necessary measures should be taken so that trade unionists who have been dismissed for activities related to the establishment of a union are reinstated in their functions, if they so wish [see **Digest**, op. cit., para. 757]. In this regard, the Committee has in many cases requested governments to ensure that the workers concerned are reinstated without loss of pay. It has also, in cases where such reinstatement is not possible due to specific workplace circumstances, recommended that the government ensure that the workers concerned are paid appropriate compensation sufficient to constitute a deterrent against anti-union dismissals.*

1144. *The Committee notes that the workers, at the meeting on 28 November 2005, put forward ideas for amending legislation including the solution provided for in the Gender Equality Act (LEg). In this regard, the Committee noted in its previous examination of the case that Swiss legislation provided better protection for workers who have been victims of dismissal that violates the principle of equality than for workers dismissed for anti-union reasons. According to the complainant organization, only unfair dismissal that comes under the terms of the Gender Equality Act can give rise to reinstatement within an enterprise, while the Government emphasized the different purposes of the LEg and the CO: the purpose of the LEg is to promote in practice the constitutional principle of equality between women and men by prohibiting any form of discrimination based on gender in employment, while the CO governs the rights and obligations of the parties to a contract of employment. The Government had specified that the solution adopted by the legislature for promoting the constitutional principle of equal treatment for women and men was based on the notion of the voidability of a dismissal, rather than on the principle of reinstatement. The Government emphasized that, with the Swiss Parliament, it had wished to establish special protection with regard to equal treatment for men and women.*

1145. *The Committee notes the Government's statements to the effect that the Federal Council and the majority of Members of Parliament have not been favourable to changes in legislation concerning protection against unfair dismissals for anti-union reasons. It notes also that parliamentary and public debates on accompanying measures to allow greater freedom of movement for individuals, and the referendum of 25 September 2005, endorsed the position of the Federal Council with regard to those measures, which do not include any specific measures to improve protection against anti-union dismissals.*

1146. *The Committee nevertheless notes the Government's statement to the effect that the substantive debate on improving protection against unfair dismissal for anti-union reasons is not over and that it might be continued, especially among the unions, in a broader political context at the national level. In this regard, the Committee requests the Government to take measures to provide the same protection for trade union representatives dismissed for anti-union reasons as is given to victims of dismissal that violates the principle of equal treatment for men and women, including the possibility of reinstatement, with due regard to the principles referred to above and Conventions Nos. 87 and 98, ratified by Switzerland.*

1147. *The Committee also notes that, according to the Government, there have recently been some positive changes in the jurisprudence of Swiss courts with regard to protection from*

unfair dismissal, one feature of this being the possibility of obtaining damages over and above the standard compensation if the maximum compensation of six months' wages appears not to reflect the harm suffered by the victim. The Committee notes, however, that as regards unfair termination of an employment contract for anti-union reasons, there are differences between the cantons and the compensation varies according to the specific circumstances, ranging from less than three months' wages to more than that sum. Since the compensation for anti-union dismissal in some cantons is unlikely to have a deterrent effect, the Committee invites the Government to continue tripartite dialogue on this specific issue as well as in respect of the whole matter. The Committee recalls that the technical assistance of the Office is available to the Government.

The Committee's recommendations

1148. ***In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:***

(a) The Committee requests the Government to take measures to provide the same protection to trade union representatives who suffer anti-union discrimination as for victims of dismissals that violate the principle of equal treatment for men and women, including the possibility of reinstatement, with due regard to the fundamental principles referred to above and Conventions Nos. 87 and 98, ratified by Switzerland.

(b) The Committee encourages the continuation of tripartite discussions on the whole matter, including a review of the situation in certain cantons with regard to compensation for anti-union dismissal.

(c) The Committee requests the Government to provide its observations as soon as possible on the most recent allegations by the complainant organization contained in its communication of 7 April 2006.

(d) The Committee recalls that the technical assistance of the Office is available to the Government.

Annex

Proposed legislative amendments presented by the USS at the Tripartite Commission of Experts on 28 November 2005

1. The members of a workers' representation body and trade union officials shall be protected during the course of their mandate and the year following the end of that mandate. They may not be dismissed by reason of the exercise of their activity as workers' representatives.
2. If an employer plans to dismiss a member of a workers' representation body or a trade union official – for a reason other than a valid ground justifying immediate dismissal within the meaning of section 337 of the Code of Obligations (CO), this intention shall be notified in advance and by registered letter to the worker concerned and to the Cantonal Conciliation Bureau (alternative: to the Cantonal Labour Office). If the worker concerned is a trade union official, the employer shall also notify the intention in the same manner to the trade union concerned.
3. The Cantonal Conciliation Bureau shall convene the parties within a short period. If the worker is a member of a trade union, the union shall be entitled to participate as a party to the procedure. The

Bureau shall hear the parties, receive and examine the written submissions and may hear third parties.

4. The Bureau shall notify the parties of its decision to authorize or refuse authorization of the dismissal within 30 days following receipt of the notification of the employers' intention to proceed to dismissal.
5. If the employer does not comply with the procedure of notification of the intention of dismissal to the Cantonal Conciliation Bureau or ignores the refusal to authorize such dismissal, the dismissal may be annulled. The worker concerned, if she or he intends to contest the termination of the contract of employment and apply for the annulment of the termination, shall take action in the courts, at the latest up to the end of the period of notice.
6. The judge may order the reinstatement of the worker and the continuation of the employment relationship for the duration of the legal procedure, where it appears that the conditions for an annulment of the dismissal are likely to be met.
7. The worker may, during the proceedings, decide not to continue the employment relationship and seek compensation within the meaning of section 336(a) of the CO instead of the annulment of the dismissal.
8. For the purposes of the above provisions, a representation body means any structure (for example, works committee, enterprise committee, committee of managerial staff, etc.) or any delegation of workers in a structure of the enterprise (for example, representing the workers on the Executive Board) or in a joint structure (for example, representing the workers on the constituent board of an insurance institution) empowered to defend the interests of the persons whom they represent in relation to the employer.

   All the members of the workers' representation body shall benefit from protection, irrespective of whether they have been formally elected or appointed, provided that such appointment was made in a written communication between the representation body and the employer or is common knowledge within the enterprise.
9. For the purposes of the above provisions, a trade union official is the person designated by a trade union to represent it in the enterprise in which she or he works, vis-à-vis the workers and the management, and whose name and capacity as a trade union official have been notified to the employer by registered letter.

CASE NO. 2313

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

Complaint against the Government of Zimbabwe presented by the International Confederation of Free Trade Unions (ICFTU)

Allegations: The complainant alleges continuing threats, intimidation, harassment, arrests and violations of human and trade union rights by the Government. The complainant refers in particular to violent police intervention and mass arrests of trade union leaders and members, in October and November 2003, during national protest actions called by the Zimbabwe Congress of Trade Unions (ZCTU)

1149. The Committee last examined this case at its June 2004 meeting, where it presented an interim report to the Governing Body [see 334th Report, paras. 1090-1121, approved by the Governing Body at its 290th Session].

1150. The International Confederation of Free Trade Unions (ICFTU) submitted additional information in support of its allegations in a communication dated 2 November 2005.

1151. As a consequence of the lack of a response on the part of the Government, at its June 2006 meeting [see 342nd Report, para. 10, approved by the Governing Body at its 296th Session] 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 have not been received in due time. To date, the Government has not sent its observations.

1152. Zimbabwe has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

A. Previous examination of the case

1153. At its June 2004 meeting the Committee made the following recommendations in relation to this case [see 334th Report, para. 1121]:

(a) The Committee once again strongly urges the Government not to resort to measures of arrest and detention of trade union leaders or members for reasons connected to their legitimate trade union activities.

(b) The Committee once again strongly urges the government not to interfere in the ZCTU's legitimate trade union activities, including the holding of workshops and seminars.

(c) The Committee requests the complainant organization to provide additional information on the circumstances of the arrest and detention of Messrs. S. Khumalo and P. Munyukwi, and on the number and circumstances of arrests made during the October 2003 events, including particulars about the four trade unionists allegedly injured by police, during the November 2003 events.

B. Additional information submitted by the complainant

1154. In its communication of 2 November 2005, the ICFTU provided detailed information, compiled by the Zimbabwe Congress of Trade Unions (ZCTU), in support of its allegations. With respect to Mr. Khumalo, the provincial chairperson for the western region of the Communications and Allied Services Workers' Union of Zimbabwe and the councillor in the Western Region Committee of the ZCTU, the documents submitted include an affidavit prepared by Mr. Khumalo, in which he describes the events of 8 October 2003. On that date, Mr. Khumalo took part in a demonstration organized by the ZCTU against high taxation, high living costs, transport problems, cash shortages and violations of human and trade union rights. The demonstration took place in front of the Mhlahlandlela government complex, which houses the Governor's Office. However, 15 minutes after arriving Mr. Khumalo and other demonstrators were cleared off the premises; they then waited on the western side of the complex, anticipating the arrival of other workers. Mr. Khumalo and the others decided to leave upon learning that the police were beating people in another part of town, and were followed by police riding in a Defender truck. When the truck reached the group of demonstrators, the police descended and began to hit the demonstrators with batons. Mr. Khumalo was struck several times by a

baton, causing blood to flow from his forehead. He was then dragged by his dreadlocks for a kilometre to the police station, where he was again beaten and had his dreadlocks shorn off with broken bottles. At this time, a police truck arrived bearing one of Mr. Khumalo's colleagues. He was made to lie down, assaulted, and forced to disclose the names of others who had participated in the demonstration, after which he and Mr. Khumalo were thrown back into the vehicle and driven around as the police searched for the individuals identified by Mr. Khumalo's colleague. One of them was found by the Tel-One office; he was beaten all over, then bundled into the vehicle. The protesters were driven out of town, and ordered to blindfold themselves. Mr. Khumalo did so in such a manner as to allow him to see through the blindfold. They were driven into the bush, then disembarked and were ordered to march. They were then ordered to lie flat on their stomachs and subsequently beaten. After the beating, they were forced to sing ZANU-PF songs, and it was while singing that Mr. Khumalo realized that the police had left. They then walked to the main road and telephoned a colleague, who arranged to pick them up. They were taken to the company clinic, then the central hospital since the nurse at the clinic felt that Mr. Khumalo's head injuries required urgent attention. Afterwards, Mr. Khumalo filed a report with the police, but so far nothing has been done; the police claim to still be investigating his complaint. In his complaint, Mr. Khumalo provided the licence number of the truck used, and the names of two police officers who had orchestrated the beatings. He also identified the colleagues who were with him as Utile Dengu and Runesu Mandinyenya. Mr. Khumalo's complaint is filed as IR 2601/04 and CR 497/2/04, and was made at the Bulawayo central police station.

1155. Several documents are attached in support of Mr. Khumalo's affidavit. The said documents include copies of hospital reports, indicating that Messrs. Dengu and Mandinyenya had suffered injuries consistent with being beaten by a blunt object; a copy of a signed affidavit by Mr. Musilwa, a medical practitioner who attested to the fact that he had treated Mr. Khumalo on 8 October 2003 and observed blood and lacerations on Mr. Khumalo's forehead, as well as multiple bruises all over Mr. Khumalo's body; and a detailed medical report of Mr. Khumalo's injuries. Copies of medical reports documenting the injuries received by Messrs. Dengu and Mandinyenya are also included in the complainant's submissions.

1156. The documents submitted by the complainant also include an affidavit by Mr. Munyukwi, the ZCTU regional chairperson for Midlands. According to his affidavit, Mr. Munyukwi, who was to be part of the workers' gathering on 8 October 2003 against high taxes, which had been dispersed by the police, was walking along Robert Mugabe Way when he was arrested by two police officers and ordered to follow them to the Civic Centre. At the Civic Centre, an assistant inspector began to poke Mr. Munyukwi, shouted "It's you who wants to rule us" at him, then proceeded to beat him with two batons. The inspector then ordered Mr. Munyukwi to sit down, but he refused, demanding to know what offence he had committed. The inspector proceeded to beat him again; four other police officers joined in the beating. When Mr. Munyukwi tried to run he was grabbed, handcuffed with his hands behind his back, and forced to lie on the ground. He was then assaulted all over his body with batons. A crowd gathered around the scene of the beating, but the officers continued to beat Mr. Munyukwi and did not stop until the arrival of officer-in-charge, Inspector Zhou. Inspector Zhou spoke to the assistant inspector who had beaten Mr. Munyukwi, then drove Mr. Munyukwi to the central police station, where he was handed over to the CID law and order section, in particular to Detective Mapingiro and Detective Sergeant Masango. Mr. Munyukwi was released at 3.30 p.m. to seek medical attention. The complainant also submits several documents in support of Mr. Munyukwi's affidavit, including: copies of medical reports indicating that Mr. Munyukwi had received extensive injuries caused by blunt trauma; a copy of a photograph displaying the bruised backside of Mr. Munyukwi; and copies of a letter to Mr. Munyukwi from the Midlands provincial headquarters police office stating that his police assault complaint had been closed, as he was unable to identify assailants at an identification parade and efforts to find the persons

responsible had failed. The letter stated his complaint could be reopened if new evidence was uncovered in the next three years.

1157. The complainant submits additional information with respect to the events of October 2003. It indicates that numerous activists were arrested before the October demonstrations commenced, and were charged with admissions-of-guilt fines of Z$5,000. Twenty-four individuals refused to pay the admission-of-guilt fines, including the ZCTU leadership, namely: Lovemore Matombo, president; Wellington Chibebe, secretary-general; and Lucia Matibenga, first vice-president. They were then charged under the Miscellaneous Offences Act for: (1) assembling and singing revolutionary songs; (2) marching along the streets waving placards; and (3) disturbing the free flow of human and motor traffic. They were subsequently released. The complainant indicates that the songs and the placards mentioned in the charges were slogans concerning legitimate trade union activities, such as ensuring no interference in trade union activities and economic and social concerns affecting trade unionists. The case was supposed to be heard on 8 March 2004, but was postponed. On 25 January 2005 the case was again postponed as the State failed to serve summons to all the 21 trade union activists charged; they are yet to be summoned to Court. The complainant alleges that the Government is trying to intimidate and harass the ZCTU leadership by deliberately protracting the proceedings and using them as a permanent threat of possible imprisonment.

1158. In addition to the arrests in Harare, 105 people were arrested in Mutare on 8 October 2003. They were detained in an enclosed area until 8.00 p.m., then asked to pay Z$3,000 for allegedly participating in an illegal demonstration. Publicity material, placards, posters and T-shirts were also confiscated.

1159. The complainant states that a total of 208 persons were arrested in connection with the events of October 2003. On 8 October 2003, 41 persons were arrested in Harare; ten in Bulawayo; 105 in Mutare; 25 in Gweru; and two in Gwanda. Additionally, 25 persons were arrested in Bulawayo on 13 October 2003.

1160. With respect to the events of November 2003, the complainant alleges that the ZCTU further organized mass demonstrations in different towns on 18 November 2003 to protest against high levels of taxation and the violation of human and trade union rights. Fifty-one activists were arrested in Harare, including members of ZCTU's leadership, who were detained for three days. Nineteen activists were arrested in Bulawayo, of which ten were released while nine were charged under the Miscellaneous Offences Act. Three hundred were arrested in Mutare; they were detained and later released on payment of admission-of-guilt fines of Z$3,000. In Gweru, approximately 15 trade union activists were arrested, detained, and denied access to legal counsel. They were subsequently released on Z$1,000 bail and charged under the Public Order and Security Act. Finally, on 19 November 2003 21 persons in Chinhoyi were arrested for participating in the protest. The total number of arrests in November 2003 was 409.

1161. Finally, the complainant alleges that the Government's statement on the ZCTU's withdrawal from the tripartite negotiating forum (TNF) is inaccurate. The complainant asserts that the ZCTU's withdrawal was not for political reasons, but instead was due to the fact that the Government was making unilateral decisions on fuel price increases, without consulting the social partners.

C. The Committee's conclusions

1162. *The Committee takes due note of the new information submitted by the complainant, which relates to: (1) the number and circumstances of arrests of trade unionists in October and November of 2003, including the bringing of charges against the said trade unionists; and*

(2) allegations of the harassment and beating of four trade unionists: Messrs. Dengu, Khumalo, Mandinyenya, and Munyukwi.

1163. *The Committee deplores the fact that, despite the time that has elapsed since this case was last examined, the Government has not replied to the Committee's recommendations or the additional information supplied by the complainant, 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.*

1164. *Under these circumstances, and in accordance with the applicable rules of procedure [see 127th Report, para. 17, approved by the Governing Body], 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.*

1165. *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.*

1166. *The Committee expresses deep concern over the allegation that numerous activists were apparently arrested in anticipation of the October 2003 demonstration and fined. Twenty-four individuals, including the ZCTU leadership, refused to pay the fine and were then charged under the Miscellaneous Offences Act. The Committee is further concerned by the delays in the proceedings relating to their case: although charged in October 2003, the trade unionists mentioned above have twice had their hearings postponed, and have yet to be summoned to court. In this respect, the Committee recalls that it has always attached great importance to the principle of prompt and fair trial by an independent and impartial judiciary in all cases, including cases in which trade unionists are charged with political or criminal offences [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 1996, 4th edition, para. 109]. In these circumstances, and in the absence of any specific indication given by the Government as to the nature of the charges brought against the ZCTU leaders and members and their dissociation from their trade union activities, the Committee strongly urges the Government to take the necessary measures so that the charges against these trade unionists are immediately dropped. It requests the Government to keep it informed in this respect. Noting further that, in Gweru, 15 trade unionists had been charged under the Public Order and Security Act, the Committee asks the Government to indicate the precise nature of the charges and, if it is found that they are being tried solely for their participation in the mass demonstration of November 2003 protesting against the violation of human and trade union rights, to take the necessary measures so that the charges are immediately dropped.*

1167. *The Committee expresses grave concern with regard to the beatings and serious injuries suffered by Messrs. Dengu, Khumalo, Mandinyenya, and Munyukwi. It is compelled to recall that the right 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****, op. cit., para. 47]. Moreover, the killing, disappearance or serious injury of trade union leaders and trade unionists requires the institution of independent judicial inquiries in order to shed full 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**, op. cit., para. 51]. Accordingly, the Committee urges the Government to initiate independent inquiries into the incidents alleged above without delay, with a view to providing adequate restitution to the four trade unionists, bringing the guilty parties to justice, and preventing the repetition of acts of violence and harassment against trade unionists. The Committee requests the Government to keep it informed in this respect.*

1168. *The Committee underscores that the present case involves allegations of an extremely serious and troubling nature. Recalling further that it had previously conveyed to the Government its deep regret over the deterioration of the situation relating to the trade union climate in Zimbabwe [Case No. 2365, 337th Report, para. 1670], the Committee is compelled to again express its deep concern in this regard. As in the abovementioned case, the Committee calls the Governing Body's special attention to the situation.*

The Committee's recommendations

1169. ***In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations***:

(a) ***Deploring the lack of reply from the Government to this case, despite the urgent appeal made by the Committee, the Committee strongly urges the Government to be more cooperative in the future.***

(b) ***The Committee strongly urges the Government to take the necessary measures so that the charges brought against the trade unionists under the Miscellaneous Offences Act are immediately dropped, and to keep it informed in this respect. With regard to those trade unionists charged under the Public Order and Security Act, the Committee urges the Government to indicate the precise nature of the charges and, if it is found that they are being tried solely for their participation in the mass demonstration of November 2003 protesting against the violation of human and trade union rights, to take the necessary measures so that the charges are immediately dropped.***

(c) ***The Committee strongly urges the Government to initiate independent inquiries without delay into the allegations of beatings and serious injuries suffered at the hands of the police by Messrs. Dengu, Khumalo, Mandinyenya, and Munyukwi, with a view to providing adequate restitution to the said trade unionists, punishing the guilty parties, and preventing the repetition of acts of violence and harassment against trade unionists. The Committee requests to be kept informed in this respect.***

(d) ***The Committee expresses its deep concern with the extreme seriousness of the general trade union climate in Zimbabwe, and once again calls the Governing Body's special attention to the situation.***

Geneva, 10 November 2006. *(Signed)* Professor Paul van der Heijden, Chairperson.

Points for decision:	Paragraph 229;	Paragraph 557;	Paragraph 905;
	Paragraph 247;	Paragraph 597;	Paragraph 928;
	Paragraph 261;	Paragraph 632;	Paragraph 968;
	Paragraph 285;	Paragraph 648;	Paragraph 978;
	Paragraph 317;	Paragraph 688;	Paragraph 1010;
	Paragraph 338;	Paragraph 704;	Paragraph 1029;
	Paragraph 363;	Paragraph 798;	Paragraph 1048;
	Paragraph 374;	Paragraph 823;	Paragraph 1064;
	Paragraph 427;	Paragraph 835;	Paragraph 1148;
	Paragraph 483;	Paragraph 858;	Paragraph 1169.