



SEVENTH ITEM ON THE AGENDA

**332nd Report of the Committee
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Part I

Introduction

1. The Committee on Freedom of Association, set up by the Governing Body at its 117th Session (November 1951) met at the International Labour Office, Geneva on 6, 7 and 14 November 2003, under the chairmanship of Professor Paul van der Heijden.
2. The members of Guatemalan, American, Indian, French and Pakistani nationality were not present during the examination of the cases relating to Guatemala (Cases Nos. 2103 and 2179), United States (Case No. 2227), India (Case No. 2228), France (Case No. 2233) and Pakistan (Case No. 2242), respectively.

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3. Currently, there are 114 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 28 cases on the merits, reaching definitive conclusions in 23 cases and interim conclusions in five 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 Governing Body's special attention to Cases Nos. 2090 (Belarus), 2258 (Cuba) and 2238 (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. 2269 (Uruguay), 2270 (Uruguay), 2271 (Uruguay), 2273 (Pakistan), 2276 (Burundi), 2278 (Canada), 2280 (Uruguay), 2282 (Mexico), 2283 (Argentina), 2285 (Peru), 2286 (Peru), 2289 (Peru), 2290 (Chile), 2291 (Poland), 2292 (United States), 2293 (Peru), 2294 (Brazil), 2296 (Chile), 2297 (Colombia), 2298 (Guatemala), 2300 (Costa Rica), 2301 (Malaysia), 2302 (Argentina), 2303 (Turkey), 2304 (Japan) and 2305 (Canada), 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), 2111 (Peru), 2177 (Japan), 2183 (Japan), 2186 (China/Hong Kong Special Administrative Region), 2214 (El Salvador), 2215 (Chile), 2217 (Chile), 2222 (Cambodia), 2248 (Peru), 2253 (China/Hong Kong Special Administrative Region), 2254 (Venezuela), 2256 (Argentina), 2257 (Canada), 2265 (Switzerland).

Partial information received from governments

7. In Cases Nos. 2068 (Colombia), 2097 (Colombia), 2138 (Ecuador), 2200 (Turkey), 2203 (Guatemala), 2211 (Peru), 2224 (Argentina), 2239 (Colombia), 2241 (Guatemala), 2244 (Russian Federation), 2259 (Guatemala), 2267 (Nigeria), 2268 (Myanmar), 2274 (Nicaragua), 2279 (Peru), 2287 (Sri Lanka), 2295 (Guatemala) and 2299 El Salvador, the governments have sent partial information on the allegations made. The Committee requests all these governments to send the remaining information without delay so that it can examine these cases in full knowledge of the facts.

Observations received from governments

8. As regards Cases Nos. 1787 (Colombia), 2088 (Venezuela), 2189 (China), 2197 (South Africa), 2204 (Argentina), 2219 (Argentina), 2226 (Colombia), 2231 (Costa Rica), 2236 (Indonesia), 2245 (Chile), 2246 (Russian Federation), 2249 (Venezuela), 2251 (Russian Federation), 2264 (Nicaragua), 2266 (Lithuania), 2272 (Costa Rica), 2275 (Nicaragua), 2277 (Canada), 2281 (Mauritius), 2284 (Peru) and 2288 (Niger), the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting.

Withdrawal of a complaint

9. In Case No. 2260 (Brazil), the Single Confederations of Workers (CUT), which was the complainant in this case, declared in a communication of 12 August 2003, that it withdrew the complaint.

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10. As regards Case No. 2232 (Chile), considering that the allegations lodged do not refer to issues relating to freedom of association, the Committee considers that this case does not call for further examination.

Urgent appeals

11. As regards Cases Nos. 2087 (Uruguay), 2096 (Pakistan), 2153 (Algeria), 2164 (Morocco), 2172 (Chile) and 2174 (Uruguay), 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.

Transmission of cases to the Committee of Experts

12. 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: Hungary (Case No. 2118), Russian Federation (Case No. 2216), Bosnia and Herzegovina (Case No. 2225), France (Case No. 2233), Pakistan (Case No. 2242) and Sri Lanka (Case No. 2255).

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

Case No. 2188 (Bangladesh)

13. The Committee examined this case on the merits at its November 2002 session [see 329th Report, paras. 194-216]. On that occasion it requested the Government to provide a copy of the High Court decision concerning Ms. Taposhi Bhattachajee, a trade union leader who had been dismissed, and a copy of the final decision on her case; the Committee also requested the Government to take all measures to ensure that she be definitely reinstated in her job, and urged it to give appropriate directions to the management of the hospital where anti-union discrimination acts had taken place, so that warnings issued to ten members of the trade union executive committee be withdrawn.
14. In a communication dated 6 September 2003, the Government indicates that the High Court Division of the Supreme Court of Bangladesh has decided that Ms. Taposhi Bhattachajee had been dismissed without any lawful authority and that her dismissal had no legal effect; she was therefore reinstated and is now enjoying all her legal service benefits. However, the Government has appealed to the Appellate Division of the Supreme Court, where the case is pending.
15. *The Committee takes note of this information. As regards the case of Ms. Taposhi Bhattachajee, the Committee strongly hopes that the Appellate Division of the Supreme Court will issue a judgement in conformity with freedom of association principles confirming the High Court decision reinstating her in her job with full benefits; it requests the Government to provide it with a copy of the judgement once it is issued. As regards the warnings issued to ten members of the trade union executive committee for acts which constitute legitimate trade union activities, the Committee urges once again the Government to give appropriate directions to the management of the Shahid Sorwardi Hospital so that all these warnings be withdrawn from their personal files, and to keep it informed in this respect.*

Case No. 1992 (Brazil)

16. At its March 2003 meeting the Committee noted the information provided by the Government, particularly with regard to the reinstatement of 28 workers of the Post and Telegraph Enterprise (dismissed along with 26 other workers following a strike in September 1997) and expressed the hope that the pending judicial proceedings would be concluded without delay [see 330th Report, paras. 18-20].
17. In its communication dated 23 May 2003 the Government sent a chart detailing the status of the proceedings relating to the 54 dismissed workers which shows that, in the majority of cases, the judicial authority ordered the reinstatement of the dismissed workers and only refused reinstatement in a limited number of cases.
18. *The Committee notes this information with interest.*

Case No. 1957 (Bulgaria)

19. The Committee last examined this case, which concerns the eviction of trade union premises and confiscation of trade union property of the National Syndical Federation (GMH) at its November 2002 meeting [see 329th Report, paras. 19-21]. On that occasion, the Committee expressed its regret that the Government had not settled these issues, more

than three years after the filing of the complaint; it once again urged the Government to hold discussions without delay with the complainant organization with a view to settling the pending issues, and to keep it informed of developments.

20. In a communication of 19 May 2003, the Government indicates that the members of the National Council for Tripartite Cooperation were requested to provide information about any activity of the GMH. Based on the answers received, there is no information about such activity at national, sectoral or regional level. The issues about the unsettled financial obligations of the GMH due for current expenses, as well as some property issues, remain pending.
21. *The Committee notes this information. Recalling that this complaint, which dates back to March 1998, involves very serious violations of freedom of association principles (i.e. acts by authorities which make it extremely difficult, if not impossible, for a trade union to function normally), the Committee once again urges the Government to hold, without delay, meaningful discussions with the complainant organization with a view to settling the issues of trade union premises and confiscation of trade union property of the GMH, and to keep it promptly informed of developments.*

Case No. 2047 (Bulgaria)

22. The Committee last examined this case at its meeting in March 2003, where it expressed the hope that the regulation concerning trade union representativeness would be adopted rapidly so that a vote concerning the representativeness of PROMYANA and the Association of Democratic Syndicates (ADS) could take place in the near future, and requested the Government to provide it with a copy of the regulation in question [see 330th Report, paras. 21-23].
23. In a communication of 19 May 2003, the Government indicates that the relevant regulation on criteria of representativeness has now been drafted and is coordinated with the social partners within the National Council for Tripartite Cooperation; the text will be presented soon to the Council of Ministers and a translated version will be sent to the Committee once adopted.
24. *The Committee notes this information. Recalling that this complaint was first filed in August 1999, the Committee hopes that the adoption process will be completed soon and that the representativeness vote will be held rapidly on that basis. It requests the Government to provide it with a copy of the relevant regulation once it is adopted and to keep it informed of the results of the vote.*

Case No. 1943 (Canada/Ontario)

25. The Committee last examined this case, which concerns lack of impartiality of the process of arbitration, at its March 2003 meeting [see 330th Report, paras. 28-31]. On that occasion, it stressed that chairpersons of arbitration boards should not only be strictly impartial but should also be seen to be so and urged the Government to take legislative measures to ensure that these principles were respected in the designation of arbitration boards and chairs, in order to gain and maintain the confidence of both sides in the system. The Committee requested the Government to keep it informed of developments and to provide it with a copy of the decision of the Supreme Court of Canada in this matter once it would be issued.
26. In a communication of 11 September 2003, the Government informed the Committee that the Supreme Court of Canada had rendered its decision on 16 May 2003, dismissing the

appeal of the Ontario Ministry of Labour. The Court stated, *inter alia*: that labour arbitration as a dispute-resolution mechanism has traditionally and functionally rested on a consensual basis, with the arbitrator chosen by, or being acceptable to, both parties; that if the purpose of compulsory arbitration is to ensure that the loss of bargaining power through legislative prohibition of strikes is balanced by access to a fair and expeditious alternative system, the process must be perceived as neutral and credible in order to do so; and that neutrality, and the perception of neutrality, is bound up with an arbitrator's training, experience and mutual acceptability.

27. *The Committee takes due note of that judgement and recalls, once again, that chairpersons of arbitration boards should not only be strictly impartial but also be seen to be so. The Committee thus urges the Government to take measures to ensure that these principles are respected in law and in practice in the designation of arbitration boards and chairs, in order to gain and maintain the confidence of both sides in the system. It requests the Government to keep it informed of developments.*

Case No. 2151 (Colombia)

28. The Committee last examined this case at its March 2003 meeting when it made the following recommendations:

- the Committee requests the Government to investigate whether in the public institutions concerned in the present case the trade union immunity of trade union officials of the Institute for Urban Development (SINDISTRITALES and SINTRASISE) and the Bogotá Council (SINDICONCEJO) has been suspended by a court (as required by law) and, if that is not the case, to take steps to reinstate them in their posts without loss of pay and, if that is not feasible, to provide them with full compensation;
- as regards the other allegations regarding anti-union discrimination, namely: (a) the dismissal of SINTRABENEFICIENCIAS officials for setting up a union in Cundinamarca District; and (b) the refusal to grant trade union leave and subsequent dismissal of SINTRASISE officials in the Transport Department, the Committee requests the Government to carry out an investigation in this matter and, if the allegations are found to be true, to take measures to reinstate the dismissed workers and ensure that the right to trade union leave is effectively enforced.

29. In its communications dated 21 and 25 March and 16 and 19 June 2003, the Union of Public Servants of the Districts and Municipalities of Colombia (UNES) alleges that, by virtue of Decree No. 1919 of 2002, the District Administration of Bogotá violated trade union agreements establishing certain advantages in respect of wages and benefits that have been recognized since 1992. The complainant organization furthermore states that despite the fact that Conventions Nos. 151 and 154 have been ratified, regulations for their application are yet to be established. As a result, public service workers are being denied the right to collective bargaining. The complainant adds that the mayor of Bogotá refuses to enter into any kind of negotiation.

30. In its communication of 11 March 2003, the Trade Union of Officials of the Ministry for Culture of Colombia alleges that the mass dismissal of 142 officials of the Ministry for Culture, 135 of which were members of the trade union (all of the musicians forming the National Symphony Orchestra and the National Symphony Band) took place as part of restructuring processes ordered by Decree No. 003210 of 27 December 2002. Nonetheless, the complainant organization recognizes that the Decree ordered the payment of all compensation provided for in the collective agreement, and that it respected the trade union immunity of officials.

- 31.** As regards the dismissal of trade union officials of various public bodies, in its communications dated 31 January, 5 February, 26 March, 28 May and 12 June 2003, the Government states that it acted in accordance with the law and respected the constitutional rights of these officials. The Government provides details of legislation and jurisprudence relating to the legal protection of trade union officials. The Government indicates that when judicial authorization to dismiss trade union officials is not requested, those affected are responsible for initiating proceedings for their reinstatement or compensation. The Government adds that it has written to the Territorial Directorate of Cundinamarca to ascertain whether any administrative labour inquiries have been initiated against the district for the dismissal of workers with trade union immunity.
- 32.** With regard to the allegations relating to the dismissal of SINTRABENEFICENCIAS officials for setting up a trade union in the Cundinamarca district, the Government states that the administrative inquiry initiated by the Territorial Directorate of Cundinamarca is being handled by the Coordination Office for the Inspection and Surveillance Group, which will issue the corresponding decision.
- 33.** With reference to the refusal to grant trade union leave and the subsequent dismissal of SINTRASISE officials in the Transport Department, the Government states that the Ministry of Labour and Social Security initiated administrative labour proceedings, and that the head of the Inspection and Surveillance Division of the Regional Labour Directorate of Santa Fe de Bogotá issued resolution No. 000801 of 31 March 1998 stating that there was no evidence that the Department of Traffic and Transport of Santa Fe de Bogotá had violated labour standards, and that action for recourse (*reposición*) and appeal had been rejected.
- 34.** *As regards the dismissal of trade union officials of various public bodies related to the Institute for Urban Development (SINDISTRITALES and SINTRASISE) and Bogotá Council (SINDICONCEJO) without the corresponding suspension of trade union immunity, the Committee observes that the Government merely indicates that it has written to the Territorial Directorate of Cundinamarca to ascertain whether any administrative labour inquiries have been initiated against the district of Bogotá for the dismissal of workers with trade union immunity. The Committee requests the Government to provide it with information on inquiries that have been initiated, as well as the results of these inquiries.*
- 35.** *As regards the allegations relating to the dismissal of SINTRABENEFICENCIAS officials for setting up a trade union in the Cundinamarca district, the Committee notes that the Government states that the administrative inquiry initiated by the Territorial Directorate of Cundinamarca is being handled by the Coordination Office for the Inspection and Surveillance Group, which will issue the corresponding decision. The Committee requests the Government to provide it with a copy of this decision.*
- 36.** *With regard to the refusal to grant trade union leave and further dismissals of SINTRASISE officials in the Transport Department, the Committee notes that according to the Government, action for recourse (*reposición*) and appeal has been rejected. The Committee requests the Government to send copies of the corresponding resolutions.*
- 37.** *With reference to the allegations made by the Trade Union of Officials of the Ministry for Culture of Colombia, the Committee observes that, in accordance with the comments made by the complainant organization itself, the Decree which provided for the restructuring of the National Symphony Orchestra and the National Symphony Band also ordered the recognition and payment of all compensation established in agreements relating to the unilateral termination without just cause of individual contracts of employment which affected all the workers of these bodies, and that the trade union immunity of officials was*

respected. Therefore, the Committee will not proceed with the examination of these allegations.

38. However, the Committee regrets to observe that the Government has not responded to the new allegations concerning the refusal of the mayor of Bogotá to bargain collectively, and the lack of regulations governing the right to collective bargaining in the public service, despite the fact that Colombia has ratified Conventions Nos. 151 and 154. The Committee requests the Government to take measures to promote collective bargaining in the Bogotá mayor's office. With regard to the lack of regulations governing the right to collective bargaining in the public service, the Committee observes that this issue has been dealt with in previous cases. In this regard, the Committee reiterates that, while some categories of public servants must have already enjoyed the right to collective bargaining under Convention No. 98, this right is recognized in general for all public servants as of the ratification of Convention No. 154 on 8 December 2000. In these circumstances, recalling that special modalities of application may be fixed with regard to collective bargaining in the public service, the Committee requests the Government to take the necessary measures to ensure that the right of public servants to collective bargaining is respected in accordance with the provisions of the Convention which has been recently ratified [see 325th Report, Case No. 2068, para. 323]. Lastly, the Committee observes that the Government has not responded to the alleged non-compliance with trade union agreements establishing certain advantages in respect of wages and benefits that have been recognized since 1992. The Committee requests the Government to send its observations in this respect.

Case No. 2237 (Colombia)

39. The Committee last examined this case at its meeting in June 2003 [see 331st Report, paras. 308-321]. On that occasion the Committee requested the Government: (a) to ensure that the workers in the Hilazas Vanylon Enterprise SA were not discriminated against in respect of wages because of their trade union membership, and to investigate whether a number of members of SINTRATEXTIL had had to renounce their membership as a result of the aforementioned wage discrimination; (b) to take steps to see that an investigation was carried out into the decline in the labour situation of the trade union official, Ms. Lucila Mercado Ladeuth, and, if the alleged discrimination were proven, to rectify the situation immediately; and (c) with regard to the uncollected fine imposed on the enterprise for refusing entry to the Labour Inspectorate, to take steps to apply the labour legislation provisions and enforce the fine without delay.
40. In a communication dated 7 September 2003, the Government reports that, with regard to the decline in the situation of Ms. Lucila Mercado Ladeuth, the official concerned has come to a conciliatory agreement with the enterprise and, in consequence, abandoned the legal action she had brought before the Territorial Directorate for Labour and Social Security of Atlántico. With regard to the fine imposed on the Hilazas Vanylon Enterprise SA for refusing entry to the Labour Inspectorate, the Government reports that this has now been enforced.
41. The Committee takes note of this information. However, it regrets that the Government has not reported whether investigations have begun to determine whether a number of members of SINTRATEXTIL have had to renounce their membership as a result of wage discrimination on the part of the enterprise because of their trade union membership. The Committee requests the Government to take steps to ensure that this investigation is carried out without delay and to keep it informed in this respect.

Case No. 2178 (Denmark)

42. The Committee examined this case on the merits at its March 2003 session. This complaint concerns the adoption of a legislative amendment that altered the existing legal and contractual regime concerning part-time work in Denmark (which previously was mostly left to collective bargaining) and which prohibited the social partners from concluding collective agreements in the future restricting any worker's preferences to work part time. The Committee invited the Government to resume thorough consultations on part-time work issues with all parties concerned, with a view to finding a negotiated solution that would be acceptable to all parties and in conformity with Conventions on freedom of association and collective bargaining, ratified by Denmark, and requested it to keep it informed of developments [see 330th Report, para. 586].
43. In a communication of 8 September 2003, the Government states that the Minister of Employment has held a meeting with the Chairman of the Confederation of Danish Trade Unions, following which it was concluded that it would not be possible to achieve a negotiated solution mutually acceptable to all parties. Nevertheless, the Minister has stated, publicly and in Parliament, his willingness to pursue discussions with social partners, with the aim of reaching a solution that ensures that employers and employees who wish to do so have the right to enter into agreements on part-time work. The Government reiterates that the Act respects current collective agreements which contained restrictions to access to part-time work, until such agreements can be denounced: this provides social partners with the opportunity to create special part-time work procedures or schedules that reflect individual needs and local labour market conditions.
44. *The Committee notes this information. Recalling that, when making its recommendation, it had taken into account the wide social consensus that previously existed in this respect and which had led to negotiated agreements between the social partners, and had considered that such a unilateral policy reversal by the Government would only have been justified in a situation of acute crisis or emergency, the Committee requests the Government once again to pursue thorough consultations on part-time work issues with all parties concerned, with a view to finding a negotiated solution that would be acceptable to all parties and in conformity with Conventions on freedom of association and collective bargaining ratified by Denmark.*

Case No. 2165 (El Salvador)

45. At its March 2003 meeting, the Committee requested the Government to examine jointly with the trade union organizations SITINPEP and FESTRASPEP the situation of certain members of these organizations, (which carry out their activities in the National Institute for Public Employees' Pensions – INPEP) who allege that they have been prejudiced for trade union reasons, with a view to their reinstatement in their jobs or the payment of compensation [see 330th Report, para. 84]. The Government had indicated that the staff reductions were due to financial reasons.
46. In its communication of 2 September 2003, the Government states that the redundancies in INPEP were not motivated by trade union membership or trade union activities and that since this case ended there have been no claims relating to trade union members that may have been prejudiced.
47. *The Committee notes this information.*

Case No. 2208 (El Salvador)

48. At its March 2003 meeting, the Committee made the following recommendations on the issues that remained outstanding [see 330th Report, para. 606]:
- (a) The Committee requests the Government to: (1) ask the judicial authority to give a ruling promptly in respect of the dismissals of 11 union officers and 30 union members at Lido, S.A., so that, if measures need to be taken to correct the situation, they can be genuinely effective; and (2) if the judicial authority considers that the dismissals were carried out for anti-union motives – specifically for participation in an eight-hour work stoppage – take urgent measures to reinstate the trade union officials and workers dismissed, with the payment of outstanding salaries in cases where this has not already been done; or if reinstatement is not possible to guarantee that adequate compensation is awarded to the dismissed workers. The Committee requests the Government to keep it informed of developments in the situation with regard to both matters.
 - (b) The Committee considers that, if strikes are prohibited whilst a collective agreement is in force, this restriction must be compensated for by the right to have recourse to impartial and rapid mechanisms, within which individual or collective complaints about the interpretation or application of collective agreements can be examined. The Committee requests the Government to indicate whether such mechanisms exist in the national legislation and to transmit a copy of the collective agreement in force at Lido, S.A.
 - (c) The Committee requests the Government to keep it informed about the fulfilment of the agreement relating to returning the relevant union dues to the Company Union of Lido, S.A.
 - (d) With regard to the allegation that Lido, S.A. used coercion to pressure union members into resigning from the union (according to the complainant organization, 25 workers have resigned in this context), the Committee requests the Government to undertake an investigation and, should the allegations be substantiated, to take measures against those responsible for such actions so as to prevent them from reoccurring in the future.
 - (e) With regard to the alleged denial of access to the company's premises of the union's executive board, the Committee recalls that governments should guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management and requests the Government to take the necessary measures to guarantee that this principle is respected within the company in question.
 - (f) The Committee requests the Government to ensure that Lido, S.A. is consulted through the national employers' organizations in respect of the allegations made in this case.
49. In its communication of 2 September 2003, the Government states with regard to the dismissals of trade union members at Lido, S.A. that it has sent an announcement to the President of the Supreme Court of the Committee's recommendations, recalling at the same time that the judiciary is independent. The Government adds that the 30 workers dismissed have been paid compensation in accordance with the Labour Code and the collective agreement in October and November 2002 and that this has been confirmed by the General Secretary of the trade union of the enterprise.
50. With regard to recommendation (b) of the Committee, the Government indicates that the mechanisms provided for in the legislation for the peaceful resolution of labour disputes are the labour courts, conciliation and arbitration.
51. With regard to recommendation (c) of the Committee, the Government states that the payment to the union of members' trade union dues has taken place normally since 28 May 2003, when the trade union requested that the Ministry of Labour take steps with the enterprise with regard to this matter.
52. With regard to recommendation (d) of the Committee, the Government states that since 3 July 2002 (the date on which the trade union and the enterprise reached a conciliatory

agreement at the General Labour Directorate) there have been no claims of coercion by the employer to pressure trade union members into resigning from the union. The allegations prior to this date are not backed by clear and convincing proof.

53. With regard to the recommendation relating to access of trade union representatives to workplaces, the Government states that it is making significant efforts and holding conciliatory meetings so that the parties can reach an agreement that will allow the trade union officials to be reinstated. Although reinstatement has still not been carried out, it is anticipated that this will take place gradually during September, subject to the agreement of both parties with regard to the specific date and the way in which this will be carried out.
54. *The Committee notes with interest the information provided by the Government. The Committee is still awaiting the legal ruling on the dismissals of 11 union officers and 30 union members at Lido, S.A. The Committee also notes that the parties, with the participation of the Ministry of Labour, have held meetings and that it was anticipated that the reinstatement of trade union officials would begin in September 2003. The Committee requests the Government to keep it informed in this respect.*

Case No. 1888 (Ethiopia)

55. The Committee examined this case, which concerns very serious allegations of violations of freedom of association, at its March 2003 meeting. The Committee made the following recommendations on the issues that were still pending [see 330th Report, paras. 643-662]:
- (a) Noting with regret that, despite repeated requests, the Government has not provided any new information on the killing of Mr. Assefa Maru, the Committee requests the Government once again to hold an independent inquiry into this matter and to keep it informed of developments.
 - (b) The Committee requests the Government to amend its legislation so that teachers, like other workers, have the right to form organizations of their own choosing and to negotiate collectively, and to keep it informed of developments in this respect, including the current status of legislative reform as regards trade union pluralism and the labour rights of civil servants.
 - (c) The Committee requests the Government to provide its observation concerning the incidents of February and September 2002 during which trade union meetings were delayed or interfered with, and ETA representatives were arrested and detained.
 - (d) The Committee requests once again the complainants to provide updated information on ETA leaders and members still aggrieved by the Government's actions as regards detention, harassment, transfers and dismissals due to trade union membership or activities.
 - (e) The Committee recalls that the Government may avail itself of the technical assistance of the Office on the matters raised in the present case.
56. In its communication of 15 May 2003, the Government reiterates its previous observations concerning the killing of Mr. Assefa Maru and states that the result of an inquiry previously conducted has established that Mr. Maru died in a shoot out after he had resisted arrest by firing on police. The Government states that it has no basis to reopen the case and the circumstances of Mr. Maru's death do not show any relationship with his earlier position in the leadership of ETA.
57. Concerning the legislative amendments, the Government states that it has benefited from the ILO's technical assistance and that the draft amendments are being reviewed for the second time by the Council of Ministers, before final consideration by Parliament.

58. Concerning the alleged incidents of delay or interference with trade union meetings in February and September 2002, the Government states that the Ministry of Labour and Social Affairs has carried out an inquiry concerning these allegations submitted by the complainants. According to the Government, the alleged ETA meeting in Addis Ababa in September 2002 never took place and consequently, there was no interference. With regard to the February 2002 ETA Awassa branch conference, the Government states that the conference was convened as scheduled and denies any interference from the regional authorities. Furthermore, the Government points out that the right of organization and assembly is guaranteed by the constitution.
59. *The Committee deplores the Government's persistent refusal to conduct an independent investigation regarding the killing of Mr. Maru. It recalls once again that when trade union leaders or trade unionists are killed, seriously injured or disappear, it is imperative that independent judicial inquiries be instituted in order to shed full light, as rapidly as possible after the facts, to determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events [Digest of decisions and principles of the Freedom of Association Committee, 4th edition, 1996, para. 51] and that the absence of judgements against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity and which is extremely damaging to the exercise of trade union rights [Digest, ibid., para. 55].*
60. *The Committee notes with interest that the Government has benefited from the technical assistance of the ILO Regional Office in Addis Ababa as regards the amendments of the labour legislation. The Committee requests the Government to provide it with a copy of the draft amendments prior to its consideration by Parliament and to keep it informed of developments.*
61. *Lastly, as regards the alleged incidents of February and September 2002 during which trade union meetings were delayed or interfered with, and ETA representatives were arrested and detained, the Committee takes note of the information provided by the Government. The Committee wishes to emphasize the fact that although the freedom of association principles are enshrined in the national constitution, the Government needs to ensure that the practice is in accordance with legislation. The Committee further recalls that all appropriate measures should be taken to guarantee that trade union rights can be exercised in normal conditions with respect for basic human rights and in a climate free of violence, pressure, fear and threats of any kind [Digest, ibid., para. 36]. The Committee requests the Government to ensure that these principles are respected.*

Case No. 2128 (Gabon)

62. The Committee last examined this case at its June 2002 meeting. On this occasion, the Committee requested the Government to take legislative or other measures as soon as possible to grant legal recognition and effective protection to trade union delegates in enterprises [see 328th Report, para. 264].
63. In a first communication dated 11 September 2002, the Government states that it would like to have sufficient time to consult Parliament with the view to taking legislative measures to grant legal recognition and effective protection to trade union delegates in enterprises. In a second communication dated 27 August 2003, the Government states that the case has made no significant progress. The Government states that the circular letter of 7 May 2001 of the Ministry of Labour, which called for a suspension of trade union delegates' activities in enterprises, was annulled and, because of this, was not put into effect. The Government adds that, in accordance with Article 4 of Convention No. 98, it has referred the definition of assignment, the length of mandate and the way in which trade union delegates are assigned to collective agreements. In this way, the Government notes

that it is appropriate to renegotiate the common body of the collective agreements, in force for 21 years. The Government adds that trade union delegates continue to carry out their trade union activities within their respective enterprises undisturbed.

64. *The Committee recalls that the issue in the present case arises from the fact that the Labour Code makes the legal existence of trade union delegates, and, therefore, their protection, dependent on the negotiation of a collective agreement. None of the relevant collective agreements contain any provision in this respect. This omission has not prevented trade union delegates from being present in enterprises in practice. Moreover, the Committee recalls that the circular letter of 7 May 2001, basing itself on the Labour Code, stated that, in the absence of relevant provisions in the collective agreements, the presence of trade union delegates in enterprises was illegal.*
65. *In the circumstances, the Committee notes with interest the information provided by the Government on the withdrawal of the circular letter and on the continuation of activities by trade union delegates. However, the Committee notes that the legal existence of trade union delegates remains precarious. Also, while noting the referral of the issue to collective bargaining, the Committee urges the Government to take legislative measures without delay to grant legal recognition and effective protection to trade union delegates and to keep it informed of the progress made in this regard.*

Case No. 2212 (Greece)

66. The Committee examined this case, which concerns the unilateral modification by the Government of an agreement on seafarers' pensions and the issuance of a civil mobilization order which put an end to a seafarers' strike, at its March 2003 meeting [see 330th Report, paras. 721-755]. On that occasion, it took note of the fact that the civil mobilization order had been lifted and requested the Government to undertake negotiations with the complainant as soon as possible in full knowledge of all the relevant facts, in order to reach agreement between the parties on a time schedule for the readjustment of seafarers' pensions. In its communication dated 22 July 2003, the Government states that this issue has been settled through the enactment of Act No. 3075/2002 (*Official Gazette* 297/5 of 5 December 2002) which increases seamen's pensions to a level never known before in the country.
67. *The Committee takes note of this information. The Committee notes that the Government does not indicate whether any negotiations took place with the complainant pursuant to the Committee's recommendations. Before reaching definitive conclusions in this case, the Committee invites the complainant to provide comments on these matters.*

Cases Nos. 2017 and 2050 (Guatemala)

68. At its November 2002 meeting, the Committee formulated the following conclusions and recommendations on the pending questions [see 330th Report, paras. 88-99] and on the questions on which the Government had sent information since the previous examination of the case:
- with respect to the La Exacta farm, the Committee had requested the Government to ensure compliance with the court orders on reinstatement of the workers dismissed from the La Exacta farm;
 - as regards the closure of Cardiz S.A. company following the establishment of a trade union in the company and the detention of the workers who remained on company premises to prevent the removal of company equipment, the Committee had asked the

Government to send information about these allegations and, more precisely, about the reasons for closing the Cardiz S.A. company;

- the Committee notes that the Government has sent only vague information on the issues relating to the La Aurora (the National Zoological Park refuses to negotiate a new collective agreement with the trade union and has encouraged a solidarity association, pressuring workers to join this), and it requests the Government to send further information on these allegations.
- 69.** In a communication of 3 September 2003, the Government states, with regards to the La Exacta farm, that on 9 June 2003 a basic agreement was established to reach a friendly agreement to resolve the issue soon, signed by the president of COPREDEH and representatives of the workers who are injured parties, the Centre for Legal Action for Human Rights (CALDH) and the Trade Union of Workers of Guatemala (UNSI TRAGUA). The relevant aspects of the agreement refer to the need to reach an agreement on financial compensation within a period not exceeding five months and to endeavour to establish other means of compensation that will benefit the families of the farm workers.
- 70.** With regard to the closure of the Cardiz S.A. company, the Government states that when the General Labour Inspectorate became involved, the company was on the point of closing down as its main international client had cancelled its buying and garment manufacture contracts. Subsequently, the company was obliged unilaterally to suspend all staff labour contracts. The General Labour Inspectorate sent the file to the relevant court for the penalty indicated to be imposed. The case is currently before the courts.
- 71.** With regard to the National Zoological Park, La Aurora, the Government states that between July 2000 and June 2002 seven files were opened and seven settlements were decided. The most recent file dates back to 2002 and, following this, no new requests for intervention have been received.
- 72.** *The Committee notes the information sent by the Government with regard to the basic agreement established to reach a friendly agreement to resolve the issue soon with regard to the La Exacta and/or San Juan El Horizonte farm, the relevant aspects of which refer to the need to reach an agreement on financial compensation within a period not exceeding five months and to establish other means of compensation that will benefit the families of the farm workers. Given that the period of five months has nearly elapsed, the Committee requests the Government to keep it informed of developments and to specify whether the agreement mentioned includes the reinstatement of the workers who were dismissed, with regard to whom legal orders for reinstatement were issued.*
- 73.** *The Committee notes the information sent by the Government with regard to the reasons for the closure of the Cardiz S.A. company; i.e. that its main international client cancelled its buying and garment manufacture contracts, which led to the company being forced unilaterally to suspend all staff labour contracts. The Committee also notes that the case is currently before the courts and requests the Government to keep it informed of the outcome of the proceedings in progress.*
- 74.** *With regard to the National Zoological Park, La Aurora, the Committee notes that the Government refers to seven files and an equal number of settlements that took place between July 2000 and June 2002, that the most recent file dates back to 2002 and that no further requests for intervention were received following this. The Committee notes that the Government does not indicate whether this information relates to the allegations submitted, i.e. that the National Zoological Park, La Aurora, refuses to negotiate a new collective agreement with the trade union and has encouraged a solidarity association,*

pressuring workers to join it. The Committee requests the Government to provide clarifications on these issues.

75. *Moreover, the Committee regrets that the Government has sent no information on the issues that remained outstanding from the previous examination of the case and urges the Government to send the information and observations requested with regard to the following without delay:*

- The Committee regrets that the Government has not sent its observations on the allegations concerning the kidnapping, assaults, and threats against the trade unionists of the Santa María de Lourdes farm, Walter Oswaldo Apen Ruiz and his family. The Committee requests the Government to send its observations on this allegation and to ensure that the safety of the trade union member, which has been threatened, is guaranteed;
- The Committee regrets that the Government has not sent information on the allegations relating to the murder of trade union members Efraín Recinos, Basilio Guzmán, Diego Orozco and José García Gonzales, the injuries to 11 workers and the detention of 45 workers of the La Exacta and/or San Juan El Horizonte farm. The Committee emphasizes once again the seriousness of the allegations and urges the Government to send information in this respect without delay;
- With regard to the murder of trade union member Baudillo Amado Cermeño Ramírez, the Committee requests the Government to send it a copy of the ruling handed down in this respect;
- With regard to the alleged threats against Miguel Angel Ochoa and Wilson Armelio Carreto López, the Committee notes the Government's statement that these persons are not members of any trade union and that no complaints in respect of threats have been sent to the Attorney-General, and it invites the complainant organizations to send comments on these observations;
- With regard to the dispute involving the Banco de Crédito Hipotecario Nacional, the Committee takes note that a negotiating committee has been set up for all the pending issues and observes that the suspension of trade union leave had been initially resolved but that the complainant organization has now alleged that it was suspended again on 26 July 2002. The Committee stresses the importance of complying with judicial rulings that prohibit dismissals without legal authorization, hopes that the negotiating committee can quickly find a solution to the dispute and requests the Government to keep it informed of progress in that committee;
- With regard to the allegations of dismissal of the founders of the trade union formed in 1997 in Hidrotecnia S.A., the Committee urges the Government to institute, without delay, an investigation into these allegations and to keep it informed of developments;
- With regard to the threats by the Bandegua company to leave the country if the workers do not agree to a reduction of their rights under the collective agreement, the dismissals threatened and carried out by that company (25 dismissals at five farms), the Committee requests the Government to ensure that anti-union dismissals do not take place and to investigate the motives for the dismissals that have occurred, to ensure respect for the collective agreement and to keep it informed of developments in the situation;
- With regard to the Tanport S.A. company, the Committee requests the Government to inform it of the result of the legal proceedings under way to protect the money owed to UNSITRAGUA members who were dismissed because of the company's closure;
- With regard to the Ace International S.A. assembly plant, the Committee requests the Government urgently to communicate the court rulings handed down on the serious allegations of discrimination and intimidation;
- Finally, the Committee requests the Government to send its observations on the new allegations, according to which the employer-controlled trade union SITRACOBSA (a fact admitted by the Government) opposed the decision of the Ministry of Labour to

reactivate workers belonging to the legitimate trade union (SITECOBSA) of the Corporación Bananera S.A. company.

76. *The Committee has just received a communication from the Government dated 27 October 2003 replying to certain allegations presented recently by UNSITRAGUA. The Committee will examine this reply at its next meeting.*

Case No. 2230 (Guatemala)

77. At its March 2003 meeting, the Committee formulated the following recommendations on the issues that remained outstanding [see 330th Report, para. 834]:

Deploing the attitude of the municipality of Esquipulas for dismissal of 42 trade unionists without the judicial authorization provided for in the Labour Code, as well as for refusing to reinstate the workers in their jobs despite warnings from the administrative authority, the Committee observes that this case has been submitted to the judicial authority and expresses the hope that the 42 trade unionists will be reinstated in their jobs very soon. The Committee requests the Government to inform it of the ruling that is handed down, as well as the text of Decree No. 35-96 of the Congress on the basis of which the dismissals were pronounced.

78. In its communication of 29 August 2003, the Government states that on 22 January 2003, it intervened in the municipality of Esquipulas because of the complaint of the dismissal of 42 workers lodged against the municipality, the relevant proceedings were carried out and the reinstatement of the workers was ordered, an order which was not implemented. It repeats that the municipality in question was fined 9,000 quetzales for the labour infringement committed. In its communication dated 27 October 2003, the Government states that the workers have not accepted a proposal by the employer to pay all benefits due, as noted by the Labour Inspector.
79. *The Committee notes the information sent by the Government. The Committee notes that this case was submitted to the judicial authority. The Committee expresses, once again, its hope that the 42 trade unionists will be reinstated in their jobs very soon and requests the Government to inform it of the ruling that was handed down in this respect.*

Case No. 2118 (Hungary)

80. The Committee last examined this case at its March 2003 meeting. It requested the Government to keep it informed of the outcome of the legal proceedings pending before the Industrial Court and the Constitutional Court with regard to the constitutionality of section 33 of the Labour Code. In this respect, the Committee had recalled [see 330th Report, paras. 103-116] that it might be difficult in practice for trade unions to attain a percentage of 65 per cent (individually) or 50 per cent (jointly) as required by section 33 in order to be able to engage in collective bargaining, especially at the level of the enterprise or branch of activity. Problems may arise when the law stipulates that a trade union must receive the support of 50 per cent of the members of a bargaining unit to be recognized as a bargaining agent; a majority union which fails to secure this absolute majority is thus denied the possibility of bargaining. The Committee considers that under such a system, if no union covers more than 50 per cent of the workers, collective bargaining rights should be granted to all the unions in this unit, at least on behalf of their own members [see General Survey of the Committee of Experts on the Application of Conventions and Recommendations, 81st Session, 1994, para. 241]. Moreover, the Committee requested the Government to take all necessary measures to ensure that the instructions of the Deputy General Manager for Public and Labour Relations were repealed.

81. In a communication dated 29 May 2003, the Government states that the Industrial Court has declared section 33 of the Labour Code unconstitutional. However, this issue of the constitutionality of section 33 is still pending before the Constitutional Court. The Government's view is that section 33 is not unconstitutional and that it is in line with Convention No. 98.
82. *The Committee requests the Government to keep it informed of the outcome of the proceedings. The Committee hopes that section 33 will be declared unconstitutional by the Constitutional Court and, otherwise, requests the Government to take all necessary measures as soon as possible to amend section 33 of the Labour Code so as to bring it in line with the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). The Committee draws again the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*
83. *With regard to the instructions of the Deputy General Manager for Public and Labour Relations according to which trade union activities had to be continuously monitored, formal and informal conversations reported and any programme or events organized by the trade union brought to the employer's knowledge, the Committee notes that such instructions have been repealed by Internal Order Gy. 7-76/2002 of the Hungarian Railway Company. The Committee requests the Government to provide a copy of the Internal Order.*

Case No. 1854 (India)

84. The Committee last examined this case at its March 2003 meeting, where it noted with regret that judicial hearings had still not taken place, eight years after the murder of Ms. Ahilya Devi, and expressed the hope that substantial progress could be noted in the very near future. The Committee requested the Government to provide it with the judgement of the court as soon as it is issued and to keep it informed of developments concerning the arrest of two absconding parties [see 330th Report, paras. 117-119].
85. In communications dated 23 May and 5 November 2003, the Government indicates that the case is pending before the Kishanganj District Magistrate Court, Bihar. Five witnesses have been examined, respectively on 7 April and 1 May 2003, and the case is scheduled for a further hearing on 20 May 2003. No witnesses were presented for cross-examination at a hearing on 17 September 2003; action as directed by the court has been initiated. The Government does not provide any indication on the arrest of the two absconding accused parties.
86. *The Committee notes this information. While noting that the trial has now started, albeit some eight years after the murder (in August 1995) of Ms. Ahilya Devi, a trade unionist who was trying to organize rural workers, the Committee strongly hopes that the proceedings will be concluded soon in this extremely serious case. The Committee requests the Government to provide it with the judgement of the court as soon as it is issued, and requests it once again to keep it informed of developments concerning the arrest of the two absconding accused parties (Messrs. Shri Munna Punjabi, alias Jai Prakash, and Shri Shrawan Giri).*

Case No. 2158 (India)

87. The Committee last examined this case at its June 2003 meeting where it requested the Government to provide information on: the murder of trade union leader Ashique Hossain; the actual situation of the complainant organization; the proceedings against eight persons at the Pataka Biri Manufacturing Company; the investigation into allegations of serious

acts of anti-union discrimination; the circumstances under which two apprentices were dismissed; the progress of proceedings before the Calcutta High Court concerning anti-union discrimination [see 331st Report, paras. 33-42].

- 88.** In a communication dated 20 May 2003, the Government indicates that the eight workers at the Pataka Biri Manufacturing Company had been hired on a contractual basis for a one-year period and that their contract automatically expired at the end of that period. Only one of the eight workers appeared before the Deputy Labour Commissioner in charge of conciliation proceedings, and stated that he had never worked in the company. There is no room for further adjudication on this issue as neither the workers involved nor the trade union seems to be interested in pursuing the matter further.
- 89.** *The Committee notes this information. It requests the Government to provide its observations on the remaining aspects of this case, namely:*
- *the conduct of an independent judicial inquiry concerning the murder of the trade union leader Ashique Hossain;*
 - *the actual situation of the complainant organization;*
 - *the progress of the investigation into allegations of serious acts of anti-union discrimination;*
 - *the circumstances under which two apprentices were dismissed; and*
 - *the progress of proceedings before the Calcutta High Court concerning anti-union discrimination.*

Case No. 2198 (Kazakhstan)

- 90.** The Committee examined this case at its November 2002 meeting [see 329th Report, paras. 653-687] and on that occasion it formulated the following recommendations:
- Recalling the importance which it attaches to the obligation for all parties to negotiate in good faith, the Committee requests the Government to adopt the necessary measures to ensure that the Tengizchevroil company bargains in good faith with the Trade Union of TCO Workers in accordance with the legislation on the deduction of trade union dues and to keep it informed in this regard.
 - The Committee requests the Government to ensure that reasonable access to workplaces of trade union members at Tengizchevroil is ensured.
 - Regarding the allegations of the forming of “yellow” trade unions at Tengizchevroil, the Committee requests the Government to initiate the relevant inquiries into these allegations and to keep it informed of the outcome.
 - The Committee urges the Government to take all the necessary measures without delay to ensure that the TCO administration withdraws the instructions contained in the Manual, which provide that the HRM labour relations coordinator shall be present at all meetings of trade union representatives and workers at TCO and that representatives of the administration of TCO may also attend these meetings, and that the Trade Union of TCO Workers be guaranteed the right to carry out its legitimate trade union activities, in particular the right to hold meetings without interference from the management. The Committee requests the Government to keep it informed of any measures taken to that.
 - The Committee requests the Government and the complainant organization to keep it informed of the outcome of the proposed trade union conference.

91. In its communication of 21 May 2003, the Government states that there are currently three associations representing workers at the Tengizchevroil company. It further states that the management of the undertaking has carried out a survey among workers to ascertain trade union membership. According to the survey, 9 per cent are not members of any organization, 85 per cent of the workers belong to the Workers' Association (a non-trade union association), 5 per cent are members of the Independent Trade Union and only 1 per cent consider themselves to be members of the complainant organization. The Government further states that a collective agreement for 2003-05 was concluded at the enterprise and that negotiations with the management involved all workers' organizations. The collective agreement was signed on behalf of the Tengizchevroil workers by the Tengizchevroil Workers' Association and the Independent Trade Union. Finally, the Government states that a new chairperson of the Trade Union Of TCO Workers was recently elected and that the management of the company is giving help and support to the new chairperson in order to ensure that the union can continue to operate. The Government concludes by stating that no obstacles to the activities of trade union organizations and no complaints have been received from workers or members of the company unions.
92. *The Committee notes the Government's communication. As concerns trade union membership at the Tengizchevroil company, the Committee notes that according to the survey conducted by the management of the undertaking, the complainant organization represent only 1 per cent of workers. The Committee observes, from the complainant's initial allegations, that in April 2002, it represented 973 workers out of 2,625 employed by the enterprise. The Committee requests the Government to provide clarifications on this matter and trusts that any survey in this regard is conducted by an independent body.*
93. *The Committee further notes the Government's statement concerning the new collective agreement. The Committee notes that although the complainant organization has also participated in the negotiations, it is not a signatory of the collective agreement contrary to the two other organizations. The Committee notes that the complainant had previously alleged that the organizations, signatories of the new collective agreements are "yellow" trade unions and are more suitable to the employer. The Committee therefore regrets that no information is provided by the Government as to whether relevant independent inquiries into the allegations of creation of a "yellow" trade unions were conducted. The Committee once again requests the Government to provide information in this respect.*
94. *The Committee also regrets that no information is provided as concerns the Committee's recommendations to take the necessary measures to ensure that the Tengizchevroil company bargains in good faith with the Trade Union of TCO Workers in accordance with the legislation on the deduction of trade union dues and that a reasonable access of trade union members to workplaces is ensured to the complainant organization. The Committee requests the Government to keep it informed in this respect. Furthermore, the Committee once again urges the Government to take all the necessary measures without delay to ensure that the TCO administration withdraws the instructions contained in the manual, which provide that the HRM labour relations coordinator shall be present at all meetings of trade union representatives and workers at TCO and that representatives of the administration of TCO may also attend these meetings, as well as that the Trade Union of TCO Workers be guaranteed the right to carry out its legitimate trade union activities, in particular the right to hold meetings without interference from the management.*

Case No. 2124 (Lebanon)

95. The Committee last examined this case at its June 2002 meeting, where it requested the Government to ensure that the principles of neutrality and non-interference by the authorities in the internal affairs of trade unions were respected and reflected in national legislation, so that in future, administrative intervention in a manner which might affect the

course of trade union elections might be avoided. The Committee also requested the Government to avoid having recourse to decrees allowing interference by the authorities and to keep it informed of any steps taken in this regard [see 328th Report, para. 463].

96. In a communication of 25 August 2003, the Government indicated that a dispute had broken out in March 2001 between the complainant organization and the administration of the General Confederation of Workers with regard to elections within the latter organization. The dispute was heard by the Council of State. Following this, reconciliation took place and the complainant organization withdrew the complaint it had lodged with the national judicial authorities.
97. *While noting this information, the Committee hopes that, in the future, the Government will exercise great restraint in relation to intervention in the internal affairs of trade unions, so that it should not do anything that might seem to favour one group within a union at the expense of another.*

Case No. 2132 (Madagascar)

98. The Committee has already examined this case on two occasions: first at its March 2002 meeting when it submitted an interim report to the Governing Body [see 327th Report, paras. 645-663], then at its June 2003 meeting when it submitted a report, requesting to be kept informed of developments, to the Governing Body [see 331st Report, paras. 579-592].
99. When it last examined this case, the Committee requested the Government to inform it of the terms of the agreement that would be reached with the trade unions on the composition of the Governing Board of the National Social Security Fund (CNaPS), as well as of the manner in which the Government would preserve the prerogatives, with regard to representation of employers' and workers' interests, of their respective organizations, if it still intended to broaden the composition of certain tripartite bodies. Moreover, the Committee requested that section 1(3) of Decree No. 2000-291 be amended to allow the representativity of trade unions to be determined without any requirement for a list of names. The Committee also requested the Government to ensure that determination of the representativity of workers' and employers' organizations is based on objective and precise legal criteria. Lastly, the Committee requested the Government to keep it informed of allegations relating to acts of interference by the Ministry of the Public Service, Labour and Social Law in the internal affairs of trade unions, and those relating to infringements of the right of collective bargaining resulting from Decree No. 97-1355; if need be, this Decree should be amended to make it compatible with the principle of voluntary collective bargaining.
100. The Government sent its observations by communications dated 24 June and 3 October 2003. The Government highlights that the Ministry of Labour and Social Law has the task of giving priority to social dialogue, hence the establishment, with the consent of the social partners, of the National Employment Council (CNE). With regard to the CNaPS, the Government and the social partners were able to reach an agreement to resolve the problem of the composition of its Governing Board, the members of which were finally able to be appointed. In this respect, the Government attached to its reply a copy of Order No. 5066-2003 of 28 March 2003 appointing members of the CNaPS Board according to the following structure: four government representatives, eight employers' representatives and eight workers' representatives. Furthermore, Decree No. 99-673 of 20 August 1999, renewing the membership of the CNaPS Board, which was promulgated under the previous government and led to disagreement between the Government and the social partners, was abrogated by Decree No. 2002-1575 of 18 December 2002, which was drawn up freely in agreement with the social partners. Generally speaking, as regards the composition of tripartite structures, the Government indicates that the role of the State from now on will

consist in endorsing the appointments proposed by the social partners. The Government emphasizes that there has been an effective resumption of social dialogue and, consequently, all activities relating to tripartism.

101. As regards the other issues raised, the Government indicates that Decree No. 2000-291 of 31 May 2000, which would require trade unions to provide a list of their members with a view to determining their representativity, is no longer justified in the light of developments. With regard to the allegations of interference, if such intervention occurred, on the one hand, the Government would not have had the intention of interfering in the internal affairs of a trade union and, on the other hand, such intervention would have been carried out with good intentions, namely to assess the actual representativity of a trade union. Lastly, Decree No. 97-1355 can never supersede the Labour Code. This Decree was promulgated against a backdrop of privatization of state-owned enterprises with a view to reducing the social impact of privatization. More precisely, enterprises experiencing difficulties, and which appeared on the list of enterprises to be privatized, were requested to suspend collective bargaining during this period until their situations were dealt with, so as to prevent the social problems generated by the economic situation from further increasing.
102. *The Committee notes with interest the information sent by the Government concerning the effective resumption of social dialogue and the resolution, in agreement with the social partners, of the issue of the composition of the CNaPS Board. The Committee particularly notes the abrogation of Decree No. 99-673 of 20 August 1999 by Decree No. 2002-1575 of 18 December 2002, which was drawn up with the social partners, and that, from now on, the role of the State will consist in endorsing the appointments proposed by the social partners with a view to their participation in tripartite bodies.*
103. *With regard to Decree No. 2000-291 of 31 May 2000, while taking note of the comments made by the Government, the Committee requests the Government to state whether section 1(3) of the Decree has been effectively abrogated. The Committee also recalls that it requested the Government to ensure that the representativity of trade unions is based on precise and objective legal criteria. The Committee requests the Government to keep it informed in this regard.*
104. *Lastly, as regards the suspension of collective bargaining for a fixed period within enterprises that were experiencing difficulties and awaiting privatization, the Committee recalls that a distinction should be made between the suspension of collective agreements that have already been concluded, and that of future negotiations. With regard to the first instance, the suspension by decree – without the agreement of the parties – of collective agreements freely entered into by the parties violates the principle of free and voluntary collective bargaining established in Article 4 of Convention No. 98. If a government wishes the clauses of a collective agreement to be brought into line with the economic policy of the country, it should attempt to persuade the parties to take account voluntarily of such considerations, without imposing on them the renegotiation of the collective agreements in force [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 876]. In the second instance, if, as part of its stabilization policy, a government considers that wage rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional measure and only to the extent that is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect a worker's living standards [see **Digest**, *op. cit.*, para. 882]. If Decree No. 97-1355 is still in force, the Committee requests the Government to transmit a copy so as to allow it to examine the compatibility of the Decree with the principle of voluntary collective bargaining in full knowledge of the facts.*

Case No. 2106 (Mauritius)

- 105.** At its March 2003 meeting, the Committee had noted with interest the resuming of social dialogue and collective bargaining in public service and had requested the Government to keep it informed of developments once the final decision is made concerning the review of the wage determination system conducted by the Pay Research Bureau (PRB) [see 330th Report, paras. 126-128].
- 106.** In a communication dated 28 May 2003, the Government states that: (1) pending the report of the PRB, it approved in December 2002 the payment of a compensation of 5.1 per cent to all workers and approved the payment of full compensation to the low-income groups; and (2) it granted an additional Rs10 on the rate of compensation, enabling the low-income groups to receive compensation higher than the inflation rate.
- 107.** In its communication dated 15 July 2003, the Government states that: (1) on 6 June 2003, it fully approved the Pay Research Bureau Report, 2003, on the Review of Pay and Grading Structures and conditions of service for implementation; (2) all recommendations concerning salaries and conditions of service directly related to salary took effect as from 1 July 2003; and (3) the PRB's report states that all industrial disputes pending before it have been settled.
- 108.** *The Committee takes note with interest of this information.*

Case No. 2115 (Mexico)

- 109.** The Committee examined at its November 2002 meeting this case, which relates to the refusal to register amendments to the by-laws of the Progressive Trade Union of Workers of the Construction Industry of the Mexican Republic (SPTICRM) so that it may include in its activities any industrial establishment and/or branch of construction involved in gas installations, gas pipelines, electricals and electricity. On that occasion, the Committee noted that the Government had pointed out that the administrative authorities took note of the by-laws on 14 August 2002 and that the complainant organization raised objections concerning certain aspects of a subsequent decision of the administrative authority on this question, in particular, to the extent in which they require that the trade union's objectives should be limited to the federal level. The Committee also noted that the Government stated that the trade union in question is registered at the federal level and that, as a general rule, the construction industry falls within the competence of the local authorities except in cases of works undertaken in the federal zone. In this respect, the Committee invited the complainant organization to provide clarifications, if it considered it appropriate, on the aspects of the administrative authority's decision that it contest, in the light of the latest observations made by the Government [see 329th Report, paras. 80-85].
- 110.** In its communication dated 6 January 2003, the complainant organization states that in August 2002 the Under-Secretariat for Labour instructed the Directorate-General for the Registration of Associations to take note of the amendments to the by-laws, and the latter issued a resolution in which it appears to comply with the aforementioned instruction. However, in its resolution the Directorate-General for the Registration of Associations added that:

... in order for this department to be able to initial each and every part of these amended by-laws with the aim of guaranteeing the legal security of the interested parties, a copy of the said by-laws must be presented to this authority, containing written mention in article 8 of the by-laws of the fact that the trade union's objectives shall correspond to industrial construction works or enterprises falling within the competence of the federal authorities, or which are

being undertaken or are operating in federal zones, or which operate under federal concession, given that the trade union in question is registered with the federal authority.

The complainant organization alleges that the resolution issued by the Directorate-General for the Registration of Associations has no legal basis, as it imposes conditions that the union cannot possibly meet, because the text of the proposed addition to the amended by-laws has neither been authorized nor agreed on by the union's members, it being unlawful for the authorities to attempt to impose their own criteria on the by-laws of workers' trade union organizations. The resolution which was issued establishes a clause, the sole objective of which is to nullify the *amparo* decision (enforcement of constitutional rights) that was issued by attempting to impose amendments and objectives which were never agreed on, constituting a violation of the freedom of association of the workers belonging to the trade union and their right to draw up or amend the by-laws of their organizations.

- 111.** In its communication dated 26 May 2003, the Government summarizes its earlier declarations and states that the Progressive Trade Union of Workers of the Construction Industry of the Mexican Republic interprets national legislation inaccurately and, as a consequence, the requirement by the Directorate-General for the Registration of Associations that the Progressive Trade Union of Workers of the Construction Industry of the Mexican Republic provide them with a copy of their by-laws stipulating in article 8 that the objectives of the union correspond to construction works undertaken within federal zones, industries or enterprises falling within the competence of the federal authorities, or which operate under a federal concession, is in accordance with the practice in Mexico whereby the application of labour standards is carried out at two levels – the federal and the local – in accordance with the distribution of powers laid out in article 123, section A, Part XXXI of the Political Constitution of the United States of Mexico and section 527 of the Federal Labour Law. The Progressive Trade Union of Workers of the Construction Industry must specify that its objective corresponds to construction works undertaken within federal zones, industries or enterprises falling within the competence of the federal authorities, or which operate under federal concession, in order to prove that it is operating under the jurisdiction of the federal labour authorities, to safeguard the federal agreement enshrined in article 124 of the Political Constitution of the United States of Mexico, which establishes that those powers not expressly conferred on federal officials are understood to be reserved to the States.
- 112.** The Government emphasizes that in its ruling of 6 June 2002, the First Circuit Tenth Collegiate Court for Labour Affairs decided that the administrative resolution being challenged should be vacated, and, in its place, the Under-Secretariat for Labour should issue another, in which it examines with full jurisdiction the conformity of the proposed by-law amendments and, with full autonomy, soundly and on justifiable grounds, decides what is in accordance with the law, without basing its decision on the provisions of article 360 of the Federal Labour Law as these are not applicable to by-law amendments. It is clear from this that the authority which ruled in the *amparo* proceedings simply decided that the resolution issued by the Directorate-General for the Registration of Associations on 19 October 2002 should be vacated and that another resolution not based on article 360 of the Federal Labour Law should be issued. The Directorate-General for the Registration of Associations fully respected this final judgement, complying with it through the resolution it issued on 14 August 2002.
- 113.** The Government concludes that the labour authorities have complied with the law and have implemented the rulings handed down by the courts. Furthermore, at no time have they contravened the provisions of Articles 1, 2, 3 and 7 of Convention No. 87, given that the right of the aforementioned organization to organize has finally been fully recognized by the labour authorities, as it was established without the prior authorization of any

authority, the organization is completely free to run itself as it sees fit and is now a recognized legal entity. Both the Progressive Trade Union of Workers of the Construction Industry of the Mexican Republic and the labour authorities also brought the actions and lodged the appeals that they considered appropriate and which are provided for by the legal system itself.

- 114.** *The Committee takes note of this information. In this respect, the Committee considers that it is for trade union organizations to decide upon the area in which they wish to carry out their activities, be it at the level of the federal district, one or more States or all of these combined. The Committee recalls yet again that the free exercise of the right to establish and join unions implies the free determination of the structure and composition of unions, and that national legislation should only lay down formal requirements as regards trade union constitutions, and the constitutions and rules should not be subject to prior approval by the public authorities [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 275 and 333]. The Committee therefore urges the Government to take measures with a view to the formal acknowledgement of the amendments to the by-laws of the Progressive Trade Union of Workers of the Construction Industry of the Mexican Republic, as decided upon by its members.*

Case No. 2136 (Mexico)

- 115.** The Trade Union Association of Airline Pilots of Mexico (ASPA), in a communication dated March 2003, withdrew its complaint as the Federal Council for Conciliation and Arbitration had ordered a survey exclusively of airline pilots in the Consorcio Aviaxsa S.A. de C.V. (AVIACSA) company in order to ascertain the organization with the greater number of members.
- 116.** *The Committee takes note of this information and will not pursue its examination of this matter.*

Case No. 2207 (Mexico)

- 117.** The Committee last examined this case at its March 2003 meeting. On that occasion, the Committee requested the Government to take steps to register the changes to the constitution requested by the complainant organization (the Progressive Trade Union of Workers in the Metals, Plastics, Glass and Allied Industries), and to keep it informed in that respect.
- 118.** In its communication dated 5 June 2003, the Government indicates that, in the case of the complainant organization, appropriate steps had been taken to comply with the right to set up trade unions and to become affiliated to them as established in Convention No. 87. As regards the registration of the changes to the constitution, it indicates that the First Circuit Second Collegiate Court for Labour Affairs, with impartiality and independence, overturned the *amparo* decision previously made in favour of the trade union and the protection granted to it under federal law as it considered that the provisions of article 360 of the Federal Labour Law, which establishes that industry trade unions must comprise workers who work in one or more enterprises in the same branch of industry, were not complied with. The Government considers that registering the changes to the constitution would imply a failure to respect the judicial decisions and the system of separation of powers prevailing in the country.
- 119.** *The Committee notes the information provided by the Government referring to the judicial decision handed down on the basis of the provisions of article 360 of the Federal Labour Law by the First Circuit Second Collegiate Court for Labour Affairs. The Committee*

*observes that it had already taken that decision into consideration in its previous examination of the case. Consequently, the Committee recalls the principle whereby the free exercise of the right to establish and join trade unions implies the free determination of the structure and composition of unions; the national legislation should only lay down formal requirements as regards trade union constitutions, and the constitutions and rules should not be subject to prior approval by the public authorities [see **Digest of decisions and principles of the Freedom of Association Committee, 1996, paras. 275 and 333**].*

Case No. 2086 (Paraguay)

- 120.** At its November 2002 meeting, the Committee last examined Case No. 2086, concerning: (1) 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 Reinaldo Barreto Medina; and (2) the dismissal of trade unionist Florinda Insaurralde [see 329th Report, paras. 109-113]. On that occasion, the Committee formulated the following recommendations:

The Committee notes the fact that the trade union leaders Alan Flores and Jerónimo López are currently under house arrest. However, taking into account its previous comments, the serious flaws in the legal proceedings concerning the two trade union leaders noted in the previous examination of the case, the time gone by since the sentence was handed down in the first instance (over one year) without the relevant appeal having been decided, and the fact that the accused have already served the minimum sentence imposed on them in the first instance, the Committee profoundly regrets that no measure has been taken to release Reinaldo Barreto Medina, Jerónimo López and Alan Flores. In these circumstances, the Committee urges the Government to take measures to this end and hopes that a decision will be handed down in the very near future on the judicial appeals filed and that they will take into account the provisions of Conventions Nos. 87 and 98. The Committee requests the Government to keep it informed in this respect.

The Committee requests the Government to keep it informed of any proceedings that Florinda Insaurralde may bring against resolution No. 321/99 and Decree No. 7081/2000, which led to her dismissal.

- 121.** In the context of the follow-up to these recommendations, in communications dated 8 February, 23 April and 2 June 2003, the complainants requested the International Labour Office to field a mission to note further flaws in the legal proceedings concerning the accused trade union leaders (alleging further delays in handling requests for release, extremely slow progress on the appeal filed against the sentence handed down in the first instance in October 2001, etc.). Moreover, in a communication dated 15 July 2003, the World Confederation of Labour (WCL) joined the complaint, stating that: (a) while a person guilty of committing an offence should be duly punished, the proper functioning of the judicial system is an essential prerequisite; (b) the judicial branch must be wholly independent and adhere to the procedures laid down in the national legislation, in full compliance with Convention No. 87; and (c) due account should be taken of the Committee’s recommendations in the judicial proceedings. In a communication dated 23 April 2003, the Government of Paraguay accepted the complainants’ proposal for a follow-up mission to visit Paraguay in connection with these allegations.

- 122.** *In this respect, the Committee has been informed that: (1) the court of first instance violated the principle of nullum crimen sine lege, which prohibits applying criminal law retroactively, and the sentence was handed down on the basis of a rule of criminal law promulgated after the acts at issue took place; and (2) the accused have served a substantial part of the terms of imprisonment imposed by the court of first instance (in the case of Mr. Barreto Medina, over half his sentence), and there is no firm prospect of any improvement in the state of the proceedings against the trade union leaders in the short or medium term (release requested by the Committee on Freedom of Association and the*

trade union leaders, a ruling by the Court of Appeal on the appeal filed in October 2001), given that the Court of Appeal has stated that, according to the statutory time limits on the proceedings, a ruling on the appeal filed in October 2001 will not be handed down before December 2003 or the beginning of 2004.

- 123.** *The Committee emphasizes that due process of law should include the non-retroactive application of the criminal law, and that the right to a fair and rapid trial is among the civil liberties which should be ensured by the authorities in order to guarantee the normal exercise of trade union rights [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 108 and 94]. In these circumstances, and in the light of the information received, the Committee deeply regrets the long delay taken by the Court of Appeal to make its ruling and reiterates its previous recommendations. Accordingly, it strongly urges the Government once again to take immediate action to secure the release of trade union leaders Reinaldo Barreto Medina, Jerónimo López and Alan Flores. The Committee requests the Government to keep it informed of any measure taken to that end.*
- 124.** *Lastly, the Committee regrets that the Government has not sent the observations requested concerning any proceedings filed by Florinda Insaurrealde against resolution No. 321/99 and Decree No. 7081/2000, which led to her dismissal, and once again requests the Government to keep it informed in this respect.*

Case No. 2098 (Peru)

- 125.** At its June 2003 meeting, the Committee once again requested the Government to take steps to investigate without delay the dismissals of Carlos Alberto Paico and Alfredo Guillermo de la Cruz Barrientos (members of the Board of the Trade Union of Workers of the Industrial Nuevo Mundo Company) and of that union's members and former leaders, Alfonso Terrones Rojas and Zósimo Riveros Villa and, if it were found that they were dismissed because of their trade union activities, to take measures to ensure their reinstatement in their posts. The Committee requested the Government to keep it informed in that respect [see 331st Report, para. 66].
- 126.** In its communication of 19 March 2003, the Government states that the judicial authority has reported that there are no proceedings under way for the persons mentioned.
- 127.** *Given that in Peruvian legislation the authority responsible for examining claims of anti-union persecution is the judicial authority, the Committee invites the complainant organizations to take steps to ensure that the trade unions officials in question take the appropriate legal actions.*

Case No. 1826 (Philippines)

- 128.** When it last examined this case in March 2003, which concerns lengthy delays and several postponements of a trade union certification election (first requested in February 1994) at Cebu Mitsumi Inc., in the Danao export processing zone, the Committee once again expressed its deep concern at the inordinate delays, intervened in the case and urged the Government to speed up, as a matter of urgency, the process of certification at Cebu Mitsumi Inc. In addition, the Committee deeply regretted that the Government did not provide any other information on the other issues (the suspension of Mr. Ulalan, and the steps taken to establish a fair and speedy certification process providing adequate protection against acts of interference by employers in such matters) [see 330th Report, paras. 138-140].

129. In a communication of 13 August 2003, the Government provided the following information. The pre-election conference on the certification elections at Cebu Mitsumi Inc., conducted by the Department of Labor and Employment, to which earlier communications of the Government referred, continued and resulted in agreements between both parties on the following points: (a) the certification election will be held on 5 December 2003 from 8 a.m. until 10 p.m.; (b) Cebu Mitsumi Inc. will submit the list of voters before 20 August 2003, the date agreed by the parties for inclusion-exclusion proceedings; (c) Cebu Mitsumi Inc. will provide the petitioner (Cebu Mitsumi Employees' Union (CMEU)) with the said list before 18 August 2003; and (d) other aspects of the certification election will be discussed at the next meeting scheduled on 20 August 2003. The communication does not contain any other information.

130. *The Committee takes note that both parties have agreed to hold the certification election on 5 December 2003. The Committee notes on the other hand that, at the time of the submission of the Government's reply, the list of voters had not been established and other aspects of the election remained to be agreed upon. Bearing in mind that the last two elections had been marred by a number of irregularities, in particular because the majority of eligible voters had not cast their votes, thus resulting in further delays, the Committee trusts that every effort will be made to ensure that the certification election will actually take place on the agreed date, with all the assurances of impartiality and non-interference. The Committee requests the Government to keep it informed in this regard. Further, the Committee deplores that for the sixth time it must reiterate its request to the Government to provide information on the indefinite suspension of the president of the CMEU, Mr. Ulalan, as well as on the steps taken with a view to establishing a legislative framework allowing for a fair and speedy certification process, providing adequate protection against acts of interference by employers in such matters. The Committee expects that the Government will now provide this information without any further delay.*

Case No. 2195 (Philippines)

131. The Committee last examined this case at its meeting in November 2002. Recalling that the 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 urged the Government to amend section 263(g) of the Labor Code in order to put it into full conformity with the principles of freedom of association. In addition, considering that sanctions, such as mass dismissals, in respect of strike action, should remain proportionate to the offence or fault committed, the Committee requested the Government to initiate discussions in order to consider the possible reinstatement in their previous employment of all the members of the Association of Airline Pilots of the Philippines (ALPAP) who had been dismissed following the strike staged in June 1998. In this respect, while acknowledging the fact that ALPAP could be required to hold a strike vote before staging a strike, the Committee considered that the Secretary of Labor and Employment should not have assumed jurisdiction over the conflict and put an immediate end to the strike [see 329th Report, paras. 722-739].

132. Since the communication of the conclusions and recommendations of the Committee, approved by the Governing Body at its 285th Session (November 2002), to the Government and the complainant, both parties have sent a number of communications. The last communication received from the complainant, dated 31 July 2003, has been transmitted on 19 August 2003 to the Government for its observations. The communications that are now before the Committee for its examination of the effect given to its recommendations can be summarized as follows.

- 133.** In a communication dated 6 January 2003, the Government indicates that it takes exception to the conclusions of the Committee. The Government reiterates and emphasizes that the strike declared by ALPAP did not meet the procedural requirements set forth in the Labor Code and was in defiance of the return-to-work order issued in accordance with article 263(g). The Government adds that the air transport plays an important role in the day-to-day economic activities of the Philippines and that the economic performance was plummeting when ALPAP went on strike. With respect to the amendment of article 263(g), the Government informs the Committee that steps towards the amendment of the law are being taken, in light of the national conditions of the Philippines. As for the recommendation of the Committee concerning the dismissed workers, the Government has duly noted it.
- 134.** In a communication dated 7 January 2003, the complainant alleges that the Department of Labor and Employment (DOLE) has decided to adopt a cavalier approach to the matter. Further, the complainant attaches to its communication a motion that it has filed with DOLE. In this document, ALPAP alleges that Philippine Airlines Inc. (PAL) has dismissed not only the workers who participated in the strike but also all the officers and members of ALPAP, including those who were on official leave or abroad at the time of the strike. Therefore, ALPAP requests DOLE to conduct “the requisite legal proceedings to determine with finality who among the officers and members of ALPAP should be reinstated or deemed to have lost their employment status for their actual participation in the strike conducted by ALPAP in June 1998”.
- 135.** In a letter of 7 August 2003, the Government provides its observations on ALPAP’s communication. The Government states at the outset that a distinction must be made between the recommendation of the Committee on the need to amend article 263(g) and the recommendation concerning the re-examination of the dismissals of ALPAP members. On the first issue, the Government indicated that DOLE has already submitted a proposal of amendment to the labour committees of the Senate and of the House of Representatives; the proposal would include the exercise of assumption of jurisdiction powers only in disputes involving “essential services”. On the other hand, the position of the Government must be replaced in the context of a dispute involving ALPAP that has been resolved with finality by the Supreme Court on 10 April 2002 (the decision of the Court was attached to the Government’s reply to the complaint).
- 136.** The Government emphasizes once more that the strike staged by ALPAP was tainted with procedural flaws and it underlines that both the Committee of Experts on the Application of Conventions and Recommendation and this Committee have admitted that the right to strike is not an absolute right and that certain prerequisites to its exercise are acceptable. In this respect, the Government underlines that requirements set out in article 263 are no different from the measures accepted by this Committee.
- 137.** As for article 263(g), the Government underlines that the Committee accepts compulsory arbitration in cases of strike, in particular, in relation to essential services. Referring to paragraph 541 of the *Digest of decisions and principles of the Freedom of Association Committee*, 4th edition, 1996, the Government emphasizes that the Committee admits that what is meant by essential services in the strict sense of the term “depends to a large extent on the particular circumstances prevailing in a country”. The Government notes that the Committee excludes the transport sector only in “general terms”. The Government therefore considers that, under reasonable circumstances, particular services in this sector may be considered as essential. In this connection, the Government states that the Philippines socio-economic lifeblood runs through an archipelago connected by travel and communications facilities and services; thus PAL provides a crucial lifeline accessed by thousands of travellers and merchants on a daily basis. Suspension of PAL flights therefore would have tremendous economic implications for the country.

138. Concerning the Committee's statement that the strike should be declared illegal by an independent body, the Government underlines that it already complies with this principle and that, in particular, the actions of the Secretary of Labor and Employment are subject to the review of the Courts. Both the Court of Appeals and the Supreme Court have confirmed the Secretary's rulings in the present case.
139. On the motion filed by ALPAP, the Government provides the following information. In a letter of 30 July 2003, the Secretary of DOLE informed ALPAP that the issue raised in the motion has been resolved with finality by the Supreme Court. Thus DOLE could not hold proceedings to determine: (1) the officers and members of ALPAP who should be reinstated or deemed to have lost their employment status with PAL, because of their actual participation in the strike conducted in June 1998; (2) issues relating to the entitlement to and the enjoyment of accrued employment benefits by the officers and members of ALPAP whether they had been terminated or not.
140. *The Committee notes that the Government develops mainly its views on the substance of the case in particular by elaborating on those which it already presented in its reply to the complaint. Bearing in mind that its examination of the case has reached the stage where the Committee has to consider the effect given by the Government to its recommendations, as they have been approved by the Governing Body, the Committee will simply take due note of these views and that they differ from the conclusions reached by the Committee.*
141. *With respect to its particular recommendations, the Committee notes with interest that the Department of Labor and Employment (DOLE) has submitted to both the House of Representatives and the Senate a proposal to amend article 263(g) so as to limit the jurisdiction of the Secretary of Labor to dispute involving essential services. The Committee requests the Government to keep it informed in this regard and to provide a copy of the proposed amendment as soon as it has been adopted.*
142. *Concerning the possible reinstatement of ALPAP's workers who had been dismissed following the strike staged in June 1998, the Committee notes that there is no indication, from the communications at its disposal, that discussions have been initiated. Moreover, the Committee notes with concern that, on the one hand, the motion filed by ALPAP contains allegations that all its members and officers have been dismissed whether they had participated in the strike or not, and that, on the other hand, the Secretary of Labor and Employment has decided not to intervene in the matter as it considered that the Supreme Court has handed down a final ruling thereon. In these circumstances, the Committee expresses the firm hope that the Government will take concrete steps to initiate discussions in order to consider the possible reinstatement in their previous employment of all ALPAP's workers who have been dismissed following the strike staged in June 1998, and to keep it informed in this regard. Further, the Committee requests the Government to provide specifically, and as a matter of urgency, its observations on the allegation of ALPAP in relation to the dismissals of all the union's members and officers regardless of their participation in the strike or not. Finally, the Committee awaits the Government's observations on ALPAP's communication dated 31 July 2003.*

Case No. 1785 (Poland)

143. The Committee last examined this case at its March 2003 session, where it requested the Government to continue to keep it informed in respect of remaining claims pending before the Social Revindication Commission, and of any further developments in respect of the Employees' Recreation Fund [see 330th Report, para. 143].
144. In a communication of 28 August 2003, the Government indicates that three cases are currently examined by the Social Revindication Commission; another decision was issued

in July 2003 but is still subject to appeal. The Public General Prosecutor has appealed (to the Supreme Court) a decision of the Supreme Administrative Court upholding a decision of the Commission. Three other cases are pending before the Supreme Administrative Court. All these decisions may lead to further proceedings before the Commission. The Government also informs that the legislative work on the status of the assets of the Employees' Recreation Fund has not started yet.

145. *The Committee takes note of this information and requests the Government to continue to keep it informed in respect of remaining claims pending before the Social Revindication Commission, and of any further developments in respect of the Employees' Recreation Fund.*

Case No. 2185 (Russian Federation)

146. The Committee examined this case at its June 2003 meeting [see 331st Report, paras. 660-677] and on that occasion it requested the Government to initiate an independent inquiry into the allegations concerning the creation of a "yellow" trade union at the OAO Novorossiisk Commercial Sea Port (OAO NMTP). It further requested the Government and the complainant to keep it informed of any developments concerning the establishment of a unified representative body on the basis of proportional representation for the conclusion of a new collective agreement.
147. In their communication of 20 August 2003, the Trade Union of Water Transport Workers (PRVT) and the FNPR indicated that the collective agreement between workers and the OAO NMTP was concluded in violation of the Russian legislation since no conference at the workplace was held and the collective agreement was signed on the basis of a decision of the drafting committee. Although the committee included representatives of the complainant organization, the PRVT states that it was impossible to put forward any serious proposals, since the management's representatives put them to a vote and they were withdrawn from discussion by the votes of the representatives of the "yellow" trade union. The complainants provide further information on the continuing discriminatory policy of the OAO NMTP management towards the PRVT primary trade union and on the pressure exercised on individual members of the trade union to leave the PRVT.
148. In its communication of 5 September 2003, the Government states that the Russian legislation provides for adequate protection against acts of interference in trade union affairs and trade union rights in general. The Government states that the General Office of Prosecutor conducted an inquiry into allegations of the primary trade union organization of the Azov-Black Sea Interregional Organization of the PRVT addressed to the Office of Prosecutor of the Krasnodar territory concerning the actions of the administration of the OAO NMTP aimed at withdrawal of the port workers from the PRVT and their subsequent entry into the new trade union. The Government states that those allegations were not confirmed.
149. The Government indicates that the process of withdrawal from the PRVT began over ten years ago and not in 2000, as the complainant in this case indicates. The new trade union of seaport workers was set up in early 2001 and registered in April 2001 in accordance with the legislation. The trade union was founded on the initiative of a group composed of 11 persons. According to minute No. 1 of the meeting of 17 January 2001, the founders of the trade union elected a committee of three people to deal with the questions of establishment of the trade union. Following the general conference where all the port workshops could delegate their representatives, the trade union was established. No evidence confirming the participation of the port management in the creation of the trade union was found. The alleged facts of appointment of workers to the conference by the port management were not confirmed.

- 150.** According to the findings of the inquiry conducted by the Office of Transport Prosecutor in June-July 2001 many members of the PRVT did not request in writing the transfer of the trade union dues to the new trade union of the seaport workers. On the order of the Office of Prosecutor this violation was obviated.
- 151.** The Government further states that this case raises the issue of collective labour disputes. In this respect, it states that the Russian legislation provides for the procedure of settlement of collective labour disputes. In particular, according to section 29 of Federal Act (No. 10-FZ) on trade unions, their rights and guarantees of their activities, “the judicial protection of the rights of trade unions shall be guaranteed. Cases of breach of trade union rights shall be heard by a court of law on the petition of a prosecutor or on a statement of claim or bill of complaint filed by the respective body of the trade union or primary trade union organization”. The complainant did not lodge any complaint with the National Labour Inspectorate of the Krasnodar territory; neither did the trade union submit any complaint to the relevant judicial bodies. Therefore, all national remedies were not exhausted.
- 152.** *The Committee notes the information provided by the complainant and by the Government. The Committee notes from the Government’s statement that the allegations of creation of a “yellow” trade union by the port management and the campaign launched by the enterprise aimed at the withdrawal of the port workers from PRVT and their subsequent entry into the “yellow” union were not confirmed by the inquiry conducted by the General Office of Prosecutor and that the new trade union of seaport workers was legally created. The Committee recalls from the previous examination of this case that the complainants had submitted a copy of minute No. 1, referred to by the Government and which provides for the names and the post of the three members of the committee responsible for establishing the trade union. Among them are the director of the Human Resources Department and the head of the Department of the State Property. The Committee also recalls that the commission of inquiry established by order of the Transport Prosecutor in May 2001, the report of which was also submitted by the complainant, confirmed the abovementioned allegations. It further notes that in this connection, the Transport Prosecutor has requested the Director of the OAO to obviate all the violations of the Law on Trade Unions. In the light of these circumstances as well as of the recent communication of the complainants to the effect that the port administration continues to put pressure on the members of the primary trade union of the complainant organization, the Committee once again requests the Government to initiate an independent inquiry into these allegations and to keep it informed of the outcome.*
- 153.** *The Committee further notes the information provided by the PRVT concerning the negotiation of a collective agreement. The Committee notes that the representative of the complainant organization has participated in the drafting of the collective agreement, but that according to the complainant, it could not successfully put forward any serious proposals as they were vetoed by the representatives of the alleged “yellow” trade union. The Committee notes that the complainant organization does not indicate whether the drafting committee was established on the basis of proportional representation, as provided for in section 37 of the Labour Code. The Committee notes the Government’s statement according to which the complainant did not lodge any complaint with the National Labour Inspectorate of the Krasnodar territory nor with the relevant judicial bodies. The Committee recalls from the previous examination of this question, that the complainant addressed the Office of Public Prosecutor with a request to issue a legal opinion on the procedure of conducting collective bargaining and on the consequences of non-respect of the legislative procedure. According to the opinion of the prosecutor, attached to the complaint, the procedure of conducting collective bargaining was not respected at the OAO NMTP; the complainant was therefore advised to appeal the actions of the port administration according to the legislation in force. The Committee request the*

complainant to indicate whether it considers appealing to the relevant judicial body with a view to annul the collective agreement in question. The Committee regrets that no actual information was provided by the Government to its request to keep it informed of any developments concerning the establishment of a unified representative body on the basis of proportional representation for the conclusion of a new collective agreement at the OAO MNTP.

- 154.** *The Committee further requests the Government to reply to the observations of the complainants contained in the communication of 20 August 2003.*

Case No. 2199 (Russian Federation)

- 155.** The Committee examined this case at its June 2003 meeting [see 331st Report, paras. 678-706] and on that occasion it formulated the following recommendations:

- The Committee regrets that, despite the time that has elapsed since the complaint was first presented, the Government has not replied to any of the complainant's allegations. The Committee urgently requests the Government to be more cooperative in the future and in particular, it would request the Government to solicit information from the employer's organization concerned with the view to having at its disposal its view as well as those of the enterprise concerned on the questions at issue.
- The Committee requests the Government to establish an independent investigation into the allegations of acts of anti-union discrimination and if it is proven that acts of anti-union discrimination were taken against RPD members, to take all necessary steps to remedy this situation, to ensure reinstatement at the TPK, as requested by the courts, as well as payment of lost wages.
- The Committee requests the Government to keep it informed of the outcome of the new case filed by the docker trade union members against new dismissals.
- The Committee requests the Government to take the necessary measures, including the amendment of the legislation, in order to ensure that the complaints of anti-union discrimination are examined in the framework of national procedures which are clear and prompt. The Committee requests the Government to keep it informed in this respect.
- As regards the complainant's allegation of violation of trade union premises and property, the Committee considers that before being undertaken, the occupation or sealing of trade union premises should be subject to independent judicial review. Drawing the Government's attention to the importance of the principle that the property of trade unions should enjoy adequate protection, the Committee requests the Government to take the necessary measures so as to ensure that this principle is respected.

- 156.** In its communication of 5 September 2003 the Government states that anti-union discrimination is prohibited under the Russian legislation, which also provides for legal remedies in case of violation of workers' rights. The National Labour Inspectorate of Kaliningrad district has examined the allegation concerning the violation of labour legislation by the administration of the Commercial Seaport of Kaliningrad (TPK). The allegations of violation of labour rights of workers – members of the Russian Trade Union of Dockers (RPD) as concerns decrease of dockers' wages following their transfer to different brigades, which took place after the termination of the strike on 28 October 1997, were not confirmed. All dockers, members and non-members of the RPD received the same wages. The investigation further found that from 1 April to 31 December 1998, 279 workers, including 55 dockers, were fired from the TPK due to the staff reduction. Twenty-six fired dockers were members of the RPD, all of them were dismissed with the approval of the trade union committee.

- 157.** The trade union organization addressed the Baltic District Court of Kaliningrad a complaint against the TPK on behalf of 24 dockers, members of the RPD. Following the court decision of 24 May 2002, the dockers were reinstated in their job on 27 May 2002. Since the court decision ordering compensation to the dockers was considered unlawful according to section 323 of the Code of Civil Procedure, the Kaliningrad Provincial Prosecutor suspended its execution of the decision. Prosecutor's objection to the execution of court decision of 24 May 2002 was confirmed by the Presidium of Kaliningrad Provincial Court. Since the TPK administration did not offer to the dockers the job provided by the labour contract, the dockers did not come to work and were fired for absenteeism. The trade union once again addressed the Baltic District Court of Kaliningrad. Following the court decision of 7 October 2002, the dockers were once again reinstated in their jobs on 23 October 2002. However, the dockers did not come to work. The bailiff of the Baltic District Court had ordered the termination of the enforcement procedure of the court decision of 24 May 2002. The bailiff's decision was contested by the dockers and revoked by the court. On 30 December 2002, the court issued a second decision containing clarifications of the previous decision and providing for the posts to be occupied by the dockers. The Kaliningrad port appealed the court decision of 30 December 2002. The civil board of the Kaliningrad Provincial Court rejected the appeals. The court decision on reinstatement of the dockers was submitted to the bailiff's office on 31 March 2003. On 2 April 2003, the bailiff issued an order to reinstate the dockers in their posts. However, the indicated date of reinstatement was 31 March 2003 and not 30 October 2002 (the date indicated in the court decision). Due to this discrepancy, the dockers did not come to work. The port director appealed the bailiff's actions. The court considered those actions to be legal. Due to the non-respect of the court decisions, administrative sanctions were imposed on the port director on two occasions. Presently, the port administration does not oppose to the reinstatement of dockers.
- 158.** As concerns the allegations of anti-union discrimination, the Government states that following relevant investigations, those allegations were not confirmed. The Kaliningrad Provincial Court had rejected those allegations on 14 August 2000 and the dockers did not appeal this decision.
- 159.** As concerns the allegations of violation of trade union premises by the port management, the Government states that the relevant inspections did not confirm these allegations. The union's request to begin criminal procedure against the port was therefore rejected by the Office of the Prosecutor on 16 August 2002.
- 160.** Finally, the Government states that the dockers used all means of procedure provided for the effective protection of their rights by the former Code of Civil Procedure: they addressed the Labour Inspectorate of Kaliningrad, the Office of the Prosecutor and the courts. The Government points out that according to the newly adopted Code of Civil Procedure, judicial decisions are binding on everyone, including authorities, organizations and citizens. Moreover, on the alleged facts of discrimination, the Government indicates that complaint No. 67336/01 "Danilenkov and others v. Russia" will be examined by the European Court of Human Rights.
- 161.** *The Committee notes the information provided by the Government. The Committee notes that although the Government denies the alleged facts of anti-union discrimination and states that the Russian legislation provides for the effective means of protection of trade union rights, it indicates that on numerous occasions, the complainants addressed the relevant judicial authorities seeking the implementation of court decisions to reinstate the dockers in their posts which the port administration had persistently refused to fully implement. The Government further indicates that the complainants have exhausted all possible remedies provided for protection of their rights. Noting with concern that numerous court decisions providing for the reinstatement of dockers, members of the RPD,*

cannot be enforced, the Committee continue to query the motivation behind the employer's refusal, as well as the effectiveness of the procedures on protection of labour rights provided by the legislation. The Committee notes the Government's statement to the effect that the port administration does not oppose to the reinstatement of dockers. However, no information on whether the dockers were reinstated was provided. The Committee requests the Government to provide information in this respect.

- 162.** *As regards the allegation of violation of trade union premises and property, the Committee notes the Government's statement to the effect that the relevant inspections did not confirm this allegation and therefore, the union's request to begin criminal procedure against the port was rejected by the Office of Prosecutor on 16 August 2002. The Committee recalls from the previous examination of this case that on 8 August 2002, the port administration notified the RPD that it was to vacate the union office (the relevant documentation was attached to the complaint) and that five days later, the trade union premises were sealed without previous judicial review. The Committee therefore once again recalls that before being undertaken, the occupation or sealing of trade union premises should be subject to independent judicial review in view of the significant risk that such measures may paralyse trade union activities. The Committee draws the Government's attention to the importance of the principle that the property of trade unions should enjoy adequate protection [see **Digest of decisions and principles of the Freedom of Association Committee**, paras. 183 and 184]. The Committee therefore once again requests the Government to take the necessary measures so as to ensure that this principle is respected.*

Case No. 2171 (Sweden)

- 163.** At its March 2003 session, the Committee examined this case, which concerns a statutory amendment enabling workers to remain employed until the age of 67 and prohibiting negotiated clauses on compulsory early retirement. The Committee requested the Government to take appropriate remedial measures so that agreements already negotiated on compulsory retirement age would continue to produce all their effects until their expiry date, invited the Government to resume thorough consultations on pension issues with all parties concerned with a view to finding a solution that would not impede the right to bargain collectively, and requested to be kept informed of developments [see 330th Report, para. 1053].
- 164.** In a communication of 26 May 2003, the Government indicated that it held a meeting on 14 May 2003 with the implementation group, which includes representatives from the five parliamentary political parties that endorse the agreement on a new pensions system. The Government had also invited the bargaining partners to a meeting on 12 June 2003.
- 165.** *The Committee notes this information and once again requests the Government to take remedial action so that collective agreements already negotiated on pension matters continue to produce all their effects until their expiry dates. It requests the Government to keep it informed of the results of the thorough consultations with the bargaining partners on pension issues held with a view to finding a solution that will be in conformity with the Conventions on freedom of association ratified by Sweden.*

Case No. 2148 (Togo)

- 166.** The Committee last examined this case at its March 2003 meeting [see 330th Report, paras. 144-147]. On that occasion, the Committee once again requested the Government to rescind the decrees declaring the teachers absent without leave and to restore the rights of all teachers still affected by these decrees, and to keep it informed in this regard.

- 167.** In its communication of 2 September 2003, the Government stated that the trade union in question, the National Union of Independent Trade Unions (UNSI), had sent it a list of assistant teachers that claimed not to have been reinstated in their jobs following the strike, which was the object of the complaint. As this list did not conform to that of the Directorate of Human Resources of the Ministry of National Education, it was decided to establish a committee to carry out the necessary verification. The Government will only decide whether there are cases where rights have not been restored after this committee makes its report.
- 168.** *The Committee notes this information. Recalling that the events giving rise to this complaint took place in June 1999, in the context of a legal strike to demand the payment of salary arrears and unpaid salaries, the Committee notes that the Government has still not followed up to its recommendation to revoke the decrees, and once again urges it to revoke the decrees in question. The Committee hopes that the verification committee will carry out its investigations very rapidly, and requests the Government to keep it informed of the outcome of these deliberations and the decisions taken as a result regarding the teachers still affected by the application of the decrees.*

Case No. 2018 (Ukraine)

- 169.** The Committee last examined this case at its November 2002 meeting when it requested the Government to continue to keep it informed of any development relating to this case [see 329th Report, paras. 142-144].
- 170.** In its communication dated 4 September 2003, the Government indicates that the administration of the Ilyichevsk Maritime Commercial Port and the Independent Trade Union of Workers of the Ilyichevsk Maritime Commercial Port (the NPRP) have concluded a new collective agreement on transfer of trade union dues. The Government further states that 1,197 are currently members of the NPRP.
- 171.** *The Committee notes this information with interest.*

Case No. 2038 (Ukraine)

- 172.** The Committee last examined this case at its March 2003 meeting when it requested the Government to keep it informed of any developments in the preparation, in full consultation with the social partners, of amendments to section 16 of the Trade Unions Act, which had created certain difficulties with regard to the interpretation of standards concerning the inclusion of trade unions in the appropriate state registers [see 330th Report, paras. 153-156].
- 173.** In its communication dated 4 September 2003, the Government indicates that the Trade Unions Act was amended on 5 June 2003 and that newly amended section 16 simplifies the legalization process. Whereas previously the legalizing body could refuse to register a trade union if the documents presented by the trade union did not correspond to its status, according to the new version of section 16, the legalizing body can no longer refuse to register a trade union but only to request it to provide the necessary additional information. The Government further states that the Cabinet of Ministers of Ukraine submitted a proposal on amendment of the legislation on trade unions and that on 10 July 2003, the Supreme Rada of Ukraine adopted the Law of Ukraine on Amendment of Certain Legislative Acts of Ukraine concerning Trade Union Activities.
- 174.** *The Committee takes note of this information. It notes with interest the amendment of section 16 of the Trade Unions Act and requests the Government to provide the copy*

thereof. The Committee trusts that any future legislative amendments affecting trade union rights will be preceded by full and detailed consultation with social partners. The Committee requests the Government to keep it informed in this respect and supply the copy of the relevant legislation as soon as it is adopted.

Case No. 2079 (Ukraine)

- 175.** The Committee last examined this case at its March 2003 meeting when it requested the Government to clarify the situation of the Volynskaya Province division of the All-Ukraine Trade Union “Capital/Region” as far as its registration with local authorities is concerned. The Committee further requested the Government to set up an independent inquiry into dismissal of Mr. Linik and if there was evidence that he had been dismissed for reasons linked to his legitimate trade union activities, to take all necessary measures to reinstate him in an appropriate position without loss of wages or benefits [see 330th Report, paras. 157-161].
- 176.** In its communications dated 2 January and 5 May 2003, the complainant alleges violations of trade union rights of the divisions of the All-Ukraine Trade Union “Capital/Region” at the following enterprises: “Volynoblenergo”, Lutsk Bearing Plant and “AY-I EC Rovnoenergo”. More particularly, the complainant states that delegates to the labour conference, at the “Volynoblenergo” enterprise, are chosen by the employer. Such situation facilitates the adoption of collective agreements suitable to the employer and their unilateral amendment by the employer. The complainant further states that the Government has not undertaken an independent investigation of Mr. Linik’s dismissal from the Lutsk Bearing Plant. As regards “AY-I EC Rovnoenergo”, the complainant states that employer ignores the complainant’s organization, publicly calls it semi-legal and prefers to deal and conduct collective bargaining with a “more suitable” trade union. None of the facilities, which should be provided to the trade union under the legislation, are afforded to the complainant’s organization. Moreover, the employer puts various forms of psychological pressure on trade union members and its leaders. In its communication of 12 May 2003, the complainant further alleges anti-union discrimination at the “AY-I EC Rovnoenergo” enterprise, where certain trade union members were threatened with dismissal or dismissed without approval by the trade union organization.
- 177.** In its communications of 14 April, the Government states that in April 1999, the Territorial State Labour Inspectorate examined the representation of Mr. Linik concerning his dismissal on grounds of staff reduction and established that the dismissal procedure was carried out in accordance with the labour legislation. As concerns the allegations of anti-union discrimination at the “AY-I EC Rovnoenergo” enterprise, in its communications of 11 July and 8 August 2003, the Government states that the Rovenskaia regional administration examined the complaint and concluded that the existence of trade union rights’ violations were not confirmed. The Government states that only Mr. Slipenko was dismissed from the “AY-I EC Rovnoenergo” enterprise, on the grounds of drunkenness at the workplace. On 5 May 2003, the management of the “AY-I EC Rovnoenergo” enterprise addressed the trade union with the request to approve the dismissal of Mr. Slipenko. However, the management had never received a response from the workers’ organization, which, according to the legislation in force, has ten days to respond. Finally, the Government indicates that on 30 May 2003, Mr. Slipenko withdrew his membership from the complainant’s organization and joined the Energy and Electrotechnical Industry of Ukraine Worker’s Union.
- 178.** *The Committee notes the statements of the complainant and the Government. The Committee regrets that no information has been provided by the Government in respect of its previous request to clarify the situation of the Volynskaya Province division of the All-Ukraine Trade Union “Capital/Region” as far as its registration with local authorities*

is concerned. It once again requests the Government to provide information in this respect. The Committee further observes that, since February 2000, it has been asking the Government to set up an independent inquiry into the dismissal of Mr. Linik. The Committee therefore reiterates this request and, if there is evidence that Mr. Linik had been dismissed for reasons linked to his legitimate trade union activities, once again request the Government to take all the necessary measures to reinstate him in an appropriate position without loss of wage and benefits. As concerns the allegations of violation of trade union rights at the “AY-I EC Rovnoenergo” enterprise, the Committee notes the Government’s statement concerning the allegations of anti-union discrimination. The Committee notes, however, that the statements of the Government and the complainant on this matter are contradictory. Moreover, no information was provided by the Government as concerns other allegations of violation of trade union rights. The Committee requests the Government to set up an independent inquiry into all the alleged violations of trade union rights at the “AY-I EC Rovnoenergo” enterprise and keep it informed in this respect. The Committee further requests the Government to provide information on the alleged violations of trade union rights at the “Volynoblenergo” enterprise.

Case No. 2058 (Venezuela)

- 179.** At its March 2003 meeting, the Committee requested the Government to inform it of any court rulings from the appellate court on the suspension, by the judicial authorities, of the administrative ruling legalizing the registration of the Trade Union of Congressional Employees and Workers – New Trade Union Structures (SINTRANES) [see 330th Report, paras. 162 and 164].
- 180.** In its communication of 15 May 2003, the Government states that the legal appeal by a rival trade union to annul the registration of SINTRANES expired on 8 January 2001, as the rival trade union did not present any legal document to support its claim; this was established and concluded by the legal authority. SINTRANES has at no time ceased to defend its interests and to enjoy freedom of association and the problems arising in this case reflect inter-union conflicts.
- 181.** *The Committee notes this information.*

Case No. 2161 (Venezuela)

- 182.** At its June 2003 meeting, the Committee noted the measures adopted by the Government with a view to implementing its recommendations regarding the reinstatement of dismissed SUTRAMACCSI officials, and requested the Government to continue to take steps to ensure that the “Sofia Imbert” Museum of Contemporary Art in Caracas reinstated them in their posts. The Committee also noted in this connection that the authorities had proposed amendments to legislation relating to anti-union discrimination, and would be requesting the ILO’s technical assistance. The Committee requested the Government to keep it informed of developments with regard to the dismissed individuals and to legislation, and hoped that these matters would soon be satisfactorily resolved [see 331st Report, para. 101]. The dismissed officials referred to are Jorge Moreno (Secretary-General), José Gregorio González (Secretary), Delvis Beomont (Treasurer), Alfonso Perdomo (Public Relations Officer) and Omar Burgos (Secretary for Labour and Complaints) and Teresa Zottola and Sonia Chacón.
- 183.** In its communications of 9 and 13 June 2003, the Government states that Teresa Zottola, Jorge Moreno, Omar Burgos and Alfonso Perdomo have been reinstated in accordance with administrative rulings that also regulate back payment of wages.

184. *The Committee notes this information with satisfaction. The Committee requests the Government to inform it of all measures adopted to reinstate trade union officials José Gregorio González and Delvis Beomont and Sonia Chacón. The Committee has also been informed that a draft law to amend the labour legislation, in particular with regard to protection against anti-union discrimination, has been submitted to the Congress of the Republic. The Committee requests the Government to keep it informed in this respect.*

Case No. 2191 (Venezuela)

185. At its meeting in March 2003, the Committee made the following recommendations [see 330th Report, para. 1163]:

The Committee trusts that the deduction of trade union dues of the workers belonging to trade unions that make up the Venezuelan Federation of Teachers (FVM) will be re-established without delay. The Committee requests the Government to keep it informed of developments in the situation in this regard.

186. In its communication dated 20 September 2003, the Government states that, applying the agreement of 12 August 2002 (signed as a result of collective bargaining by the Ministry of Education, Culture and Sport and the teachers' trade unions, including the FVM), trade union dues are being deducted from teachers and paid to the trade unions that make up the FVM.

187. *The Committee takes note of this information with interest.*

Cases Nos. 1937 and 2027 (Zimbabwe)

Industrial action in respect of questions of economic and social policy

188. At its June 2003 meeting, the Committee had noted the amendments made to the Labour Relations Amendment Act, and had noted that the various definitions given to the term "unlawful collective job action" may raise difficulty in respect of the right to strike. It requested the Government to indicate the manner in which, under current law, it is ensured that industrial action may be taken in respect of questions of economic and social policy without sanctions [see 331st Report, para. 104].

189. In a communication dated 28 July 2003, the Government states that the Labour Relations Amendment Act, which was passed by Parliament on 18 December 2002, was promulgated into law on 7 March 2003 as the Labour Relations Amendment Act No. 17/2002. With regard to the possibility to take industrial action in respect of questions of economic and social policy, the Government states that "the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers", to the extent that they are disputes of interests, can appropriately be addressed by collective job action. It further states that the definition of "collective job action" does not seek to broaden the grounds of collective job action by extending the right to question economic and social policy per se (such questions according to the Government are in the realm of political issues as opposed to labour issues), but confines it to the economic and social questions related to the undertaking.

190. *The Committee concludes that the legislation does not allow workers and their organizations to take industrial action in respect of questions of economic and social policy. The Committee therefore reiterates its previous principles and requests the Government to amend the Labour Relations Amendment Act No. 17/2002 to ensure that*

industrial action may be taken in respect of questions of economic and social policy, without sanctions.

Sanctions in case of unlawful collective job action of the Labour Relations Amendment Act (sections 109 and 112)

- 191.** The Committee noted that, in the case of unlawful collective job action being organized as strictly defined in the legislation, excessive sanctions are provided. Sections 109 and 112 establish possible imprisonment of the individual engaged in an unlawful collective job action, while section 107 gives the power to the Labour Court to dismiss the individual engaged in such action and to suspend or rescind the registration of the trade union involved in such action. The Committee requested the Government to amend the legislation so as to bring it into conformity with freedom of association principles on this point [see 331st Report, para. 105].
- 192.** The Government states that sections 109 and 112 provide in case of illegal strikes for maximum penalties, which are not mandatory; moreover, the levels of fines are proportionate to the prison terms.
- 193.** *The Committee reiterates its previous principles and requests once again the Government to amend the Labour Relations Amendment Act No. 17/2002 so as to bring it into conformity with the freedom of association principles so as to guarantee that no imprisonment sanctions are taken in case of peaceful strikes and that the sanctions are proportionate to the seriousness of the infringements.*

Assault on the trade union leader, Mr. Morgan Tsavangirai

- 194.** With regard to the assault on Mr. Tsavangirai, the Committee urged the Government to ensure that an independent investigation is fully carried to its term with the aim of identifying and punishing the guilty parties [see 331st Report, para. 106].
- 195.** The Government maintains its position that instituting a judicial inquiry over the assault of the former secretary of the ZCTU would create a wrong precedent.
- 196.** *The Committee is deeply concerned about the fact that more than three years after the first examination of the case and repeated demands to that effect, the Government maintains the same position and does not intend to conduct an investigation. The Committee reiterates its previous conclusion and urges the Government to ensure that an independent investigation is fully carried to its term with the aim of identifying and punishing the guilty parties.*

Investigation into the arson of the ZCTU offices

- 197.** The Committee had requested the Government to keep it informed of developments concerning the investigation into the arson of the ZCTU offices [see 331st Report, para. 106].
- 198.** The Government states that the matter is still pending since nobody has so far been identified as the perpetrator.
- 199.** *The Committee recalls that the legal proceedings have been pending since December 1998. The Committee emphasizes that justice delayed is justice denied [see **Digest of decisions and principles of the Freedom of Association Committee**, op. cit., para. 105]. The Committee urges the Government to take the necessary measures to conduct an*

inquiry in order to identify the perpetrators and to keep it informed of the measures taken in this regard, as well as the results of the investigation.

Temporary ban on industrial action in November 1998

- 200. The Committee had asked the Government to keep it informed of the judgement of the High Court concerning the temporary ban on industrial action issued in November 1998.
- 201. The Government states that the temporary ban on industrial action, which was imposed in 1998 and subsequently lifted in 1999, was never decided by the High Court.
- 202. *The Committee stresses that only in cases of acute national crisis important restrictions could be imposed on the right to strike [see **Digest**, op. cit., para. 527].*
- 203. *The Committee requests the Government to keep it informed on developments on all the questions raised.*

Case No. 2081 (Zimbabwe)

- 204. At its June 2003 meeting, the Committee urged the Government to take the necessary measures to amend section 120 of the Labour Relations Act, which gives sweeping powers to the Government to interfere in the running of the affairs of trade unions and asked to be kept informed of developments in this regard.
- 205. In a communication dated 30 July 2003, the Government maintained that the provision in question protects workers' funds and properties from being used for non-worker activities. The Government further explained that such provision was only applied once the affected members or trade unions had approached the Government with sound information to warrant an investigation. According to the Government, the current scenario where trade unions are heavily involved in politics makes this position more necessary.
- 206. *The Committee is not convinced by the Government's explanations and reiterates that the text of section 120 of the Labour Relations Act is incompatible with the provisions of Convention No. 87. The Committee deeply regrets that no progress whatsoever has been achieved in this matter three years after the first examination of the case. Therefore, the Committee is bound to recall its previous recommendations [see 331st Report, paras. 109-110].*
- 207. *The Committee recalls once again that section 120 gives rise to two different sets of problems from the standpoint of freedom of association. Paragraphs (a) and (b) of subsection (2) of section 120 authorize an investigator appointed by the Minister to enter trade union premises and question any person employed there at all reasonable times and without prior notice. The Committee has emphasized in this respect that the right of the inviolability of trade union premises necessarily implies that the public authorities may not insist on entering such premises without prior authorization or without having obtained a legal warrant to do so and any search of trade union premises, or of unionists' homes, without a court order constitutes an extremely serious infringement of freedom of association [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 175 and 177]. Moreover, searches of trade union premises should be made only following the issue of a warrant by the ordinary judicial authority where that authority is satisfied that there are reasonable grounds for supposing that evidence exists on the premises material to a prosecution for a penal offence and on condition that the search be restricted to the purpose in respect of which the warrant was issued [see **Digest**, op. cit., para. 180]. The Committee recalls that paragraphs (a) and (b) of subsection (2) clearly do not respect the principles enunciated above.*

- 208.** *Secondly, as regards paragraph (c) of subsection (2), which empowers an investigator, at all reasonable times and without prior notice, to inspect and make copies and take extracts from any books, records or other documents on trade union premises, the Committee has previously stated that the control exercised by the public authorities over trade union finances should not normally exceed the obligation to submit periodic reports. The discretionary right of the authorities to carry out inspections and request information at any time entails a danger of interference in the internal administration of trade unions. Moreover, as regards certain measures of investigations, the Committee has considered that these should be applied only in exceptional cases, when justified by grave circumstances (for instance, presumed irregularities in the annual statement or irregularities reported by members of the organization), in order to avoid any discrimination between one trade union and another and to preclude the danger of excessive intervention by the authorities which hamper a union's exercise of the right to publicity or the disclosure of information which might be confidential [see **Digest**, op. cit., paras. 443 and 444]. The Committee notes that the powers of supervision contained in paragraph (c) of subsection (2) are not limited to exceptional cases; rather this provision gives excessive powers of inquiry to the administrative authorities into financial management of trade unions, thereby violating the right of workers' and employers' organizations to organize their administration without interference by the public authorities.*
- 209.** *The Committee strongly urges the Government to amend section 120 of the Labour Relations Act and to keep it informed of developments.*
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- 210.** Finally, as regards Cases Nos. 1951 (**Canada**), 1955 (**Colombia**), 1962 (**Colombia**), 1970 (**Guatemala**), 1973 (**Colombia**), 1975 (**Canada**), 1991 (**Japan**), 1996 (**Uganda**), 2006 (**Pakistan**), 2014 (**Uruguay**), 2051 (**Colombia**), 2067 (**Venezuela**), 2083 (**Canada**), 2105 (**Paraguay**), 2125 (**Thailand**), 2126 (**Turkey**), 2127 (**Bahamas**), 2129 (**Chad**), 2133 (**The former Yugoslav Republic of Macedonia**), 2139 (**Japan**), 2140 (**Bosnia and Herzegovina**), 2141 (**Chile**), 2144 (**Georgia**), 2147 (**Turkey**), 2150 (**Chile**), 2156 (**Brazil**), 2162 (**Peru**), 2163 (**Nicaragua**), 2166 (**Canada**), 2167 (**Guatemala**), 2169 (**Pakistan**), 2173 (**Canada**), 2175 (**Morocco**), 2176 (**Japan**), 2180 (**Canada**), 2181 (**Thailand**), 2182 (**Canada**), 2192 (**Togo**), 2196 (**Canada**), 2206 (**Nicaragua**), 2220 (**Kenya**), the Committee requests the governments concerned to keep it informed of any developments relating to these cases. It hopes that these governments will quickly provide the information requested. In addition, the Committee has just received information concerning Cases Nos. 1952 (**Venezuela**), 1965 (**Panama**), 2048 (**Morocco**), 2084 (**Costa Rica**), 2104 (**Costa Rica**), 2134 (**Panama**), 2146 (**Serbia and Montenegro**), 2154 (**Venezuela**), 2160 (**Venezuela**), 2229 (**Pakistan**) and 2243 (**Morocco**), which it will examine at its next meeting.

CASE NO. 2221

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

**Complaint against the Government of Argentina
presented by
the Trade Union of Newspaper and Magazine Vendors of the
Federal Capital and Greater Buenos Aires (SIVENDIA)**

Allegations: Imposition of illegal and unconstitutional rules by a decree and administrative decisions regulating the activities of workers in the newspaper and magazine vending sector; exclusion of the right to freedom of association of organizations in the sector; restrictions on the right to collective bargaining

211. The complaint is contained in a letter from the Trade Union of Newspaper and Magazine Vendors of the Federal Capital and Greater Buenos Aires (SIVENDIA) of September 2002.
212. The Government sent its observations in communications dated 9 May and 30 September 2003.
213. Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

214. In its letter of September 2002, the Newspaper and Magazine Vendors Union of the Federal Capital and Greater Buenos Aires (SIVENDIA) states that Decree 1025 of 2000 issued by the national Government, Ministry of Labour resolution 434 of 2001 and Ministry of the Economy resolution 256 of 2001 revoked the regime regulating the activity of newspaper and magazine vendors, and made it a commercial activity subject to a system of free competition (not regulated by labour legislation). The complainant organization alleges that the new legislation is in contravention of the national Constitution, the national laws on trade unions and collective bargaining and ILO Conventions Nos. 87, 98 and 154, and is a flagrant breach of the labour rights of newspaper and magazine vendors and the like and their right to organize and freely and voluntarily negotiate conditions of employment in the sector.
215. Specifically, the complainant organization alleges, firstly, that the change from employment to commercial activity converts the "workers" engaged in that activity into traders, thereby removing their right to organize and virtually condemning their organization and sister organizations in the sector in the interior of the country to extinction. The complainant states that the predominantly employment nature of the activity was determined by the State itself which in 1945 granted it trade union status (as most representative trade union), in accordance with the conditions and scope of the Trade Unions Act, to defend and represent workers in the newspaper and magazine vending sector.

216. In addition, the complainant organization alleges that Decree 1025 of 2000 renders void administrative decisions concerning the sector made by the Ministry of Labour following a process of collective bargaining in the framework of a tripartite commission and also the provisions establishing a framework for collective bargaining, thereby restricting the right to collective bargaining. These decisions laid down provisions on conditions of work, wages and rest and the procedure for recognition of the right to strike and conditions for acquiring, retaining and transferring it.

B. The Government's reply

217. In its letter of 9 May 2003, the Government states that the Ministry of Labour, Employment and Social Security recognizes the right of newspaper and magazine vendors to form trade unions on the basis of historical and legislative considerations without taking into account, exceptionally, of whether workers in the sector were self-employed or employees. Consequently, it granted trade union status to trade unions which applied for it and which satisfied the necessary requirements. In this regard, the Government indicates that the authority responsible for applying these rules (National Directorate of Trade Unions in the Ministry of Labour) approved in March 2003 the granting of trade union registration to the Jujuy Province Union of Newspaper and Magazine Vendors.

218. The Government further observes that the rules governing the activity of newspaper and magazine vendors unequivocally presuppose the existence of trade unions in the sector, since, for example, the Control Commission of the National Register of Newspaper and Magazine Vendors and Distributors, established by resolution 434 of 2001, is made up of representatives of publishers, distributors and the Buenos Aires Union of Newspaper and Magazine Vendors or the Argentine Federation of Newspaper and Magazine Vendors in the case of matters beyond the confines of the city of Buenos Aires.

219. The Government points out that the issue in this case is not whether the workers in the sector are self-employed or employees, a matter which it considers outside the ambit of the Committee, but whether they are recognized as having the right to organize. Moreover, the Government reiterates that it has been shown quite clearly that the Ministry of Labour recognizes the existence of trade unions representing workers in the complainant organization's sector and, consequently, the full enjoyment of freedom of association.

220. Finally, in its communication of 30 September 2003, the Government states that the Ministries of Labour and of Production have adopted a joint decision (No. 168 of April 2003) which clarifies the differences of interpretation concerning the standards of the sector and helps overcome the divergencies between the sectors concerned. This decision had the support of all members of the Control Commission (including the representatives of the complainant).

C. The Committee's conclusions

221. *The Committee observes that the allegations in this case concern the imposition of illegal and unconstitutional rules by a decree and administrative decisions regulating the activities of workers in the newspaper and magazine vending sector; exclusion of the right to freedom of association of organizations in the sector; and restrictions on the right to collective bargaining.*

222. *In these circumstances, the Committee is not in a position to examine the question as to the self-employed or employee status of workers in the sector and that its mandate is to establish whether the situation considered in this case is consistent with the provisions of Conventions Nos. 87 and 98, ratified by Argentina. In any case, the Committee recalls that*

by virtue of the principles of freedom of association, all workers – with the sole exception of members of the armed forces and police – should have the right to establish and to join organizations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize [see *Digest of decisions and principles of the Freedom of Association Committee*, para. 235].

- 223.** Moreover, the Committee observes that the complainant organization alleges that the new legislation deprives workers in the sector of the right to organize and condemns the existing organizations to extinction. In this respect, the Committee notes that the Government denies this allegation and states that the Ministry of Labour recognizes the right of workers in the sector to form trade unions and has granted trade union status (most representative trade union with exclusive rights to collective bargaining and strike) to various trade unions in the sector. In this regard, the Government adds that recently the National Directorate of Trade Unions approved the granting of trade union registration to another trade union in the sector (the Jujuy Province Union of Newspaper and Magazine Vendors). The Committee also notes the Government's assertion that the rules governing the activity of newspaper and magazine vendors unequivocally presuppose the existence of trade unions in the sector since, for example, the Supervisory Commission of the National Register of Newspaper and Magazine Vendors and Distributors, established by the new resolution 434/01, is made up of representatives of publishers, distributors and trade unions in the sector. The Committee considers that in the light of the information provided by the Government, the new regime does not exclude the trade union rights of workers and organizations in the sector and thus, in this regard, is not a violation of the principles of freedom of association.
- 224.** Furthermore, as regards the allegations concerning restrictions on collective bargaining, the Committee observes that the complainant states that rules contained in administrative decisions of the Ministry of Labour adopted following a process of bargaining in the context of a tripartite commission (on recognition of the right to strike and conditions for acquiring, retaining and transferring it and provisions on conditions of work, wages and rest) have been revoked and modified. The Committee observes that the Government has not made reference to these allegations. In this respect, although it is not a matter of bargaining in the meaning of Convention No. 98, since it is a tripartite body (apparently rather a consultative body whose conclusions must be incorporated in an administrative decision to be binding), the Committee requests the Government in future to respect the agreements concluded with the participation of the parties concerned and to refrain from rendering them void by decree and recalls the importance it attaches to the promotion of dialogue and consultations on matters of mutual interest between the public authorities and the most representative employers' and workers' organizations of the sector involved [see *Digest*, op. cit., para. 926].
- 225.** In addition, with regard to the allegations of restrictions on collective bargaining, the Committee observes that the complainant organization maintains that Decree-Law 24095 which fixed the abovementioned procedure for establishing rules in the sector has been repealed. Indeed, it appears from the information on the legislation sent by the complainant that the former tripartite commission to elaborate and propose a legal regime no longer exists. Instead, a Supervisory Commission of the National Register of Newspaper and Magazine Vendors and Distributors has been created, also tripartite, the functions of which are centred on "control" of the regime regulating the activity established in the resolution. This Commission may after five years or when the majority of its members consider it necessary, revise the regime regulating the activity. The Committee observes, however, that the Commission in question is chaired by the administrative

authority for labour and consists of a representative of the association of newspaper publishers, a representative of the association of magazine publishers, a representative of the society of newspaper and magazine distributors and a representative of the union of newspaper and magazine vendors. The Committee considers that this composition does not provide the required balance between the trade union and the employers and that this could have a negative impact on the trade unions' confidence in the body. The Committee requests the Government to undertake detailed consultations with the parties concerned with a view to adopting measures to remedy this situation and recalls that, irrespective of this system, trade unions and employers in the sector should be able to engage in free and voluntary collective bargaining concerning their conditions of work. The Committee requests the Government to keep it informed of developments in this regard.

226. *The Committee takes note with interest of decision No. 168 by which, according to the Government, the divergencies between the sectors concerned have been overcome. The Committee observes that according to the Government, this decision had the support of all members of the Control Commission, on which the complainant organization is represented.*

The Committee's recommendations

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

- (a) The Committee requests the Government in future to respect the agreements concluded with the participation of the parties concerned and to refrain from rendering them void by decree and recalls the importance it attaches to promoting dialogue and consultation on questions of mutual interest between the Government and the most representative employers' and workers' organizations when preparing new legislation in the newspaper and magazine vending sector.*
- (b) As to the alleged restrictions on collective bargaining, the Committee requests the Government to undertake detailed consultations with the parties concerned with a view to remedying the imbalance in the Supervisory Commission of the National Register of Newspaper and Magazine Vendors and Distributors and to promote free and voluntary collective bargaining between newspaper and magazine vendors' unions and employers in the sector. It requests the Government to keep it informed of developments in this regard.*

CASE NO. 2223

DEFINITIVE REPORT

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

- **the Trade Union Association of Judicial Employees
of the Province of Córdoba (AGEPJ) and**
- **the Argentine Judicial Federation (FJA)**

***Allegations: The complainant organizations
allege that the judicial authority of the Province
of Córdoba prohibits employees in the sector
from holding trade union assemblies and
meetings during working hours and at the
workplace***

- 228.** The complaints in this case are contained in communications from the Trade Union Association of Judicial Employees of the Province of Córdoba (AGEPJ) and the Argentine Judicial Federation (FJA) dated 30 July and September 2002. The Government sent its observations in communications dated 9 April and 11 July 2003.
- 229.** Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. Allegations by the complainant organizations

- 230.** In their communications dated 30 July and September 2002, the Trade Union Association of Judicial Employees of the Province of Córdoba (AGEPJ) and the Argentine Judicial Federation (FJA) explain that, in the framework of a collective dispute in 2002 caused by wage problems that gave rise to *amparo* proceedings and to protective measures in favour of the members of the AGEPJ, they held assemblies and engaged in industrial action during working hours, as had traditionally occurred in conjunction with the trade union. The complainants point out that while the assemblies were arranged during working hours, they were always held outside the limits or premises of the judicial authority, by virtue of the fact that, in December 1996, the High Court of Justice of the Province of Córdoba, in the framework of another wage dispute, ruled in Order No. 300, series A, point III “to provide for the prohibition, as from the current date, of the holding at premises of the judicial authority of assemblies or meetings of any type. It will be considered a serious offence, punishable by suspension, to participate in, attend or convene meetings, assemblies or mass meetings of this kind”. In addition, the highest court in the Province of Córdoba provided in point IV of the Order that “shall be prohibited, with the same scope and consequences, any instance of noise that disturbs the normal running of activities in the various courts or establishments of this judicial administration. For transmittal”.
- 231.** This being the case, and despite the fact that the trade union organization, to protect its members, convened them to meet outside the premises of the judicial authority so as not to violate the abovementioned Order No. 300, the High Court of Justice, in a further manifestly anti-union stand, notified all participants in the meetings held on 13 and 14 March 2002 to answer the charge of having been absent from their workplaces in open contradiction with the internal rules regulating staff attendance and dismissals. Once these

charges were answered and involvement confirmed in the assemblies convened by the trade union organization in the framework of the collective dispute in question, the High Court of Justice issued Order No. 119, series A, dated 26 March 2002, stating that, "... decides: (1) to recommend to the officials of the judicial administration that henceforth they abstain from leaving their workplaces to attend trade union assemblies, when they are convened during working hours, under caution of the application of the corresponding penalties ...". In other words, not only was it prohibited to hold assemblies on the premises of a judicial authority (Order No. 300, series A, mentioned above), but it was also prohibited to do so off the premises, during working time, all of which demonstrates the employer's systematic conduct to crush any possibility of trade union claims, even trying to destroy the viability of protest against, or the defence of, violated rights; with this logic meaning that sooner or later it will be prohibited to carry out industrial action or strikes during working hours or on working days, leaving the right to defence, assembly, freedom of association and protest limited to Saturdays and Sundays.

- 232.** Order No. 300 of 6 December 1996, and also Order No. 119, series A, of 26 March 2002, weaken and alter the rights and obligations established in the law on trade union associations and its accompanying regulatory decree. They add that the decisions of the judicial authority are unlawful because they regulate unilaterally and arbitrarily the exercise of trade union rights in the matter, which no legislator has done. The changes highlighted affect judicial workers in particular, but also have negative ramifications for all workers and their trade unions who, from now on, face precedents that encourage the restriction of their trade union activities in their respective organizations or state bodies through the procedure referred to.
- 233.** The complainant organizations indicate that the law of trade union associations does not confer upon the employer the decision of when and how workers belonging to trade union organizations may exercise their rights. The broad formula used by the law (the right to meet or gather without need for prior authorization) is in keeping with the nature of the labour dispute and safeguards, for each case, the effective exercise of freedom of trade union action. And, while it is true that it does not specify the environment where this right may be exercised, it is also true – as the decree itself states – that the fact of not requiring the "prior authorization of the employer" refers to the workplace environment, as referring to the environment outside the workplace would mean that the safeguard arose out of the National Constitution itself.
- 234.** The complainant organizations indicate that as a consequence of the abovementioned situation, on 30 April 2002 they requested the intervention of the Ministry of Labour and Social Security to resolve the obvious arbitrariness and the serious violation of trade union freedom by the High Court of Justice. File No. 1.056.692 was opened, wherein the dispute was registered in detail and in which the Ministry decided to summon the parties to a hearing in order to resolve the dispute in some way.
- 235.** Faced with these summonses, the High Court of Justice decided, in a decree on 28 May 2002, to reject categorically the competence of the Ministry of Labour, without there being administrative or legal appeals that can bring this long process of confrontation to a fair conclusion. The decree agreement referred to is Order No. 247, series A.

B. The Government's reply

- 236.** In communications dated 9 April and 11 July 2003, the Government states that the dispute relating to wages, mentioned by the complainant organizations, was resolved in accordance with Order No. 163, series C, of 20 December 2002 (resolution No. 171), to take effect from 1 January 2003; it was decided to increase the working day with the subsequent increase in remuneration.

- 237.** With regard to the allegation relating to the prohibition to hold meetings during working hours at premises of the judicial authority of the Province of Córdoba, the Government states that this prohibition was regulated by Order No. 300, series A, of 6 December 1996. This Order arose as a result of the report submitted by the president of the judicial authority, with respect to the facts that took place on 5 December 1996 during the morning, at which time, it seems, following a meeting or assembly held by the staff belonging to the Trade Union Association of Judicial Employees of the Province of Córdoba, a group of those present held a noisy march through various departments, arriving at those occupied by the High Court of Justice, initiating there a noisy protest that included personal and verbal attacks against members of the court and other employees or civil servants and thumping on the doors of various offices.
- 238.** The Government states that the judicial authority is adamant that all judicial staff must be present in their various workplaces during working hours in which they are open to the public. It should not be forgotten that the judicial authority has its own responsibilities that are essential and cannot be delegated, the performance and efficient achievement of which are principally the responsibility of the High Court of Justice and, because of this, it must apply internal measures that prevent situations that might lead to possible change or deterioration. The principles of efficiency, effectiveness and uninterrupted performance are a unique dimension in the organization of the judicial authority because of the exclusiveness of the public functions that it monopolizes, for which reason the urgent need to guarantee them is increased. For this reason, assemblies of an informative nature or of any other nature convened by the trade union organization, which bring together staff of the judicial authority, can only take place outside working hours.
- 239.** Leaving the workplace to attend an assembly means not complying with the duty to be in the workplace and to provide services that are personal and cannot be delegated, which reflect the description of judicial employment. Because of this, the right to meet for trade union reasons can take place without the need for authorization or consent from the employer or work provider only in those cases where these (assemblies) take place outside working hours and, in the specific case of the judicial authority, outside the premises where the departments related to it are located.
- 240.** The Government states that the High Court of Justice recognizes the right of judicial workers to meet in assemblies, but this does not mean that it accepts that the labour regulations in force with regard to workers in general (and to judicial workers in particular) provide the right to be absent from the workplace during working hours to attend meetings convened by the trade union organization to which they belong. The recognized right of workers to meet and to carry out trade union activities must be interpreted within a reasonable context in accordance with the nature of judicial activity, because, if not, there would be the potential risk that all staff could be absent en masse from their workplace at any time for the reasons mentioned above (to attend assemblies). None of this reasoning has been challenged by the appellants.
- 241.** The Government states that, in interpreting Law No. 23551 on trade union associations, the criterion of reasonable conduct that was used does not allow any escaping the fact that the judicial authorities work continuously (in hours laid down by law), as the nature of this administration guarantees all citizens their constitutional right of access to justice.
- 242.** The Government adds that judicial employees do have, and are not denied, the right to meet or to attend assemblies convened by the trade union association to which they belong, but that this must take place outside the workplace and outside working hours. The Government also ratifies the constitutional powers of the High Court of Justice to regulate how its services are performed by its employees, based on the judicial doctrine of the High Court of Justice when it upheld that “the relations between provincial public employees

and the Government upon which they depend are governed by the various provisions of local character that make up the appropriate administrative law”.

243. Finally, the Government states that the decision taken by the High Court does not violate the provisions of ILO Convention No. 87. The restriction on holding assemblies in workplaces and during working hours in which they are open to the public has not been imposed to prevent measures of direct action, but only to guarantee continuity and normal performance of judicial services, to create the appropriate conditions for performing essential and necessary services and to allow litigants and members of the public to circulate freely.

C. The Committee’s conclusions

244. *The Committee notes that the complainant organizations object to two decisions (“orders”) by the High Court of Justice of the Province of Córdoba in which it was decided to prohibit the holding at the premises of the judicial authority of assemblies or meetings of any type and that recommended that officials of the Judicial Administration abstain from leaving their workplaces to attend trade union assemblies, when they are convened during working hours.*
245. *In this respect, the Committee notes that the Government states that: (i) this prohibition was imposed and regulated in 1996 following a trade union assembly during which a group of participants acted abusively and, specifically, held a noisy march through various departments, including participating in verbal and personal attacks against employees of the High Court of Justice and thumping on the doors of offices; (ii) the judicial authority requires that judicial staff are present in their respective workplaces during working hours in which they are open to the public; (iii) while judicial employees have the right to hold assemblies, this does not mean that they have the right to be absent from their workplaces during working hours when they perform services for the public; and (iv) the restriction on holding assemblies in workplaces and during working hours in which they are open to the public was not imposed to prevent measures of direct action but to guarantee continuity and normal performance of judicial services.*
246. *The Committee recalls that the right to hold meetings is essential for workers’ organizations to be able to pursue their activities and that it is for employers and workers’ organizations to agree on the modalities for exercising this right. The Committee further recalls that the Labour Relations (Public Service) Convention, 1978 (No. 151) – ratified by Argentina – lays down in Article 6 that “such facilities shall be afforded to the representatives of recognized public employees’ organizations as may be appropriate in order to enable them to carry out their functions promptly and efficiently, both during and outside their hours of work” and that “the granting of such facilities shall not impair the efficient operation of the administration or service concerned”. In these circumstances, the Committee requests the Government to invite the parties to negotiate with a view to achieving agreement on the modalities for the exercise of the right to hold meetings, including the place for such meetings, as well as on the granting of facilities provided for under Article 6 of Convention No. 151.*

The Committee’s recommendations

247. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee recalls that the right to hold meetings is essential for workers’ organizations to be able to pursue their activities and that it is for*

employers and workers' organizations to agree on the modalities for exercising this right.

- (b) *The Committee further recalls that the Labour Relations (Public Service) Convention, 1978 (No. 151) – ratified by Argentina – lays down in Article 6 that “such facilities shall be afforded to the representatives of recognized public employees’ organizations as may be appropriate in order to enable them to carry out their functions promptly and efficiently, both during and outside their hours of work” and that “the granting of such facilities shall not impair the efficient operation of the administration or service concerned”.*
- (c) *In these circumstances, the Committee requests the Government to invite the parties to negotiate with a view to achieving agreement on the modalities for the exercise of the right to hold meetings, including the place for such meetings, as well as on the granting of facilities provided for under Article 6 of Convention No. 151.*

CASE NO. 2240

DEFINITIVE REPORT

Complaint against the Government of Argentina presented by

- **the Buenos Aires Police Union (SIPOBA) and**
- **the Argentine Federation of Police and Prison Service Unions (FASIPP)**

Allegations: The complainant organizations allege that the administrative authority rejected the application for registration of police trade unions and that officials of these unions had been dismissed for exercising activities on their behalf

- 248.** The complaint is contained in a letter from the Buenos Aires Police Union (SIPOBA) and the Argentine Federation of Police and Prison Service Unions (FASIPP) dated 14 December 2002. SIPOBA and FASIPP provided additional information in a letter dated 21 January 2003. The Government sent its observations in a letter dated 27 May 2003.
- 249.** 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

- 250.** In their letter of 17 December 2002, the Buenos Aires Police Union (SIPOBA) and the Argentine Federation of Police and Prison Service Unions (FASIPP) complained that on 4 April 1989 an Assembly was held for the purpose of forming the Buenos Aires Police Union (SIPOBA) and that as a consequence the Buenos Aires police authority instigated disciplinary proceedings against the members of the trade union, arguing that they were in breach of the provisions of article 53, paragraphs 10 and 58, and paragraph 15 of

Provincial Decree-Law No. 9550/80. These proceedings led to the dismissal of the chairman of the provisional steering committee, principal officer Nicolás Alberto Masi for exercising, according to the police authority, "... an activity to promote and enrol members within the force in order to form a police trade union ... all of which seriously affected discipline and responsibility for assignment of duties, an offence mitigated by the absence of sanctions in their service record and aggravated by the public importance of the matter".

- 251.** The complainants add that on 13 August 1997, FASIPP applied for registration, and that by Decision No. 169/98, the Ministry of Labour and Social Security refused that application. The decision was appealed in the courts and the National Employment Appeals Court, Chamber V, refused the appeal on the grounds that it was formally inadmissible since the decision subject to the appeal was not final, since it was not an executable decision and because the confirmation of the administrative refusal relied on matters of fact and only incidentally ruled on the rights of police officers, an aspect which could be determined in the courts, subject to compliance with the basic requirements as to the viability of the application.
- 252.** In compliance with the basic requirements mentioned by the National Employment Appeals Court, a list of members, membership forms and list of members of the Executive Committee, together with the Constitution and other documents required under article 21 and conclusions of Law No. 23551, were submitted to the Ministry of Labour on 6 April 1999, thus fulfilling all the requirements of that law for the granting of trade union status. They state that despite all this, on 17 July 2002, the Minister of Labour and Social Security denied the application for trade union registration presented by the Buenos Aires Police Union by Decision No. 500. An appeal for review of the refusal was submitted on 31 July 2002.
- 253.** The complainants indicate that the previous submission was supplemented on 22 October 2002 in letter No. 1063741 by a copy of opinion No. 32251 of the Attorney-General in the National Employment Appeals Court in favour of the trade union registration, reform of the Constitution in line with the observations by officials of the Ministry of Labour and Social Security, and appointment of members in accordance with resolution DNAS No. 36/98. Despite that, in decision No. 661 dated 30 September 2002, the Minister of Labour and Social Security refused the application for review.
- 254.** The complainants mention that article 14bis of the National Constitution provides the right of any worker, without distinction and without any restrictions, to form a trade union. Likewise, international law, which ranks equally with the Constitution (article 75, paragraph 22, of the Constitution) provides the right of freedom of association and the right to organize without interference from the public authorities (American Declaration of the Rights and Duties of Man, Universal Declaration of Human Rights and the Covenant of San Jose de Costa Rica). In this regard, the complainants recall that, as expressly recognized by the Government, there is no law that exempts the security forces from the provisions of Law No. 23551 or affects or generally limits their right to form a trade union. In the light of this omission, it is logical to apply the provisions of the Constitution, especially taking into account the principle of legality and article 19 of the National Constitution. Any gap in the law and the alleged legal vacuum cannot be interpreted as creating a prohibition.
- 255.** In their letter of 21 January 2003, SIPOBA and FASIPP allege that the administrative authority refused the application for trade union registration submitted by the Santa Fe Provincial Police Professional Association (which was the subject of an appeal to the courts in September 2002). The complainant organizations also allege that the General Secretary of that organization, Mr. Miguel Orlando Salazar, was suspended without pay

and his arm and badge were withdrawn because he had organized the workers' protest at the late payment of wages and commented in the press on the lack of police equipment.

B. The Government's reply

- 256.** In its letter of 27 May 2003, the Government indicates that Convention No. 87 leaves it up to the law in each ILO member State whether or not to allow the formation of trade unions in the armed forces and the police, and article 8 of the International Covenant on Economic, Social and Cultural Rights guarantees the freedom to form trade unions allowing only restrictions which are necessary in a democratic society in the interests of national security or public order. Furthermore, article 22 of the International Covenant on Civil and Political Rights fully endorses the right of freedom of association, the only restriction to the exercise of that right being the case of members of the armed forces and the police, and article 16 of the American Convention on Human Rights (Covenant of San Jose de Costa Rica), paragraph 3, states "The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police".
- 257.** The Government states that it is essential to recall that these international treaties are integral to Argentine law as instruments of constitutional standing, as laid down in article 75, paragraph 22, of the Constitution. It is thus clear that the unionization of the security forces and the police is contained in Argentine law in accordance with international instruments, since at present there is no other specific legislation on this issue. It adds that although freedom of association is fully recognized, solely limited in the cases discussed above, it was decided that because of the nature of the activities of the armed forces and the police, it was not appropriate for them to be organized in trade unions.
- 258.** There is a hierarchical principle in the security forces which conflicts with the principle of trade union democratization, the latter being an essential condition for the recognition of the authority of trade union associations as collective subjects of labour law. A trade union is a group of workers united by affinity and solidarity whose functions are independent of employers and the State itself.
- 259.** Independence vis-à-vis employers and the State, specifically set out in article 6 of the Trade Unions Act, Law No. 23551, is an essential requirement. No one can overrule or interfere in the actions of a trade union in such a way as to prevent it fulfilling its principal objective. The armed forces and the police are not independent of the State, but represent it and are part of it, since they are the sole repositories of public authority and guarantors of internal security. Moreover, in ratifying Convention No. 154, article 2 of Law No. 23544 provided that it should not apply to the armed and security forces. The consistency of Laws Nos. 23551, 14250 (Collective Bargaining Act) and 23544, as well as the abovementioned international instruments which have constitutional standing, show that the legal system has exercised the right to restrict the right to freedom of association for members of the armed forces, security forces and the police, and that this restriction in no way constitutes any violation whatsoever of the letter and spirit of Convention No. 87.
- 260.** The Ministry of Labour, Employment and Social Security has frequently spoken on the subject, recalling that the task of security imposed by law on the armed forces and the police, under a vertical hierarchical structure, is essential to the maintenance of the internal discipline of the forces and its effectiveness in fulfilling its tasks, which would be rendered very difficult if a trade union for these categories were established. Consequently, the applications for trade union registration were refused. The Minister's position was upheld on several occasions by the judiciary.

261. Granting the right to form trade unions to the security forces is a highly complex issue given the country's realities and characteristics. It would also generate a climate of debate which would affect people's security, especially considering that the armed forces and the police are the sole responsible enforcement agencies for that purpose. This does not mean a failure to recognize the rights of the members of these forces under appropriate administrative mechanisms which guarantee these rights. Finally, the Government states that under the abovementioned international provisions which carry constitutional standing, comparative law and the decisions of the Committee on Freedom of Association and the judicial authority, it is concluded that non-recognition of the right of the armed forces and the police to establish trade unions cannot be considered a violation of Convention No. 87.

C. The Committee's conclusions

262. *The Committee observes that the complainant organizations allege that the national administrative authority refused the applications for trade union registration of the Buenos Aires Police Union (SIPOBA) and the Santa Fe Provincial Police Professional Association (APROPOL). In addition, the complainant organizations allege that as a reprisal, after the formation of SIPOBA, one of the members of its Executive Committee, Principal Officer Nicolàs Alberto Masi, was dismissed and the General Secretary of APROPOL, Mr. Miguel Orlando Salazar, was dismissed for claiming payment of wage arrears and complaining of the lack of police equipment on behalf of the workers. The Committee notes the general reply of the Government with respect to the right to organize of the police.*

263. *The Committee recalls that Argentina has ratified Convention No. 87, Article 9 of which provides that "The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations".*

264. *In the light of this text, there is no doubt that the International Labour Conference intended to leave it up to each State to decide the extent to which it considered it appropriate to apply the rights envisaged in the Convention to members of the armed forces and the police, in other words, by implication, that States which have ratified the Convention are not obliged to recognize the rights set out therein for those categories of workers [see 145th Report, Case No. 778 (France), para. 19]. Nevertheless several member States have recognized the right to organize of the police and the armed forces*

265. *In these circumstances, taking into account that the Convention left the issue up to member States to decide, the Committee recommends to the Governing Body that it should decide that the case does not require further consideration.*

The Committee's recommendation

266. *In the light of its foregoing conclusions, the Committee invites the Governing Body to decide that the case does not call for further examinations.*

CASE NO. 2250

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

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

Allegations: The complainants object to the decision of the administrative authority to exclude the ATE from the bargaining committee negotiating a collective agreement on the grounds that there are other more representative organizations

- 267.** The complaint is contained in a communication from the Confederation of Argentine Workers (CTA) and the Association of State Workers (ATE) of February 2003. The Government sent its observations in a communication dated 21 July and 10 September 2003.
- 268.** Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainants' allegations

- 269.** In its communication of February 2003, the Confederation of Argentine Workers (CTA) and the Association of State Workers (ATE) state that the Ministry of Labour, Employment and Human Resources Training decided that the ATE lacked the legitimacy to represent the workers in the sector employed by the Nucleoeléctrica Argentina S.A. (NASA) enterprise, for collective bargaining purposes.
- 270.** The complainants add that on 31 May 2000, Decision No. 63 was issued by the National Directorate of Collective Bargaining setting up the bargaining committee for the conclusion of a collective agreement in the NASA enterprise. The ATE filed an application for reconsideration of the decision, together with a subsidiary appeal to the higher administrative authority, requesting to be included in the bargaining committee, since, on the workers' side, it only included the Argentine Federation of Light and Power Workers (FATLYF), the Villa María Regional Light and Power Workers' Trade Union and the Paraná Light and Power Workers' Trade Union. The Directorate responded favourably to the application for reconsideration of its decision and ordered the inclusion of the ATE in the bargaining committee.

271. The complainants add that after the inclusion of the ATE, the FATLYF claimed the exclusive right to bargain in the sector and ATE maintained that it had the right to participate in the committee (without demanding exclusivity or the exclusion of the other trade unions from the committee). The matter was finally settled through administrative channels, with Ministerial Decision No. 595/02 of 3 September 2002 granting the FATLYF and its affiliates exclusive rights to represent the workers.
272. The complainants explain that the ATE never denied the right of the Federation or its affiliates to participate in bargaining, given that this is a right of the workers of the NASA enterprise, and hence their representative bodies should endeavour to establish bargaining committees that represent the workers' interests, irrespective of which trade unions represent them.
273. According to the complainants, the State is denying the right of ATE to participate in collective bargaining in the enterprise, despite the fact that it has trade union status (*personería gremial*) and has a large membership, with even more members than the other organizations, on grounds that – according to Ministerial Decision No. 595/02 – decisions have been taken under which the alleged legitimate trade unions expanded the scope of their activity, displacing the ATE. The complainants point out that the decisions were adopted under procedures in which the ATE did not take part and that no comparison had been made between membership numbers which would have deprived the ATE of its representative trade union status.
274. The complainants assert that the right of representation should in no case be granted to one trade union without hearing the other trade union or trade unions who would thereby lose their status, and that this is the case of the decisions underlying the administrative act which is the subject of the complaint. The workers are clearly willing to support the action and participation of the ATE in defence of their interests in the NASA enterprise. This reality can by no means be denied, restricting the freedom of the workers to express themselves through their trade union. There are two trade unions with the right to represent the workers, and both undeniably have the right to participate in collective bargaining and hence to represent the workers' collective interests.
275. Lastly, the complainants state that the ATE has more paid-up members in the sector to which the NASA enterprise belongs, both among nuclear plant workers and among administrative personnel employed under the National Atomic Energy Commission.

B. The Government's reply

276. In its communications dated 21 July and 10 September 2003, the Government states that the complaint is based on the exclusion of the ATE from the bargaining committee set up to discuss the collective agreement of the staff employed at the Nucleoeléctrica Argentina S.A. (NASA) enterprise. The Government points out that under Argentine legislation, the most representative trade unions have exclusive rights to bargain collectively. According to the Government, the Committee on Freedom of Association has considered that granting preference to the most representative trade union in collective bargaining is not contrary to the principles of freedom of association and it is commonly found in many legal systems.

277. The Government states that in this case it is the Argentine Federation of Light and Power Workers and its regional affiliates, the Villa María Regional Light and Power Workers' Trade Union and the Paraná Light and Power Workers' Trade Union, which have the status of most representative trade unions. At no time has the ATE demonstrated that it is the most representative union in the sector. Moreover, through a number of administrative acts by the implementing authority, the staff of the Embalse Nuclear Power Plant have been assigned to representation by the Villa María Light and Power Workers' Trade Union and the staff of the Atucha Nuclear Power Plant assigned to representation by the Paraná Light and Power Workers' Trade Union.
278. The Government states further that exclusion from collective bargaining does not imply non-recognition of the trade union rights (the right to take direct action, etc.) enjoyed by the ATE in the enterprise concerned. According to the Government, it can be inferred from the above that there has been no violation of freedom of association. Finally, in its communication of 10 September 2003, the Government states that the ATE lodged an appeal before the judiciary against the administrative acts to which it objects, and that the National Labour Court of Appeals rejected the appeal (in its decision, the judicial authority indicates that the complainant should channel its claim through the procedures of the Trade Unions Act No. 23551, on the basis of either a conflict of representativity or a dispute of representativity in a sector under articles 59 and subsequent of Act No. 23551).

C. The Committee's conclusions

279. *The Committee observes that the complainants object to the decision taken by the administrative authority to the effect that the Association of State Workers (ATE) lacks the legitimacy to represent the workers in the sector employed by the Nucleoeléctrica Argentina S.A. (NASA) enterprise, resulting in the exclusion of the ATE from the bargaining committee for the conclusion of a collective agreement. The Committee also observes that the complainants state that: (1) although the ATE has trade union status – the necessary prerequisite to be able to bargain collectively – and a large membership – with, according to the complainants, even more members than the other organizations – it is being denied the right to participate in collective bargaining; (2) the ATE claims the right to participate in collective bargaining, but does not demand exclusivity or the exclusion of the other authorized trade unions; and (3) the ministerial decisions declaring that the other trade union organizations have the right to represent the workers were adopted after procedures in which the ATE did not take part and without comparing membership numbers.*
280. *The Committee observes that the Government states that: (i) Argentine legislation provides that the most representative trade unions have exclusive rights to bargain collectively; (ii) in this case, it is the Argentine Federation of Light and Power Workers and its affiliates which have the status of most representative trade union; (iii) at no time has the ATE demonstrated that it is the most representative organization; and (iv) the judicial authority rejected the appeal lodged against the administrative acts.*
281. *In this respect, the Committee recalls that the competent authorities should, in all cases, have the power to proceed to an objective verification of any claim by a union that it represents the majority of the workers in an undertaking, provided that such a claim appears to be plausible. If the union concerned is found to be the majority union, the authorities should take appropriate conciliatory measures to obtain the employer's recognition of that union for collective bargaining purposes [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 824].*

282. *In this case, the Committee does not have sufficient information to determine whether the complainant organization ATE is the most representative organization in the Nucleoeléctrica Argentina S.A. (NASA) enterprise. However, noting that the judicial authority indicated that ATE should channel its claim through the procedures of conflict of representativity or of dispute of representativity in a sector so as to determine whether it is the most representative organization, the Committee requests the Government to keep it informed of the outcome of any judicial procedures that ATE may undertake in this respect.*

The Committee's recommendations

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

- (a) The Committee recalls that the competent authorities should, in all cases, have the power to proceed to an objective verification of any claim by a union that it represents the majority of the workers in an undertaking, provided that such a claim appears to be plausible. If the union concerned is found to be the majority union, the authorities should take appropriate conciliatory measures to obtain the employer's recognition of that union for collective bargaining purposes.*
- (b) Noting that the judicial authority indicated in the present case that the Association of State Workers (ATE) should channel its claim through the procedures of conflict of representativity or of dispute of representativity in a sector under the provisions of the Trade Unions Act No. 23551 so as to determine whether it is the most representative organization, the Committee requests the Government to keep it informed of the outcome of any judicial procedures that ATE may undertake in this respect.*

CASE NO. 2263

DEFINITIVE REPORT

**Complaint against the Government of Argentina
presented by
the Latin American Federation of Education and
Culture Workers (FLATEC)
on behalf of
the Argentinian Trade Union of Private Tutors (SADOP)**

Allegations: The complainant organization alleges that, ever since a negotiating committee was set up in the private teaching sector in 1999, the employers, in violation of the duty of good faith and the duty to make every effort, as laid down in legislation, have resorted to unfair practices (the refusal to attend meetings, delaying measures, the denial of the right of teachers to bargain collectively in the private teaching sector) in order to avoid negotiating a collective agreement in the private teaching sector. The complainant organization also alleges that, with regard to this situation, the Ministry of Labour has been unhelpful and has not acted in any way, ignoring its obligation to encourage and promote collective bargaining in accordance with Conventions Nos. 98 and 154 and has not penalized the employers in spite of their non-compliance with the legislation and in spite of trade union complaints

- 284.** The complaint is contained in a communication dated April 2003 from the Latin American Federation of Education and Culture Workers (FLATEC), on behalf of the Argentinian Trade Union of Private Tutors (SADOP). The Government sent its observations in communications dated 29 July and 10 September 2003.
- 285.** 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). It has also ratified the Collective Bargaining Convention, 1981 (No. 154).

A. The complainant's allegations

- 286.** In its communication of April 2003, the Latin American Federation of Education and Culture Workers (FLATEC), on behalf of its affiliated organization the Argentinian Trade Union of Private Tutors (SADOP), alleges that this trade union represents more than 200,000 Argentinian private tutors. FLATEC alleges that, in spite of efforts made by SADOP to reach agreement on a collective agreement for work in the private teaching sector, the employers (business chambers) have systematically refused to make the necessary efforts and have even denied that private tutors have the right to bargain collectively. With regard to this situation, the Ministry of Labour has been unhelpful and has not acted in any way, thereby infringing legislation in force and Conventions Nos. 98 and 154, ratified by Argentina, which require the Government to encourage and promote collective bargaining.
- 287.** FLATEC explains that for four years now, and more specifically since 19 June 1999, SADOP has submitted a file for collective bargaining in the private teaching sector. After difficult discussions, the Ministry of Labour formed a negotiating committee in resolution No. 376/99 of 17 November 1999. In May 2000, SADOP laid a written complaint that the employers had repeatedly refused to consider trade union proposals; in July 2001, the employers stated that resolution No. 376/99 did not mention the establishment of a joint committee; on 2 August 2001, SADOP laid a complaint about the violation of the legal obligation of good faith and the legal obligation to make every effort to negotiate; in recent months, in 2002, the employers have denied that private tutors have the right to bargain collectively and have refused to attend the hearings called at the Ministry of Labour to proceed with the collective bargaining process (moreover, SADOP has stated in writing that the non-appearance by the employers constitutes unfair practice, which is punishable by a fine inasmuch as they refuse to participate in collective bargaining and are causing delays).
- 288.** According to the complainant organization, throughout this process the Ministry of Labour, instead of encouraging collective bargaining and punishing the employers, has done nothing but forward to the trade union organization the unlawful statements and actions of the employers.

B. The Government's reply

- 289.** In its communications of 29 July and 10 September 2003, the Government states that the complaint is based on the hypothetical non-compliance of the Government with Conventions Nos. 98 and 154 for failing to encourage and promote collective bargaining in the negotiating committee set up under resolution No. 376/99 of the Ministry of Labour, Employment and Social Security of 17 November 1999 (the Government attaches a copy of the resolution to its response).
- 290.** The Government states, in this respect, that the Ministry of Labour has always worked to ensure that collective bargaining takes place, within its legal powers, taking into account the voluntary character of collective bargaining (the Government attaches a copy of the minutes of the meetings which had taken place on the initiative of the administrative authority). With regard to this subject, the Committee has stated that "collective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining", and indicates that "nothing in Article 4 of the Convention places a duty on the government to enforce collective bargaining by compulsory means with a given organization; such an intervention would clearly alter the nature of bargaining".

291. In the case in question, according to the Government, the administrative authority summoned the parties to start a process of collective bargaining, a process that it has always tried to encourage, providing the appropriate environment so that employers and workers might carry out voluntary collective bargaining. If, in such a process, one of the parties did not proceed with due good faith, which should prevail in all collective bargaining, it is not for the administrative authority to determine whether or not such an attitude existed or to impose penalties. On the contrary, the party that considers itself wronged has every right to resort to legal proceedings, and these proceedings will resolve the issue. If the State had intervened, this would have been contrary to the spirit and the letter of the international conventions and the declarations of the supervisory bodies of the ILO.

292. Argentinian legislation treats this issue in Law No. 25250, article 14, and establishes the following:

3. The parties are obliged to negotiate in good faith, which implies:

- (a) Attendance at meetings fixed by common accord or by the bodies or third parties that convene them in the framework of proceedings to resolve disputes laid down in the previous article.
- (b) The designation of negotiators with the appropriate mandate.
- (c) The exchange of the information necessary to examine the issues under discussion in order to begin justified discussion and to obtain a fruitful and balanced agreement. In particular, the parties are obliged to exchange information relating to the distribution of the benefits of productivity and recent and future changes in employment.
- (d) Making genuine efforts to reach agreements.

4. In collective bargaining begun at the enterprise level, where the enterprise employs more than 40 workers, this exchange will extend to information relating to the following issues:

- (a) the economic situation of the enterprise, the sector and the environment in which the enterprise performs;
- (b) unit labour costs and absenteeism indicators;
- (c) technological innovation and plans to realize this;
- (d) the organization, duration and distribution of working hours;
- (e) the occupational accident rate and prevention measures;
- (f) plans for and action with regard to vocational training.

[...]

7. Without prejudice to that which is laid down in articles 53-54 of Law No. 23551, the unwarranted refusal to bargain collectively in good faith, by the employers, the professional associations that represent them or trade union associations, with the trade union organization, the employer or the competent employers' organization, or to provoke delays that obstruct the collective bargaining process, shall be considered unfair practice and contrary to the ethics of professional labour relations.

In such cases, the party affected by this non-compliance will be able to lodge a claim for unfair practices with the competent court, in extraordinary summary proceedings provided for in the Argentinian Civil and Commercial Procedural Code. The court shall rule that the behaviour which obstructs the duty to negotiate in good faith cease immediately and shall, moreover, impose a careful and reasoned penalty to the non-complying party of a fine of up to, but not exceeding, 20 per cent of the total monthly wage at the time of the occurrence, of those workers involved in the negotiations. If the party in breach of the law maintains its attitude (reoccurrence), more severe penalties shall be considered.

293. The Government indicates that, in accordance with the legislation, the obligation to negotiate in good faith also exists in cases of procedures to prevent crises in enterprises and in bankruptcy proceedings, and for unfair practices there is also a similar legal procedure described with the possibility of penalties.

294. The Government concludes by indicating that the complainant trade union should turn to the appropriate court and lodge a complaint of alleged bad faith with regard to collective negotiations by the other party, as it is the legal authorities, rather than the Ministry of Labour, that are responsible for resolving the issue. All this is in accordance with international standards and, therefore, the Government believes that the present case, in accordance with its previous statements, does not merit further examination.

C. The Committee's conclusions

295. *The Committee notes that the complainant organization alleges that since the negotiating committee was established in the private teaching sector in 1999, the employers, in violation of the duty of good faith and the duty to make every effort, laid down in legislation, have resorted to unfair practices (the refusal to attend meetings, delaying measures, the denial of the right of teachers to bargain collectively in the private teaching sector) in order to avoid negotiating a collective agreement in the private teaching sector. The complainant organization also alleges that, with regard to this situation, the Ministry of Labour has been unhelpful and has not acted in any way, ignoring its obligation to encourage and promote collective bargaining in accordance with Conventions Nos. 98 and 154, and has not penalized the employers in spite of their non-compliance with the legislation and in spite of trade union appeals.*

296. *The Committee notes that the Government highlights that: (1) the legal authorities, rather than the administrative authorities, are responsible for examining and possibly penalizing unfair practices, among which the legislation includes bad faith in collective bargaining and, more specifically, the non-attendance of the negotiating parties at meetings, the unwarranted refusal to negotiate in good faith or provoking delays; (2) the legislation provides for penalties equivalent to large fines; (3) the administrative authorities have summoned the parties to begin a collective bargaining process, encouraging this by providing them with an environment in which they can bargain collectively on a voluntary basis, according to the provisions of the ILO Conventions (the Government attaches to its response a copy of the minutes of the meetings which had taken place).*

297. *In this respect, the Committee observes that the following emerges from the minutes of the meeting held between SADOP and representatives of the employers' sector at the Ministry of Labour on 26 December 2002:*

First, both parties confirmed their willingness and broad spirit of dialogue and agreement under the provisions of the rules concerning the procedure of negotiations adopted on 19 September 2002 in accordance with Decision S.S.R.L. No. 376/99.

Second, as agreed at the meeting of 18 December, the trade union representatives present a draft General Negotiating Agreement and hand a copy to the employers' institutions who are present and who undertake to analyse it and express a formal opinion or make a counter-proposal in writing, at the meeting which is scheduled to this effect, on 7 February 2003, at 4.30 p.m., at the Ministry of Labour, Employment and Social Security.

- 298.** *The Committee recalls the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relationships, and that it is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 814 and 815].*
- 299.** *In these circumstances, the Committee requests the Government to continue to make every effort so that the parties can conclude a collective agreement for the private teaching sector, pursuant to the agreement reached in December 2002.*

The Committee's recommendation

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

The Committee requests the Government to continue to make every effort so that the parties concerned can conclude a collective agreement for the private teaching sector, pursuant to the agreement reached in December 2002.

CASE NO. 2090

INTERIM REPORT

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

- **the Belarusian Automobile and Agricultural Machinery Workers' Union (AAMWU)**
- **the Radio Electronics Workers' Union (REWU)**
- **the Congress of Democratic Trade Unions (CDTU)**
- **the Belarusian Free Trade Union (BFTU)**
- **the Belarusian Trade Union of Air Traffic Controllers (BPAD)**
- **the International Confederation of Free Trade Unions (ICFTU)**
- **the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF)**
- **the Federation of Trade Unions of Belarus (FPB) and**
- **the Agricultural Sector Workers' Union (ASWU)**

Allegations: The complainants' pending allegations concern: interference by government authorities with trade union activities and elections, in particular as concerns the presidency of the trade union federation and subsequent favouritism; continuing government interference in the internal affairs of the REWU, AAMWU, CDTU, and the Minsk Regional Trade Union Organization of Employees in the Cultural Sphere (MRTUECS) and the ultimate dissolution of the BPAD by order of the Supreme Court; detention of the CDTU Chairperson for the exercise of his freedom of expression in relation to the defence of trade union rights; administrative detentions of the CDTU lawyer and of the AAMWU president; dismissals and further blacklisting for employment of trade union leaders Evgenov, Evmenov and Bourgov; obstacles to registration in Presidential Decree No. 2 and the non-registration of primary-level organizations of the BFTU; interference in internal trade union activities by virtue of Presidential Decrees Nos. 8 and 11

301. The Committee examined the substance of this case on several occasions, when it presented interim reports to the Governing Body [324th Report, paras. 133-218, 325th Report, paras. 111-181, 326th Report, paras. 210-244, 329th Report, paras. 217-281, 330th Report, paras. 207-238 and 331st Report, paras. 122-168, approved by the Governing Body at its 280th, 281st, 282nd, 285th, 286th and 287th Sessions (March, June

and November 2001, November 2002 and March and June 2003)]. New allegations and supplementary information were received from the Radio and Electronic Workers' Union (REWU) (2 and 29 May, 5 and 9 September, and 29 October 2003), the Automobile and Agricultural Machinery Workers' Union (AAMWU) (2 June, 17 July, 10 September and 13 and 31 October 2003), the Belarusian Trade Union of Air Traffic Controllers (BPAD) (4 September 2003), the Belarusian Free Trade Union (BFTU) (10 September 2003) and the Congress of Democratic Trade Unions (30 October 2003). The International Confederation of Free Trade Unions (ICFTU) transmitted new allegations in communications dated 18 September and 31 October 2003.

- 302.** The Government transmitted further observations in a communication dated 11 September 2003.
- 303.** Belarus 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).
- 304.** From 8 to 11 September 2003, at the request of the Government, a mission was carried out to Belarus by Mr. Kari Tapiola, Executive Director of the Sector on Standards and Fundamental Principles and Rights at Work and Ms. Karen Curtis, Head of Section, Freedom of Association Branch, to discuss the issues raised in the case and possible measures to implement the Committee's recommendations. The mission report is attached as Annex I.
- 305.** The Committee further notes that an article 26 complaint for non-observance by the Government of Belarus of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), was deposited with the Secretary-General of the International Labour Conference at its 91st Session (June 2003) by a number of workers' delegates. The question of whether to establish a commission of inquiry has been placed on the agenda of the present (288th) Session of the Governing Body (November 2003).

A. Previous examination of the case

- 306.** At its June 2003 Session, the Governing Body approved the following recommendations in the light of the Committee's interim conclusions:
- (a) The Committee once again urges the Government to establish independent investigations, having the confidence of all parties concerned, into the allegations of government interference in the elections of the Federation of Trade Unions of Belarus (FPB), the Agricultural Sector Workers' Union (ASWU), the Brest Regional Association of Trade Unions and the Brest Regional Committee of Science and Education Unions, with the aim of rectifying any effects of this interference. The Committee strongly requests the Government to keep it informed of the results of these investigations.
 - (b) The Committee urges the Government to institute independent investigations into the claims that state and local authorities have acted in such a way as to promote the dissolution of the Belarusian Trade Union of Air Traffic Controllers (BPAD) and the Minsk Regional Trade Union Organization of Employees in the Cultural Sphere (MRTUECS) and into the allegations of anti-union discrimination in respect of some members of these organizations and, if the allegations are proven to be true to take all necessary measures to ensure that these organizations are protected from such interference in the future and that any acts of anti-union discrimination are redressed. The Committee requests the Government to reply in detail to these allegations and to keep it informed of the outcome of these investigations.
 - (c) Noting with regret the very serious allegations of interference in trade union internal affairs made by the Radio and Electronic Workers' Union (REWU) in its communication

of 2 May 2003, the Committee requests the Government to reply as a matter of urgency to the matter raised therein. The Committee further requests the Government to reply in detail to the allegations made in the complainants' communications of February 2003 concerning various acts of favouritism towards the FPB.

- (d) The Committee urges the Government to make all efforts to ensure that the representative workers' organizations concerned may effectively participate in the various bodies established in the country for the promotion of social dialogue.
- (e) Deploring the fact that the Government has taken no steps to implement its previous recommendations, the Committee once again urges it to:
 - (i) take the necessary measures to ensure that Mr. Evgenov, Mr. Evmenov and Mr. Bourgov are reinstated in their posts with full compensation for any lost wages and benefits;
 - (ii) institute independent investigations into the allegations of anti-union tactics made in respect of the GPO "Khimvolokno" Free Trade Union and the Free Trade Union at the "Zenith" plant;
 - (iii) institute an independent investigation into the allegations of managerial pressure for the establishment of a regional trade union of electronics industry workers and for the affiliation of the Tsvetotron plant to the new regional union;
 - (iv) take the necessary steps for the registration of the Belarusian Free Trade Union at the Khimvolokno State Production Amalgamation and eliminate any remaining obstacles to trade union registration noted in its previous report;
 - (v) amend Presidential Decree No. 8 so that workers' and employers' organizations may benefit freely, and without previous authorization, from the assistance which might be provided by international organizations for activities compatible with freedom of association, and Presidential Decree No. 11 so as to ensure that restrictions on picketing and other demonstrations called by workers' or employers' organizations are limited to cases where the action ceases to be peaceful or results in a serious disturbance of public order and so that any sanctions imposed will be proportionate to the violation incurred;
 - (vi) provide information on the alleged refusal to employ the re-elected chairperson of the Free Trade Union of Metalworkers at the Minsk Automobile Plant, Mr. Marinich.

The Government is requested to provide all necessary information in respect of all the above matters so that the Committee may examine this case in full knowledge of the facts.

B. The complainant's additional allegations

307. In its communication of 2 May 2003, the Radio and Electronic Workers' Union (REWU) states that an attempt has been made by the Chairperson of the Federation of Trade Unions of Belarus (FPB), Mr. Kozik, to remove the Chairperson of the REWU, Mr. Fedynich, from office. The REWU indicates that a decision was taken to this end by the FPB presidium, instructing first-level organizations of the REWU to hold an extraordinary congress in order to replace Mr. Fedynich. The Deputy Minister of Industry has visited enterprises in Vitebsk and Minsk in order to pressure the trade union committees and their representatives in this regard.

308. The REWU recalls that the Third Plenary Session of the Republican Council of Trade Unions, held on 19 December 2002, featured an agenda item on the follow-up to decisions taken at the Fourth Extraordinary Congress of the FPB and the Third Congress of the REWU on the defence of the socio-economic rights and interests of workers in the branch and the strengthening of the trade union's organizational unity. Both Mr. Kozik and the Deputy Minister of Industry participated in the plenary session. In reply to the pressure brought to bear on the members of the Republican Council representing the trade union committees, Mr. Fedynich made a motion to add an item to the agenda on "Confidence in

G. Fedynich, Chairperson of the REWU” and to hold a secret ballot. The plenary session approved the motion, despite the interventions by Mr. Kozik and the Deputy Minister, by 49 in favour and only one vote against. At that time it was decided not to convene an extraordinary congress of the REWU until Mr. Fedynich’s term expired in September 2005.

- 309.** Despite having subsequently concluded a collective agreement which met with the full support of the trade union members, the REWU states that, on 27 March 2003 at an ongoing seminar of senior officials and local authorities on improving ideological work, the President of Belarus made a report in which the Minister of Industry was given two months to solve the problem posed by the leaders of the branch unions of workers in the agricultural machinery industry, Mr. Bukhvostov (Chairperson of the Automobile and Agricultural Machinery Workers’ Union (AAMWU)) and of the REWU, Mr. Fedynich, describing them as belonging to the opposition, which was irreconcilably hostile to the State. Mr. Kozik was said to have added that these two leaders were not prepared to discharge their main obligation – trade union work and were actively opposed to society and the FPB.
- 310.** Subsequently, in its communication dated 29 May 2003, the REWU states that officials of the Ministry of Industry had offered Mr. Fedynich a post as company director or deputy director on condition that he agree to resign his post as chairperson. It adds that the FPB together with the Ministry of Industry held the constituent general assembly of the Belarus Industrial Association (BIA), while barring admittance to members of the REWU and the AAMWU. The REWU believes that this effort is aimed at making their organizations subordinate to the existing power structures. The REWU indicates in this regard that the Ministry of Industry had sent telegrams to various undertakings ordering directors and union committee chairpersons to attend the constituent general assembly of the BIA. While a number of trade union committees disregarded the call, some individuals did attend out of fear of losing their jobs.
- 311.** Subsequently, according to the REWU, the Deputy Minister of Industry visited “Monolit” in Vitebsk to force the plant director to put a proposal to the union committee affiliated to REWU that it should join the BIA instead. While the director did put the proposal forward, the conference did not support it. The Deputy Minister visited other industrial undertakings, leaving copies of the by-laws of the new organization and the leaders of nine power generation undertakings were told to begin the work of affiliating existing primary-level organizations to the new industrial union.
- 312.** Finally, in its communications of 5 and 9 September 2003, the REWU indicates that acts of interference are continuing and have even intensified. The Deputy Minister has continued to visit plants, calling on managers to affiliate to the new union. A series of measures have been used to place pressure on managers, and through them the union committee chairperson and members to get them to leave the REWU, including: threats not to renew contracts, to cancel orders and to refuse to sanction official trips abroad. All of this was going on without any response from the leadership of the FPB, to which the REWU is affiliated and which should be defending its interests.
- 313.** The AAMWU, in a communication dated 2 June 2003, confirms the above information about the attempts to remove their chairperson from office. A decision had been taken by the presidium of the FPB council to apply to the union executive bodies to remove Mr. Bukhvostov from his post as chairperson because of his having complained to the ILO. The Chairperson of the FPB demanded that this question be placed on the agenda of the plenary conference of the AAMWU. Despite the pressure brought to bear on council members by city and district officials and company representatives, the results of the ballot led to the removal of this question from the plenary conference agenda.

- 314.** The AAMWU signed a wage agreement with the Ministry of Industry for the year 2003 and a number of demands and proposals had been put forward to the Government, which met with widespread support from union members. Despite this, a presidential instruction to remove the AAMWU chairperson was issued on 27 March (an extract from the President's address was attached). The complainant adds that these instructions have nothing to do with the work undertaken by the AAMWU or its chairperson, but rather correspond to an attempt to eliminate anyone who stands for constitutional principles, law and democracy.
- 315.** The AAMWU further indicates in its communication of 17 July 2003 that the administration of the Oktiabrsky region of Mogilev has now denied registration to the local trade union at the Mogilev Automobile Plant, a primary trade union organization of the AAMWU, despite the fact that all the necessary documents were submitted. A copy of the letter refusing registration was attached to the complaint. The refusal letter merely indicates that not all of the necessary documents were submitted, without indicating precisely what was missing. In its communication of 10 September, the AAMWU complains of continuing acts of interference in its internal trade union affairs.
- 316.** In a communication dated 4 September 2003, the Belarusian Trade Union of Air Traffic Controllers (BPAD) sent information concerning the decision of the Supreme Court on 7 August 2003 to suspend its activities. The BPAD explains that on 7 August 2003 the Supreme Court, at the request of the Prosecutor-General, suspended its activities. The court cited section 5 of the Law on Trade Unions according to which, where the activities of trade unions are unconstitutional or otherwise unlawful, they can be suspended. The Supreme Court deemed it to be a breach of legislation that the trade union in question did not have the required minimum membership for national level trade unions of 500 members.
- 317.** The BPAD objected to the Supreme Court ruling stating that: (1) in 1999, BPAD had undergone re-registration with the Ministry of Justice, in accordance with Presidential Decree No. 2 of 26 January 1999; and (2) that the procedure for suspending the activities of the union was originally instigated by the Chairperson of the State Aviation Committee, Mr. F. F. Ivanov, who repeatedly made politically motivated statements on this matter to the Ministry of Justice and made clear the real reasons for which in his view the trade union had to be closed down. A copy of a letter from Mr. Ivanov to the Minister of Justice dated 14 July 2003 was attached to the complaint. In this letter Mr. Ivanov refers to:

... the reply from your Ministry (of Justice) of 17 October 2002 (No. 06-11/12441) signed by the head of the civil aviation department M. M. Sukhinin fails to give the State Aviation Committee a clear and unequivocal answer. This sort of approach to the problem by the Ministry of Justice creates conditions for the establishment of free and independent trade unions in all undertakings in this sector, which will jeopardize the ability of the civil aviation sector to do its job, as well as going against the demands made of the trade unions by President Lukashenko.

The leaders of the Belarusian Trade Union of Air Traffic Controllers (BPAD) continue their efforts to destabilize the situation not only within the union, but also throughout the sector (a copy of the BPAD complaint is attached). Viktor Grigorevich [the Minister of Justice], I urge you to take a hand in resolving this problem and reconsider the issue of the legality of the union's registration.

- 318.** According to BPAD, no concrete evidence is presented to support these allegations. On the contrary, the head of the department for public associations at the Ministry of Justice, Mr. Sukhinin, had replied earlier to the Chairperson of the State Aviation Committee:

The Belarusian Trade Union of Air Traffic Controllers has republic-level status since at the time of re-registration it had more than 500 members from five regions and the city of

Minsk (paragraph 3, Presidential Decree No. 2 of 26 January 1999) and is not required to establish structural or membership criteria for its representative status or financial accounts (section 7, Law on Trade Unions).

In our view, the conclusions [of the Chairman of the State Aviation Committee] are based on personal prejudices, rather than a wish to enforce the terms of sections 23 and 28 of the Law on Trade Unions.

All this shows that the re-registration was justified and in conformity with legislation, and the decision not to register the union should not have been taken.

319. The BPAD raises a number of other procedural and legal arguments against the Supreme Court ruling. It adds that it had called on witnesses who testified to the fact that members of the union were subjected to psychological pressure aimed at forcing them to leave their union and join the state union. (Witness testimony was provided with the BPAD communication of 4 September.) According to these witnesses, the illegal methods used included: dismissals of BPAD members (three altogether); threats of dismissal through compulsory transfer to new contractual arrangements; threats of “biased” appraisals; disinformation aimed at BPAD members regarding the legitimacy of the trade union, etc. The Prosecutor-General ignored all of this testimony and the court failed to consider this information. Yet to talk about the total membership of a trade union under such a climate of fear in which its members are living is just nonsensical. According to the BPAD, this ruling was politically motivated and attests to the lack of an independent judicial system in Belarus.

320. In its communication dated 10 September 2003, the Belarusian Free Trade Union (BFTU) contends that there is a de facto ban on the Belarusian Free Trade Union and its activities in the Republic of Belarus. It attaches, in this regard, a list of the following 31 non-registered first-level organizations affiliated to the BFTU: first-level organization of workers of the Mogilev Automobile Plant, first-level organization of workers of the open joint-stock company “Stroitrest No. 12” in Mogilev; first-level organization of workers and individual entrepreneurs in Mogilev; first-level organization of workers of the “Parikmakherskaya Kristina” production cooperative in Mogilev; first-level organization of workers of the “Parikmakherskaya Aleksandrina” production cooperative in Mogilev; first-level organization of workers of the “Parikmakherskaya Uspek” production cooperative in Mogilev; first-level organization of workers of the “Parikmakherskaya Pavlinka” production cooperative in Mogilev; first-level organization of workers of the open joint-stock company “Zavod iskusstvennogo volokna im. V. V. Kuibyshev” in Mogilev; Mogilev Regional Organization of the Belarusian Free Trade Union; first-level organization of the open joint-stock company “Khimvolokno” in Grodno; first-level organization of workers of the “Samana Plus” joint venture in Mosty; first-level organization of workers of the “Orshansky Inokombinat” national unitary industrial and trading enterprise; first-level organization of the “Orsha – Zhilfond” municipal unitary housing maintenance enterprise of the Orsha municipal executive committee; first-level organization of workers of the “Orshateploset” municipal unitary enterprise; first-level organization of workers of the “Avtogidrousilitel” plant national unitary production enterprise in Borisov; first-level organization of workers of “Steklovolokno” in Polotsk; first-level organization of workers of the Novopolotsk housing and utilities municipal unitary enterprise; first-level organization of workers of the Novopolotsk heat station; first-level organization of workers of the “Naftan” production association in Novopolotsk; first-level organization of workers of Secondary School No. 7 in Novopolotsk; first-level organization of workers of Secondary School No. 4 in Novopolotsk; first-level organization of workers of Secondary School No. 10 in Polotsk; Novopolotsk-Polotsk Regional Organization of the Belarusian Free Trade Union; first-level organization of workers of the central district hospital in Gantsevichi; first-level organization of workers of the Baranovichi automated line plant; first-level organization of workers of the Baranovichi Technical College of the Belkoopsoyuz (Belarusian Republican Union of

Consumer Societies); Baranovich Regional Organization of the Belarusian Free Trade Union; Minsk Automobile Plant, affiliated to the Free Trade Union of Metalworkers; Minsk Tractor Plant, affiliated to the Free Trade Union of Metalworkers; Minsk Electrotechnical Plant, affiliated to the Free Trade Union of Metalworkers; Minsk Motor Plant, affiliated to the Free Trade Union of Metalworkers.

- 321.** In its communication dated 18 September 2003, the International Confederation of Free Trade Unions (ICFTU) brings to the Committee's attention that the regional court of Minsk had that day sentenced the President of the Congress of Democratic Trade Unions, Alexander Yaroshuk, to ten days' imprisonment, for allegedly "showing disrespect for the Supreme Court of Belarus".
- 322.** By way of background, the ICFTU explains that, some weeks ago, Alexander Yaroshuk had protested, in the newspaper *Narodnaja volja*, against the decision of the Supreme Court to cancel the legal registration of the Belarusian Trade Union of Air Traffic Controllers (BPAD). The union was forced to dissolve itself as a consequence of the Supreme Court ruling. Further to his interview with *Narodnaja volja*, a legal suit was launched against Mr. Yaroshuk, which led to the prison sentence mentioned above.
- 323.** The ICFTU has stressed that Mr. Yaroshuk is a well-respected trade union leader of an organization with which it has had regular cooperation over the years, and that his only action was to defend the right of a well-established union to exist and to pursue its activities, in full accordance with the law. The ICFTU considers the sentence against Mr. Yaroshuk is further evidence that the public authorities of Belarus do not accept the very basic principles of freedom of association, nor respect the fundamental right to freedom of expression.
- 324.** In its communication of 13 October 2003, the AAMWU alleges the continuing interference by the authorities in trade union affairs, including the refusal to register and, in certain cases, the cancellation of registration of the primary trade unions of AAMWU and REWU. The REWU alleges similar acts of interference in its communication dated 29 October 2003 aimed at getting primary-level organizations to leave the REWU and change their affiliation to the new industrial union and continuing efforts to discredit trade union leaders Mr. Bukhvostov and Mr. Fedynich through mass media. The REWU further states that proposals to discuss these acts of interference by the authorities and to express support for these two organizations at the FPB plenum were not supported by the FPB's president.
- 325.** In its communication of 30 October 2003, the CDTU states that on 9 October 2003, the president, Mr. Yaroshuk, was not allowed to attend the meeting of the National Council for Labour and Social Issues. It further condemns the administrative detention of Mr. Yaroshuk on 18 September 2003. Finally, it adds that on 17 October 2003, Mr. Odynets, the lawyer of the CDTU, was also placed under administrative detention for five days for showing disrespect to the court.
- 326.** The AAMWU condemns in a communication of 31 October 2003 the sentencing of Mr. Bukhvostov to ten days' administrative detention for carrying out a picket aimed at drawing the attention of the Belarusian society, the leadership of the country and the international community to the violation of trade union rights in Belarus.
- 327.** The ICFTU, in a communication dated 31 October 2003, expresses its deep concern over the sentencing of Mr. Bukhvostov to ten days' administrative detention and other methods used both inside the FPB and outside to weaken Mr. Bukhvostov's position and to further repress the voice of independent trade unions in Belarus. Another trade union official, Mr. Komlik of the REWU, was also reportedly detained in connection with

Mr. Bukhvostov's arrest but was subsequently released. Added to the ICFTU's concern is the fragile state of health of Mr. Bukhvostov.

C. The Government's further reply

- 328.** In its communication dated 11 September 2003, the Government expresses its interest in resolving Case No. 2090 and cooperating with the ILO. It indicates that the following comments were prepared in consultation with trade unions and employers' organizations.
- 329.** As concerns Presidential Decree No. 2 respecting certain measures to regulate the activity of political parties, trade unions and other public organizations, the Government recalls that the Decree of 26 January 1999 was promulgated following the adoption of new civil and housing codes. The Decree provides that at least 500 founders from the majority of territorial and administrative and territorial units of the respective territory are needed for the establishment and activity of a republican (national) trade union and not less than 10 per cent of the total number of enterprise workers, but not less than ten persons. Only the last condition constitutes a requirement for the establishment of a trade union. The Government does not consider that 10 per cent is too high and indicates that this requirement concerns only the establishment of independent trade unions (and not the trade union units). The Government further indicates that since section 11 of the regulation on state registration sets out the particular cases where registration may be denied, the registration authorities cannot exercise any discretion in this regard. Moreover, when registration is denied, the decision of the registration authority can be appealed.
- 330.** To date, there has been no refusal to register a trade union; 20,197 primary-level organizations have been registered. There have only been 59 cases of refusal to register a primary-level organization since the promulgation of the Decree. The Government states that one of the reasons for refusal has been the non-respect of the requirement to provide a legal address. To improve the labour legislation, the Government is working with all interested bodies of the national administration: the Ministry of Labour and Social Protection, the Ministry of Justice, the Ministry of Industry and the Ministry of Foreign Affairs. Consultations are also being conducted with trade unions and employers' associations.
- 331.** On the question of Presidential Decree No. 8, the Government reiterates its previous comments and states that this Decree does not hinder trade unions from receiving free foreign aid intended for their legal activities and that no cases of refusal of trade union applications for registration of free foreign aid or of misuse of aid have come to light.
- 332.** As concerns Presidential Decree No. 11, the Government indicates that in order to systematize standards (legislation) concerning public activities, the Law on gatherings, meetings, street processions, demonstrations and picketing was adopted on 7 August 2003 to amend the Law concerning public meetings, public marches, demonstrations and picketing. In any event, the Government states that since the promulgation of Decree No. 11, there has been no liquidation of trade unions as a result of violations of the established procedures for holding public demonstrations in Belarus.
- 333.** The Government further indicates that according to the Regulations on the National Council for Labour and Social Issues (NCLSI), a consultative body with equal participation of representatives of the Government, employers' organizations and trade unions, the trade union representation in the council is based on proportional representation. The Government states that the members affiliated to the FPB trade unions are much greater in number than those affiliated to the Congress of Democratic Trade Unions (CTDU). Considering the number of trade union members of the CDTU (4,000), this organization could not aspire to be represented at the NCLSI. Nevertheless, one seat

has been kept for the CDTU representative. The CDTU representative participated in the NCLSI meeting of 9 August 2002, but not in its last two meetings. Furthermore, tripartite consultative bodies are functioning in the regions of Belarus. Due to the fact that trade unions affiliated to the FPB represent 98 per cent of all trade union members in Belarus, these trade unions are mainly represented in regional councils. When possible, trade unions not affiliated to the FPB are also asked to participate in consultative bodies. This is the case, for example, of Novopolotsk coordination council of Vitebskiy district.

- 334.** As concerns the election of the FPB President, the Government indicates that it has once more examined the matter. As indicated in previous observations, the elections were conducted according to the unions' own by-laws and there has been no violation of national law.
- 335.** On the question of the election of the Chairperson of the Agricultural Sector Workers' Union (ASWU), the Government once again indicates that Mr. Yaroshuk was released from his post as Chairperson of the National Committee of the Union at the Committee's plenary sitting on 10 September 2002 with 34 persons voting for, one against and five abstentions. Since the union by-laws did not provide for the procedure of election of the chairperson or other trade union leaders in between the congresses, during this plenum, the question of interpretation of the trade union by-laws was also examined. The plenum decided that, according to normal practice, the election and destitution of the Chairperson of the National Committee of the Union should be decided by the National Committee itself (43 persons voted for such an interpretation while two voted against). Since that time, Mr. Naumchik was elected Chairperson of the Committee on 26 March 2003 during the plenary of the Committee.
- 336.** As concerns the elections in trade unions of the Brest District, the Government once again states that Mr. Mironchik was released from his post as Chairperson of the Brest District Trade Unions' Association by a general meeting of the association and that Mr. Kovsh was released from his post as Chairperson of the Brest District Committee of the Trade Union of Education and Science Workers at his own request, following his retirement.
- 337.** As for the question of the establishment of the Minsk city trade union organization of employees of the cultural sphere, the Government indicates that Mr. Mamonko is a chairperson of one of the trade union units of the Minsk district regional organization of employees of the cultural sphere and not of an independent trade union. Presently, many industrial trade union organizations have district and Minsk city organizations in their structures. The decision to establish a unit belongs to the executive body of the trade union. The Minsk city trade union organization of employees of the cultural sphere was established by decision of the presidium of the National Committee of the trade union according to its by-laws. Mr. Mamonko participated in the work of the presidium, where he argued against the creation of the Minsk city trade union organization of employees of the cultural sphere. However, the members of the presidium did not support him. The Government points out that the establishment of the Minsk city organization did not result in the liquidation of the Minsk district organization, the president of which is still currently Mr. Mamonko. The Government supplies a copy of the decision of the presidium of the National Committee of Belarus Trade Union of Employees of the Cultural Sphere, as well as its organizational chart.
- 338.** On the question of the liquidation of the Belarusian Trade Union of Air Traffic Controllers (BPAD), the Government states that the Ministry of Justice had registered this trade union as a national trade union. Presidential Decree No. 2 provides for a minimum membership requirement of 500 workers to establish a national trade union. Since its registration, the membership of BPAD has declined. In February 2003, there were only 282 members of the trade union. In the meantime, the trade union continued to exercise its activities as a

national trade union. Considering this fact and in order to comply with the legislation, the Office of the Prosecutor-General of the Republic of Belarus advised the trade union, on 12 March 2003, to reconsider its status and to register as a trade union at a different level, according to its membership and sphere of activity. On 8 April 2003, the President of BPAD rejected this suggestion. The Prosecutor-General consequently addressed the Supreme Court with a request to stop the activities of the said trade union, in accordance with section 5 of the Law on Trade Unions. On 7 August 2003, the Supreme Court decided to stop the activity of the BPAD. The Government supplies the court ruling in this case.

- 339.** As regards the question of the establishment of the trade union of industrial workers, the Government states that in 2000 the suggestion to create a Belarusian trade union of industrial workers had already been made by a number of industrial trade unions, which at that time concluded wage agreements with the Ministry of Industry. This suggestion was supported by the then President of the FPB, Mr. Goncharik. Nor were the leaders of industrial trade unions, including Mr. Bukhvostov and Mr. Fedynich, against this proposal. However, at that time, the leaders of the industrial trade unions could not work out a common position on the mechanism of association. The National Industrial Trade Union of Automobile and Appliance Machinery Workers played the most active role in the creation of the new union. The Belarusian Industrial Association was established on 28 May 2003 with affiliation from this trade union, as well as from other trade unions not affiliated to other national industrial unions, such as the trade unions of the Minsk Automobile Plant, AO "Atlant", the Belarusian Metallurgical Plant of Jlobin, the regional trade union "Integral" and others.
- 340.** Furthermore, on the question of the establishment of the regional trade union of electronics workers "Integral", the Government reiterates its previous points made in this respect as well as on the question of disaffiliation of the primary trade union organization at the "Tsvetotron" plant in Brest from the branch union representing workers in the radio-electronics industry. The Government once again indicates that the reason given for the disaffiliation was a disagreement between the primary union organization and the branch union regarding the contributions to the union's republic-level committee. Now, the regional trade union of electronic workers "Integral" is affiliated to the newly established Belarus Industrial Association.
- 341.** The Government reiterates its previous comments as concerns the dismissals of Mr. Evmenov, Mr. Bourgov and Mr. Evgenov. The Government once again indicates that Mr. Evmenov was not dismissed for failure to organize "subbotnik" in April 1999 but for failure to assume the responsibilities imposed on him by his labour contract. The Government states that these workers were dismissed entirely in accordance with the legislation, and this fact has been confirmed on a number of occasions by the courts. The Government also indicates that according to the investigation by the labour inspectorate, Mr. Evmenov was hired by the DU KPP "Raysservice" of Ossipovichi for a short-term contract. At the end of his contract, Mr. Evmenov was dismissed.
- 342.** The Government also refers to its previous replies where it drew attention to the lack of evidence to support allegations that members of the Belarusian Free Trade Union at the "Grodno Khimvolokno" production association and at the "Zenith" plant in Mogilev had been threatened with dismissal. According to the Government, no workers have been dismissed at these plants, with the exception of Mr. Popov (dismissed on 2 September 2002 due to staff reductions) and of Mr. Tcherney, the President of the primary trade union of the Belarusian Free Trade Union, due to the expiration of his contract. As concerns Mr. Marinich, the former President of the Free Trade Union of Metalworkers at the Minsk Automobile Plant, the Government indicates that he was hired by OOO "Tourtranse" for a two-month contract. At the end of this term, Mr. Marinich was not fired and still works for the said enterprise. The Government submits documents to support this information.

D. The Committee's conclusions

343. *The Committee notes that the pending and new allegations in this case concern: interference by government authorities with trade union activities and elections, in particular as concerns the presidency of the trade union federation and subsequent favouritism; continuing interference in the internal affairs of the REWU, AAMWU, CDTU and the Minsk Regional Trade Union Organization of Employees of the Cultural Sphere (MRTUECS) and the ultimate dissolution of BPAD by order of the Supreme Court; detention of the CDTU Chairperson for exercising freedom of expression in defence of trade union rights; administrative detentions of the CDTU lawyer and of the president of the AAMWU; dismissals, and further blacklisting for employment of Mr. Evgenov, Mr. Evmenov and Mr. Bourgov; obstacles to trade union registration in Presidential Decree No. 2 and the non-registration of the primary-level organizations of the BFTU; and interference in the right of workers' and employers' organizations to organize their activities by virtue of Presidential Decrees Nos. 8 and 11.*
344. *The Committee takes note of the report of the ILO mission undertaken in Belarus from 8 to 11 September 2003 and wishes to thank the mission for its report which has provided important information on the context of the trade union movement in the country and the varying views on how this movement should function.*
345. *As concerns the recommendation that an independent investigation be conducted in respect of a number of trade union elections in the country, the Committee must observe with deep regret that, despite advice from the mission on steps to be taken for the implementation of the Committee's recommendations, the latest reply from the Government continues to refer only to the question of compliance with by-laws and relevant legislation and still does not address any of the issues related to the circumstances surrounding these elections and the impact of government interference in this process. Moreover, the Government has still not provided any indication as to the steps that might be envisaged to institute independent investigations into these matters, despite the fact that the Committee has been requesting the Government to do so since its meeting in November 2002 [see 329th Report, paras. 269-275].*
346. *The Committee takes due note of the indications made by the Government to the ILO mission that, beyond reviewing the correct conduct of the procedure for elections, there is little the Government can do to interfere in an internal conflict within the trade union movement. The Committee wishes to recall, however, that while it has no competence to examine the merits of disputes within the various tendencies of a trade union movement, a complaint against another organization, if couched in sufficiently precise terms to be capable of examination on its merits, may bring the government of the country concerned into question – for example, if the acts of the organization complained against are wrongfully supported by the government or are of a nature which the government is under a duty to prevent by virtue of its having ratified an international labour Convention [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 964]. In this case, the allegations concern not only the wrongful support by the Government of certain actions, but even the instigation by the Government of a certain number of attacks within the trade union movement.*
347. *The Committee is obliged to note in this regard not only that no steps have been taken to investigate the allegations concerning government interference in the trade union election of the Federation of Trade Unions of Belarus (FPB), the Agricultural Sector Workers' Union (ASWU) and the two organizations in Brest, but that additional allegations have been made by the complainants in this case of continuing government interference in respect of their organizations. In particular, the Committee deplores the allegations from the Radio and Electronic Workers' Union (REWU) and the Automobile and Agricultural*

Machinery Workers' Union (AAMWU) that the Chairperson of the FPB had made attempts to remove them as leaders of these unions at the end of 2002 because of their association with this complaint. Once these attempts had failed, the REWU and the AAMWU further allege that the President of Belarus issued instructions in March 2003 for the Minister of Industry to take the necessary measures to deal with the problem posed by these two chairpersons. The Committee notes with regret that the Government provides no information concerning these instructions, not even to deny their existence. The Committee emphasizes the importance it attaches to the principle that no person should suffer prejudice of any kind for bringing a complaint to the ILO and requests the Government to take all necessary measures to ensure respect for this principle.

- 348.** *The complainants go on to provide details of the efforts made by the Deputy Minister of Industry, following these instructions, to place pressure on plant directors and union members to leave the REWU and the AAMWU and to affiliate to the newly created Belarus Industrial Association (BIA). In this respect, the Committee observes that the BIA is made up of certain unions which had broken off from the REWU and the AAMWU and about which allegations of interference had been made earlier, resulting in the Committee requesting an independent investigation, in particular into the creation of a new regional trade union for workers at the "Integral" research and production association and the disaffiliation of the primary trade union organization at the "Tsvetotron" plant in Brest from the REWU [see 325th Report, paras. 169-171]. As regards these break-off unions, the Government continues to refer in its latest reply to the free choice of workers to form new trade unions, yet it still has not indicated any measures envisaged to establish an independent investigation into the circumstances surrounding this choice, which had even been called into question at the time by the district prosecutor [see 325th Report, para. 170].*
- 349.** *The Committee must note also the further allegations of interference made by the Belarusian Trade Union of Air Traffic Controllers (BPAD) and the information provided by the Chairperson of the Minsk Regional Trade Union Committee of Employees in the Cultural Sphere (MRTUECS) to the ILO mission. The Committee recalls in this respect that it had requested the Government in its previous recommendation to institute independent investigations into these allegations, take the necessary measures to ensure that these organizations were protected from any further interference and redress any consequences of such interference [see 331st Report, paras. 161 and 162]. Despite this request, the BPAD has since been dissolved by the Supreme Court. The Government's reply makes no indication that measures were taken for an independent investigation into BPAD's allegations that their members were being harassed to resign from the union, but simply relates that the membership of the union had declined to a point where it was no longer representative at the national level.*
- 350.** *The Committee must observe with particular consternation that no efforts appear to have been made either by the Prosecutor-General who requested their dissolution, or by the Supreme Court who ordered it, to investigate the BPAD's allegations that members were leaving the organization only because of the pressure and intimidation placed upon them by their employer and the Chairperson of the State Committee on Aviation. In this respect, the Committee must deplore the terms of the letter of the Chairperson of the State Committee on Aviation to the Minister of Justice in July 2003, which call into question the very fundamental right to form free and independent trade unions and links the request for the dissolution of the BPAD to demands made by the President of Belarus.*
- 351.** *In the light of the above, the Committee is regrettably obliged to conclude that the Government has had no real intention to take the necessary measures to have these extremely serious allegations investigated by independent persons having the confidence of*

all the parties concerned. The Committee further notes with great concern that, according to the complainants, government interference from the highest levels continue.

- 352.** *In these circumstances, the Committee can only once again urge the Government to take the necessary steps immediately to establish independent investigations, having the confidence of all parties concerned, into the allegations of interference surrounding the elections of the FPB, of the ASWU, the Brest Regional Association of Trade Unions and the Brest Regional Committee of Science and Education Unions, as well as into the interference aimed at weakening the representation of the REWU, the AAMWU, the BPAD and the MRTUECS, with the aim of rectifying all effects of this interference. The Committee further stresses that all necessary steps must be taken immediately at the highest level to call a halt to the continuing pressure and interference by various ministries and enterprise directors on the leaders and members of the REWU, the AAMWU, the BPAD and the MRTUECS.*
- 353.** *As concerns its previous request for information on the extent to which alternative organizations representing workers, such as those present in the complaint, participated in the various national tripartite bodies, the Committee notes the Government's indication that a seat on the National Council for Labour and Social Issues (NCLSI) is held for the Congress of Democratic Trade Unions (CDTU), despite the fact that the Congress only represents 4,000 members. The Committee notes, on the other hand, that according to the Government's reply, the CDTU has not participated in the NCLSI since August 2002. From the impressions given by the mission report, it would seem that the complainants consider that interference in the internal affairs of trade unions has reached a point where there can be little confidence between the complainant organizations, the Government and the main Federation, the FPB. The Committee further notes with regret the recent allegations made by the CDTU to the effect that, despite the Government's assurances, the president of the CDTU was not allowed to attend the NCLSI meeting on 9 October 2003. Recalling that the development of free and independent organizations and negotiation with all those involved in social dialogue is indispensable to enable a government to confront its social and economic problems and resolve them in the best interests of the workers and the nation [see **Digest**, *op. cit.*, para. 24], the Committee urges the Government to ensure independent investigations into the numerous allegations of interference, including the recent exclusion of the CDTU from the NCLSI and to rectify all consequences of such interference.*
- 354.** *The Committee further notes with deep regret that, just one week after the ILO mission in September, the Chairperson of the CDTU was sentenced to ten days' administrative detention for "showing disrespect for the Supreme Court" because he had published a newspaper article criticizing the Supreme Court ruling that dissolved the BPAD. The Committee recalls that the right to express opinions through the press or otherwise is an essential aspect of trade union rights. Moreover, the detention of trade union leaders or members for reasons connected with their activities in defence of the interests of workers constitutes a serious interference with civil liberties in general and with trade union rights in particular [see **Digest**, *op. cit.*, paras. 153 and 71]. The Committee calls upon the Government to take all necessary measures to ensure that trade union leaders may fully exercise their freedom of expression in the future, without fear of reprisal.*
- 355.** *Following Mr. Yaroshuk's detention, the Committee is further obliged to note with deep regret and concern that recourse to administrative detention in respect of trade unionists and leaders is becoming more frequent. It condemns in this respect the ten-day detention of Mr. Bukhvostov, president of the AAMWU, on 31 October 2003 and the five-day detention of Mr. Odynets, lawyer of the CDTU, on 17 October 2003. The Committee recalls that, while persons engaged in trade union activities or holding trade union office cannot claim immunity in respect of the ordinary criminal law, trade union activities should not in*

themselves be used by the public authorities as a pretext for the arbitrary arrest or detention of trade unionists. Moreover, the arrest of trade unionists may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities. [See *Digest*, *op. cit.*, paras. 83 and 76.] The Committee therefore urges the Government to take all necessary measures to ensure in the future that trade unionists will not be subjected to detention for the exercise of their fundamental rights of freedom of association.

- 356.** *As concerns the dismissal of the three trade union leaders Mr. Evgenov, Mr. Evmenov and Mr. Bourgov, the Committee notes yet again with regret that the Government provides no additional information on the measures taken to ensure their reinstatement and limits itself to stating that their dismissals were not related to the question of the “subbotnik” (unpaid voluntary labour), but rather to failure to assume their contractual responsibilities. The Committee must first recall that its examination of this question goes back to 2001 wherein it noted that Mr. Bourgov and Mr. Evmenov were dismissed for “absenteeism” related to their failure to work on a non-work day [see 325th Report, paras. 175 and 176]. As for the recent allegations of the continued harassment of Mr. Evmenov in respect of his employment opportunities, the Committee notes that the Government limits itself to stating that he had a short-term contract and therefore it was normal that his contract would come to an end. The Government does not appear to have actually investigated the allegations of anti-union discrimination and blacklisting of these trade union leaders. The Committee must therefore once again urge the Government to take the necessary measures to ensure that Mr. Evgenov, Mr. Evmenov and Mr. Bourgov are reinstated in their posts with full compensation for any lost wages and benefits.*
- 357.** *As concerns Presidential Decree No. 2 (regulation of activity of political parties, trade unions and other public associations), No. 8 (arrangements for the receipt of foreign gratuitous aid) and No. 11 (procedure for holding assemblies, rallies, street marches and other mass demonstrations), the Committee notes with regret that the Government has limited itself to stating that over 20,000 primary-level trade unions have been registered, no requests to receive foreign financial aid have been refused and that no trade union has been dissolved as a result of the provisions of Presidential Decree No. 11. As to this last Decree, the Government further refers to the compilation of relevant standards into the Law concerning public meetings, public marches, demonstrations and picketing, which was adopted on 7 August 2003. The Committee notes with extreme regret that, rather than using this opportunity to amend the paragraphs emanating from Presidential Decree No. 11 that had provided for disproportionate sanctions for violation of its measures, such as the dissolution of trade unions, all the previous restrictions on mass meetings, demonstrations and picketing remain, thus maintaining significant restrictions on the right of workers’ and employer’s organizations to organize their activities and to give expression to their positions on socio-economic policy considerations affecting them. In fact, while the Presidential Decree had provided that these organizations may be dissolved upon repeated violation of its provisions when holding assemblies or carrying out demonstrations, the new law refers to the sanction of dissolution for a single violation (section 15). The Committee therefore urges the Government to amend the new law, as well as Presidential Decree No. 11 if it is still in force, so as to ensure that restrictions on meetings, demonstrations and pickets are limited to cases where the action ceases to be peaceful or results in a serious disturbance of public order and so that any sanctions imposed will not be disproportionate to the violation incurred, and in particular to eliminate all references to the dissolution of trade unions.*
- 358.** *Recalling its previous recommendations concerning the restrictions placed on the activities of workers’ and employers’ organizations by Presidential Decree No. 8, which requires previous authorization for receipt of foreign gratuitous aid, the use of which is prohibited for carrying out public meetings, demonstrations, strikes and disseminating*

campaign material [see 325th Report, para. 167], the Committee once again urges the Government to amend this Decree so that workers' and employers' organizations may benefit freely, and without previous authorization, from the assistance that might be provided by international organizations for activities compatible with freedom of association.

359. *As concerns Presidential Decree No. 2, the Committee urges the Government to take the necessary measures either to amend the Decree in line with its previous recommendations [see 324th Report, para. 201], or to revoke it entirely, at least as far as workers' and employers' organizations are concerned, so that these organizations are not hindered in their right to form organizations of their own choosing, without previous authorization. In this respect, the Committee requests the Government to register the primary-level organizations affiliated to the Belarusian Free Trade Unions listed in the BFTU communication of 10 September 2003 without delay.*

* * *

360. *Overall, the Committee deeply regrets that it has not been able to observe any steps on the part of the Government to implement its recommendations in respect of the very serious matters in this case, despite the fact that two ILO missions have been carried out in the country to assist the Government in this regard. In light of its examination of this case since 2001, the Committee considers that serious attacks have been, and continue to be, made on all attempts to maintain a free and independent trade union movement in the country. The Committee urges the Government to take serious steps to implement its recommendations and to take all appropriate measures to guarantee that, irrespective of trade union affiliation, trade union rights can be exercised in normal conditions with respect for basic human rights and in a climate free of violence, pressure, fear and threats of any kind.*

361. *In these circumstances, and taking into account the complaint under article 26 of the ILO Constitution submitted by a number of Workers' delegates to the 91st Session of the International Labour Conference in June 2003, the Committee recommends that the Governing Body refer the examination of all the pending allegations in this case, along with the complaint submitted in June, to a commission of inquiry.*

The Committee's recommendations

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

- (a) The Committee thanks the ILO mission for its report which has provided important information on the context of the trade union movement in the country and the varying views on how this movement should function.*
- (b) The Committee urges the Government to take all necessary measures to ensure that no person suffers prejudice of any kind for bringing a complaint to the ILO.*
- (c) The Committee urges the Government to take serious steps to implement its recommendations and to take all appropriate measures to guarantee that, irrespective of trade union affiliation, trade union rights can be exercised in normal conditions with respect for basic human rights and in a climate free of violence, pressure, fear and threats of any kind.*

- (d) *Noting with regret that no measures have yet been taken in reply to its previous recommendation, the Committee must once again urge the Government to take the necessary steps immediately to establish independent investigations, having the confidence of all parties concerned, into the allegations of interference surrounding the elections of the FPB, of the ASWU, the Brest Regional Association of Trade Unions and the Brest Regional Committee of Science and Education Unions, as well as into the interference aimed at weakening the representation of the REWU, the AAMWU, the BPAD and the MRTUECS, with the aim of rectifying all effects of this interference. The Committee further notes with regret that, in the absence of any positive action on the part of the Government in this respect, the BPAD has now been dissolved. It therefore stresses that all necessary steps must be taken immediately at the highest level to call a halt to the continuing pressure and interference by various ministries and enterprise directors on the leaders and members of the REWU, the AAMWU, the BPAD and the MRTUECS.*
- (e) *The Committee calls upon the Government to take all necessary measures to ensure that trade union leaders may fully exercise freedom of expression in the future, without fear of reprisal.*
- (f) *The Committee once again urges the Government to take the necessary measures to ensure that Mr. Evgenov, Mr. Eymenov and Mr. Bourgov are reinstated in their posts with full compensation for any lost wages and benefits.*
- (g) *The Committee urges the Government to amend the new Law concerning public meetings, public marches, demonstrations and picketing, adopted on 7 August 2003, as well as Presidential Decree No. 11 if it is still in force, so as to ensure that restrictions on meetings, demonstrations and pickets are limited to cases where the action ceases to be peaceful or results in a serious disturbance of public order and so that any sanctions imposed will not be disproportionate to the violation incurred, and in particular to eliminate all references to the dissolution of trade unions.*
- (h) *The Committee once again urges the Government to amend Presidential Decree No. 8 so that workers' and employers' organizations may benefit freely, and without previous authorization, from the assistance that might be provided by international organizations for activities compatible with freedom of association.*
- (i) *The Committee urges the Government to take the necessary measures either to amend Presidential Decree No. 2 to bring it into line with its previous recommendations [see 324th Report, para. 201], or to revoke it entirely, at least as far as workers' and employers' organizations are concerned, so that these organizations are not hindered in their right to form organizations of their own choosing, without previous authorization. In this respect, the Committee requests the Government to register the primary-level organizations affiliated to the Belarusian Free Trade Unions listed in the BFTU communication of 10 September 2003 without delay.*
- (j) *In these circumstances, and taking into account the complaint under article 26 of the ILO Constitution submitted by a number of Workers' delegates to the 91st Session of the International Labour Conference in*

June 2003, the Committee recommends that the Governing Body refer the examination of all the pending allegations in this case, along with the complaint submitted in June, to a commission of inquiry.

Appendix I

Report of the ILO mission to Belarus

(8-11 September 2003)

Case No. 2090

I. Introduction

The Committee on Freedom of Association (CFA) has examined the complaint concerning allegations of trade union rights' violations in Belarus (Case No. 2090) since March 2001. By a letter dated 22 May 2003, the Minister of Labour and Social Protection of Belarus requested the ILO to visit Minsk in order to carry out consultations concerning this case. By a communication dated 18 June 2003, the Chairperson of the Workers' group and 13 other Workers' delegates to the 91st Session of the International Labour Conference presented a complaint under article 26 of the ILO Constitution against the Government of Belarus for non-observance of Conventions Nos. 87 and 98 to the Secretary-General of the Conference. When discussing Case No. 2090 during the adoption of the report of the CFA at the 287th Session of the Governing Body (June 2003), the Chairperson of the Workers' group requested the Office to prepare the documents for the establishment of a commission of inquiry for the 288th Session of the Governing Body in November 2003. In the meantime, he indicated to the Government that the decision to appoint a commission of inquiry had not yet been taken and that the time until this next Governing Body session was available for the Government to take the necessary measures to implement the CFA's recommendations.

In light of the above, the Executive Director for Standards and Fundamental Principles and Rights at Work, Mr. Kari Tapiola, replied to the Government's May request in a communication dated 8 July 2003 specifying that the mandate of the mission would be to discuss the issues raised in the case and possible measures to be taken in reply to the CFA's recommendations. Joined to the letter was a list of points for discussion on the basis of the CFA's recommendations in June 2003. This mission was carried out by Mr. Tapiola and Ms. Karen Curtis, Head of Section, Freedom of Association Branch from 8-11 September.

II. Conduct of the mission

The mission had meetings with the following government officials and their aides: Vice Prime Minister; Minister of Justice; Minister of Foreign Affairs; First Deputy Minister of Labour; Deputy Head of the Presidential Administration; Deputy Minister of Industry; and the Chairman of the State Committee on Aviation (see the appendix for a list and names of persons met). The mission also met with the chairperson and judges of the Constitutional Court.

The mission met with the complainants in this case and other concerned organizations, including: the Chairperson and branch members of the Federation of Trade Unions of Belarus (FPB); officers of the following complainant branch-level affiliates, Belarus Automobile and Agricultural Machinery Workers' Union (AAMWU) and the Belarus Radio and Electronics Workers' Union (REWU); officers of the Congress of Democratic Trade Unions (CDTU); the Chairperson of the Belarusian Free Trade Union (BFTU); officers of the Belarusian Trade Union of Air Traffic Controllers (BPAD) and the Chairperson of the Minsk Regional Trade Union of Employees from the Cultural Sphere (MRUECS). The mission also met with the two employers' confederations: The Byelorussian Union of Entrepreneurs and Employers named after Prof. M. Kouniavski and the Byelorussian Confederation of Industrialists and Businessmen (see the appendix for a list and names of persons met).

Finally, the mission had a general background meeting with the head of the mission of the Organization for Security and Cooperation in Europe (OSCE), Mr. Heyken.

III. Information obtained during the mission

The mission would like to state at the outset that, with the exception of the Minister of Labour who was unfortunately ill at the time of the mission, the high level and diversity of the government officials met with demonstrated that the Government was paying particular attention to the discussions taking place in various ILO bodies with respect to Belarus. Indeed, the mission had been told that the level of understanding of international labour standards in the Council of Ministers had been raised greatly over the last year. In particular, the Minister of Foreign Affairs had stated that the Government's attention to the issues before the ILO had been heightened and that there was a great deal of communication between the different ministries in this regard. The necessary measures were taken to ensure that all officials with whom the mission had requested meetings were made available.

Government interference in trade union elections and internal affairs

While this issue was raised initially in the complaints with reference to Instructions from the Head of the Presidential Administration of 11 February 2000 to interfere in the elections of branch trade unions, their congresses and the Congress of the Federation of Trade Unions of Belarus (FPB), the allegations now describe developments in the dynamics of such interference. The allegations over the last year have referred to a successful attempt by the Government to bring the FPB under its control and to use its leadership as an arm of political power and policy. In examining such allegations, it is necessary to make a distinction between those issues which might be purely internal conflict within the trade union movement itself and those where the conflict involves direct participation by government and management representatives in what should be the independent decision-making of trade union organizations. Such involvement for the purpose of influencing a decision may either be instigated by state authorities or solicited by one side of a conflict, or both. The mandate of the mission, however, was not to make judgments on these matters, but rather to provide the CFA with elements that might help it to assess the situation better.

At the initial meeting at the Ministry of Labour, it was reiterated that the July 2002 election of the Chairperson of the FPB was totally legitimate and in conformity with the federation's by-laws and national legislation. In view of the country's history, it was not surprising to have the former deputy head of the Presidential Administration as leader of the federation. The Deputy Minister stated that this aspect of the complaint was emotional and the matter no longer held any importance.

The questions surrounding his election and his role in the trade union movement, as well as his relationship with the Radio and Electronic Workers' Union (REWU) and the Automobile and Agricultural Machinery Workers' Union (AAMWU), were also raised with the Chairperson of the FPB, Mr. Kozik. He stated that there were minor problems within the trade union movement which should normalize shortly. He stated that he was not interested in conflict but rather focused his organization on the improvement of workers' standards of living. He recalled all the advances he had gained since he came into office, including the prompt restoration of check-off facilities for all unions. On this issue, he had written a letter to the authorities asking for restoration of the check-off facilities and received a favourable reply. The process had taken some months, as he also had to intervene with the National Bank. He also listed other achievements, including: the reconvening of the National Tripartite Council on Social and Labour Affairs and the adoption of a government resolution returning to trade unions the role of the labour inspectorate. He stated that social partnership should be utilized to strengthen unity rather than obstruct it. Mr. Kozik asked not to be blamed for succeeding and suggested that all should forget the problems of the past. He indicated that he had suggested to the Chairperson of the Congress of Democratic Trade Unions (CDTU), which he stated only had 4,000 members, that they put their efforts together. The membership of the federation was 4 million.

Mr. Kozik categorically denied any government interference in the election process of the federation and declared that he had been duly elected. The former Chairperson, Mr. Vitko, had preferred taking up a post in the Government embassy in Bulgaria. Mr. Kozik recalled that he has been a long-standing trade union member and has been involved in trade union activity for eight years. As for the recent creation of the Belarus Industrial Association (BIA), Mr. Kozik stated that this was aimed at regaining the 150,000 members that some branch unions had lost over the past few years. While he tried to persuade these members to rejoin their branch unions, he was unsuccessful and therefore decided that the best thing for the federation was to get these members

back by creating a new industrial branch union. While some might feel threatened with this, he emphasized that this was done in accordance with relevant by-laws and everyone should have the right to choose.

When asked whether he was aware that the REWU had been complaining about interference by the Ministry of Industry in its internal affairs, Mr. Kozik stated that he had only been informed about this one week prior to the mission by a group of members of the union. He said, in fact, that deputy ministers who are members of a union could well make recommendations at union meetings. He stated that he tried to meet with the Deputy Minister of Industry whose name had been specifically mentioned in this regard, but he was unwell. He then met with the Minister of Industry who categorically denied that there had been any interference. In Mr. Kozik's opinion, this was simply a matter of internal trade union affairs.

On the question of the allegations surrounding the Minsk Regional Trade Union of Employees of the Cultural Sphere (MRTUECS), Mr. Kozik stated that this was only an internal structural problem and no longer existed. As proof of his good intentions to solve trade union problems where they exist, Mr. Kozik handed the mission a copy of a letter he had sent to the Chairperson of the Customs Committee protesting against efforts made to deny workers the right to be union members.

The mission was then invited to a meeting of leaders and activists from the various branch unions of the FPB. Neither the Chairperson of the REWU nor of the AAMWU were at this meeting and later they informed the mission that while they had not been invited by the FPB, despite their affiliation, they did try to attend but were barred at the door. The Chairperson of the Belarusian Trade Union of Employees in the Cultural Sphere, of which the MRTUECS is a part, gave the first presentation. He stated that the problems, which had existed for MRTUECS, did not have anything to do with government interference but were rather simply related to structural issues of representation. He added that Mr. Mamonko who had been involved in the complaint to the ILO was still in his position as Chairperson of MRTUECS and all was now resolved. The mission, however, subsequently met with Mr. Mamonko who stated that many efforts were still being made by the public authorities to interfere in his union's internal affairs. He called these efforts an example of interference at the highest level, including the Presidential Administration, the Ministry of Culture, and the Minsk Executive Committee. He had not been invited to present his position at the meeting that the FPB held with the mission.

The Chairperson of the BIA took the floor at the FPB branch meeting and explained the circumstances surrounding the creation of the BIA. He recalled that efforts had actually been made by the REWU and the AAMWU to do something similar two years ago. He stated that his organization was attractive to workers as, in combining several structures, it had been able to reduce expenditure and consequently trade union dues. The BIA was made up of the organizations that had split off from the REWU and AAMWU in the past couple of years, including Integral and the National Union of Machine and Tool Workers, and the chairperson himself was from the Integral Amalgamation (Integral had been raised in initial complaints of government interference to diminish the REWU's membership base).

The alleged government interference in trade union affairs had also been raised with the Deputy Minister of Industry who had been cited in recent complaints as using his influence and pressure to encourage workers to quit the REWU and join the newly established BIA. He stated that there was nothing in the legislation that prohibited the management and directors of enterprises, or officials from respective ministries, from being members of unions in their branches and participating in union activities. He himself was a member of the REWU and considered himself still to be a member although he had received a letter indicating that his expulsion from the union was on the agenda. It was natural and desirable that all be involved in matters which affected them. This was particularly the case when issues concerning tariff agreements were to be discussed, given that the respective ministries are also parties to these agreements. On the other hand, he stated that he did not attend meetings when he was not invited to do so and which concerned purely trade union affairs.

He denied the allegations that he had brought pressure to bear on workers to resign from the REWU. While he admitted to being at certain of the workplaces to which the complainant had referred, he stated that this was part of his job and that he could not avoid answering questions or providing his own opinion if workers were to ask him about the newly created industrial branch union. He stated that the creation of the BIA was simply an expression of the trade union movement's need and desire to unite, and the REWU and the AAMWU had envisaged such unification a few years ago.

He continued to accept the REWU as a counterpart in negotiations and stated that he was prepared to discuss with them concerning future agreements. He emphasized that, under the current legislation, the Ministry had to negotiate with all registered unions. Related to the question of bargaining, the Deputy Minister of Labour had stated in the initial meeting with the mission that the Minister of Industry had raised concern about the present context for collective bargaining in which all unions have this right and stated that the Government was looking at amending the Labour Code to require a certain degree of representativeness for collective bargaining purposes. Concern for the need to amend the legislation in this respect was also expressed at the meeting in the Ministry of Justice.

The Chairperson of the REWU, for his part, indicated that the pressure and interference on the part of government authorities was continuing and even getting worse. Moreover, he had been slandered by Mr. Kozik who stated that he had called for economic sanctions against the country at the ILO Conference but he had not been able to bring Mr. Kozik to court yet for slander due to procedural obstacles. The state newspaper with wide distribution refused to publish his statement at the Conference. He referred to the minutes of the meeting in the ideological department where the President, supported by Mr. Kozik, called for the removal of himself and the Chairperson of the AAMWU within two months, although this deadline had since been extended. He doubted the sincerity of Mr. Kozik's intervention with the Deputy Minister of Industry and added that Mr. Kozik had been put in a position where he had to do something. He believes that Mr. Kozik has been placed in the trade union movement only to ensure a vote on a referendum to extend the number of presidential mandates. The members of the FPB plenum are gradually being replaced with people coming from the Government. These thoughts were echoed by other complainant organizations.

The AAMWU Chairperson emphasized that he would have expected, at the very least, that the Government would have suspended the harassment and the pressure while the ILO mission was in the country; regrettably this had not been the case. He referred to continuing efforts to convene meetings at various plants to induce local member organizations to decide to leave his branch union, although these attempts were carried out in a manner contrary to the union by-laws. He was regularly denied access to these plants, or even to their immediate vicinity, to speak to the union members, and the plant directors would refuse to meet him. He had printed information for the workers that the directors also refused to have disseminated. In his opinion, none of the CFA's recommendations had been implemented.

While observing that more and more people were showing the courage to give testimony about the various acts of harassment and emphasizing that his organization would remain independent, he expressed the fear that little by little the Government would be successful in whittling away at the independent trade union movement until it could claim that they no longer represented the workers. In this respect, he added that it was impossible to publish the CFA's recommendations in the state-owned newspapers which had the widest distribution and yet it was essential that the public be made aware of this case.

The Chairperson of the Agricultural Sector Workers' Union (ASWU) at the FPB branch meeting (again where allegations from 2002 refer to government interference in elections) echoed many of the participants in this FPB meeting that now that Mr. Kozik has taken up the presidency, the dialogue with the Government is more positive and important issues are being resolved. He stated that demands should be realistic. After the meeting he requested the mission to resolve the issue that had been raised concerning the ASWU 2002 elections. He provided the mission with the protocol minutes from the meeting that relinquished Mr. Yaroshuk from his post as chairperson, stating that this was proof that this was done in accordance with applicable rules. The mission noted that the Minister of Agriculture had been the second speaker on this agenda item and queried whether it was appropriate for a minister to state his position to union members concerning their leadership. The current chairperson, as well as all government officials similarly queried, stated that this was perfectly normal, always worked this way and recalled that ministers were most often members of their respective branch unions.

Mr. Yaroshuk, who has now been elected Chairperson of the CDTU, was more concerned with the tasks ahead of him in building the democratic trade union movement than discussing this election, which he now considered being part of his past. He did point out however that beyond the concerns of government interference, the intervention of the Minister at the plenum meeting was actually even against the by-laws as he was not a member of the national committee. Other elements of violation of the ASWU statute were raised in allegations made in this case last year. He did state, however, that he was experiencing ongoing harassment from the public authorities in his present

position. In particular, he referred to the public prosecutor who had been threatening him about a number of articles he had published in the independent press. (On 18 September, a week after the mission left Belarus, Mr. Yaroshuk was condemned to ten days in prison, with immediate effect, for the article published on 21 August 2003, in the *Narodnaya Volya* paper concerning the dissolution of the Air-Traffic Controllers' Union.)

The officials of the Belarusian Trade Union of Air Traffic Controllers (BPAD), the most recent complainant to join the complaint alleging that state and local authorities were acting to promote the union's dissolution, informed the mission that the BPAD had been dissolved by the Supreme Court in August 2003 on the grounds that they had insufficient membership to be registered as a national-level trade union (only national-level unions – at least 500 members – can negotiate tariff agreements). They recalled that, up until these recent events, they had never had any problems, since their initial registration in 1991. They were duly re-registered as a union with national status under Presidential Decree No. 2 in 1999 and this had been confirmed even this year by the registration official in the Ministry of Justice. They had signed a wage agreement in June 2002 without any difficulties, and in August of that year had reached the height of their membership with 860 members.

They presented the mission with a number of documents and testimonial evidence relative to their court case. These referred in particular to pressure placed on union members by the management and examination committees to resign from the union and a letter from the Chairperson of the State Committee on Aviation asking the Minister of Justice to ensure BPAD's dissolution because free and independent unions disrupted the proper functioning of aviation. The registration official from the Ministry of Justice explained to the mission that trade unions couldn't be dissolved by the Ministry. When there has been a legislative violation, the Ministry will issue a first warning and subsequently the prosecutor can go to the Supreme Court to request dissolution. He confirmed that his Ministry had never issued such a warning, not for the BPAD or for any other organization, but added that the problem could have been avoided if the BPAD had been more flexible and reorganized at a lower level. He stated that he was not in a position to determine whether there had been any pressure on union members to resign and confirmed that the Ministry of Justice had not at all been involved in the court case.

The BPAD officers believe that this attack came after calls from the Chairperson of the FPB to the effect that there should be only one union movement in the country. The Chairperson of the State Committee on Aviation had thus obviously decided that all workers should merge into the Aviation Industry Workers' Union, which was already affiliated to the FPB. The BPAD is now trying to get registration as an affiliate to the Democratic Transport Workers' Union (affiliated to the CDTU), but fear that they will continue to meet up with obstacles in this regard, in particular the issue of legal address (see below under *The right to organize and the process of registration*). They added that, unexpectedly, all air traffic controllers' without-limit-of-time contracts had now been converted into fixed-term employment contracts.

The Chairperson of the State Committee on Aviation recalled to the mission that in the Soviet times there had only been one union in the aviation industry covering all workers and, consequently, there had been no difficulties at that time. The air traffic controllers' union had been set up in 1991 and dealt directly at that time with the Cabinet of Ministers. According to him, they received national status at that time because they were not part of any particular ministry. In 1996, the State Committee on Aviation was created, and it negotiated with the union. He recalled that the Aviation Industry Workers' Union represented 10,000 workers, while the BPAD only represented some 600 workers; their representative status thus was not comparable.

As for the specific difficulties arising last year, he attributed these first to complaints made by air traffic controllers who were not members of the BPAD but stated that dues were being withheld from their pay. When asked, however, he confirmed that check-off was normally only possible after a specific request on the part of the worker, and he was not able to explain how there could be a discrepancy in this respect. This was further confirmed more generally by the Chairperson of the Constitutional Court who declared that the State ensured enforcement of the Court's first judgment concerning check-off facilities, which emphasized the need to be accountable to the workers and ensure that they have all explicitly agreed to be members and have their dues retained at the source.

More generally, the Aviation Committee Chairperson referred systematically to a conflict with the union over the financing of air traffic controllers' travels to Europe to play football with meagre results. It was not clear how this related to the previous or present situation with the union, but it was apparently of great importance to the Chairperson. He recalled that strict discipline was

necessary for the delicate work of air traffic controllers. As for the matter of transfer to fixed-term contracts, he stated that this was a change taking place everywhere and that it was necessary to ensure that there was a competitive basis for promotion. After having asserted that no one had been fired or transferred, he did acknowledge that there were some ten dismissals at the Centre for Flight Coordination, but that these had been reviewed by the Ministry of Labour, which had found no violation on the part of the employer and permitted the dismissals on the grounds of failure to perform duties in line with instructions. He stated that he would of course continue to negotiate with the union, but it had to be registered at another level.

From the employers' point of view on government interference, the Belarusian Union of Employers and Entrepreneurs (BUEE) recalled that the conflict between the Government and the unions had been at an impasse. It was not the Government's task to define trade union strategy, however, as these were matters which should be resolved by the unions themselves. They expressed regret that the solution to this problem had been extreme and, while observing that the Government had exceeded its powers and functions, noted on the positive side that the relationship with the unions had now been re-established. They recalled that the National Council for Labour and Social Issues had stopped meeting altogether when the former Chairperson of the FPB became a presidential candidate. Now, with Mr. Kozik as FPB Chairperson, while the direction in the Council was not the same, at least they were meeting. The Belarusian Confederation of Industrialists and Entrepreneurs (BCIE) considered that in the current context unions only followed government instructions. This was a problem for employers' organizations, which needed a clear partner in negotiations, represented by strong and independent unions with a clear distinction between management/employer and worker.

The Deputy Head of the Presidential Administration recalled numerous efforts on the part of the Government to ensure strong social protection to workers. He stated that trade union activities should be aimed at supporting the development of the State, but assured that no union received favourable treatment. He did admit however that the Government had a much more constructive partnership with the unions since the latest FPB elections. He asserted that there was no pressure from the State in respect of these elections, but rather that the change was due to the fact that union members were not happy with the absence of constructive dialogue with the Government. Referring to Mr. Kozik's transfer to the trade union movement, he stated that any union member has the right to be elected. In passing he noted that he too was a member of the FPB. As for the alleged interference of ministers in trade union affairs, he recalled that they are also union members and need to be able to protect their own interests.

At the meeting with the Deputy Head, the deputy Minister of Labour once again underlined the results of the investigation carried out by her Ministry into the allegations of government interference. When the mission explained that an independent investigation meant one that was not carried out under the aegis of the government, but rather independent persons who could be acceptable to all parties concerned, she stated that this was the first time she had received an explanation on what the CFA actually meant by independent investigations. She indicated that they would consider such a possibility but expressed doubt that the complainants would accept the results.

The right to organize and the process of registration

The need to amend Decree No. 2 regarding measures regulating the activity of political parties, trade unions and other social institutions has been raised by the CFA since its first examination of this case, which focused in particular on the obstacles posed for trade union registration by the issue of legal address and 10 per cent membership requirement of workers in the enterprise. This issue remained the major concern of the Belarusian Free Trade Union (BFTU), which presented the mission with a list of 31 first-level free trade union affiliates that had still not been able to obtain registration.

It may also be of relevance that the Belarusian Trade Union of Air Traffic Controllers (BPAD), which had recently been dissolved and was now trying to re-register as an affiliate to the Democratic Transport Workers' Union raised the concern that they too might find themselves denied registration on the basis of the legal address requirement. When this was raised during the meeting with the Ministry of Justice, the officer in charge of registration recalled the article of the Law on Trade Unions which refers to the employer granting premises to trade unions and which has often been indicated by the complainants as the major obstacle for legal address, as the employer no longer has an obligation in this respect and will often refuse.

While in the initial meeting with officials from the Ministry of Labour the mission was informed that attempts to simplify the registration process and amend Decree No. 2 were opposed by the employers' organizations; both the BCIE and the BUEE denied voicing any such opposition. In fact, the BCIE underlined that they have always called for the total revocation of this decree, particularly as concerns workers' and employers' organizations for whom it should clearly not be applicable. It seems plausible that whatever opposition there might be from this side would have come rather directly from the managers of state enterprises who do not wish to accord premises and thus an address for registration.

Presidential Decrees Nos. 8 and 11

Initially in the meeting at the Ministry of Labour, the mission was simply told that these two presidential decrees (requiring prior authorization for foreign financial assistance to workers' and employers' organizations and broadly restricting and penalizing unlawful demonstrations, pickets and mass meetings) had not been used in any way to obstruct trade union affairs. No information was provided concerning any new laws or amendments in this respect. However, the mission was informed by the Chairperson of the Belarusian Trade Union of Public Service Workers at the FPB meeting that two draft laws dealing with these same subjects were well advanced in their consideration before the Parliament. When asked what effect such laws would have on the force of the presidential decrees, he told the mission that once the laws were adopted the decrees would no longer have any force.

Subsequently, the mission raised the question of new draft legislation at its meeting at the Ministry of Justice. It was then told that the law on gatherings, meetings, street processions, demonstrations and picketing, consolidating a certain number of laws and/or decrees on the same subject, had actually come into force in June 2003, and a copy was provided. When asked about the effect of laws on presidential decrees, the officials of the Ministry of Justice did not give a clear reply but rather defended the normalcy of presidential decrees in themselves and recalled that they are subject to parliamentary approval anyway, and that many countries permitted the issuance of presidential decrees. The mission indicated in this respect that its concern was not the fact of legislating through presidential decree, but rather the contents of the two decrees in question and their relation to eventual legislation. Finally, when raising the query of supremacy in law between parliamentary laws and presidential decrees with the Chairperson of the Constitutional Court, the mission noted that even at this level no unequivocal reply was provided. While the chairperson expressed his personal opinion that a law subsequently adopted should take precedence over a presidential decree on the same subject, he added that there are theories on this question that refer to the supremacy of presidential decrees.

It should be noted that none of the complainant organizations appeared to have been consulted about this new law. The chairperson of the REWU indicated that, in his opinion, it was tougher than the Presidential Decree in that there would no longer be a warning prior to dissolution of a union for violation of its provisions. In any event, the mission was obliged to point out in its final meeting at the Ministry of Labour that many of the provisions which the CFA had requested be amended in Presidential Decree No. 11 appeared at a first glance to be maintained in the new law. As for Presidential Decree No. 8, no draft text was available and no specific indications were given as to the types of changes, if any, might be made. The BCIE indicated that their position was also that this decree should be revoked.

Other matters

As concerns the CFA's recommendations to take the necessary measures to reinstate Mr. Evgenov, Mr. Evmenov and Mr. Bourgov, the Deputy Minister of Labour reiterated the Government's position that these individuals had not been dismissed for trade union activities or for having refused to work on a "subbotnik" (voluntary unpaid labour) and therefore their dismissals were legitimate. No indication was given of any intention to take measures for their reinstatement. As for the recent allegations relative to Mr. Evmenov (taken up in the CFA's examination in June 2003), she stated that he had been hired as a replacement worker for a fixed-term contract and therefore it was normal that his employment had come to an end.

The Chairperson of the AAMWU noted that reinstating these three individuals (one of whom was a member of his union) would have been the simplest of the recommendations to implement. In

his opinion, no action was taken to this effect because it would have been seen as a victory for the free trade union movement.

As regards the outstanding request for information concerning the threats of dismissal against members of the Free Trade Union at the Zenith Plant (dating back to 1999), the Deputy Minister of Labour stated that all those concerned are still employed except for one who was dismissed in 2002 for reasons of redundancy. As to the allegations on the part of the management, she stated that these were difficult to corroborate given the absence of any proof and the divergence of views on this.

At the FPB branch union meeting, the Chairperson of the Trade Union at the Minsk Automobile Plant stated that Mr. Marinich, former Chairperson of the Free Trade Union of Metalworkers at the plant raised in the initial complaint because the employer had allegedly refused to rehire him, was now employed in another company as a locksmith. In a later meeting with the CDTU, the mission was told that the court had actually ruled that Mr. Marinich was to be reinstated but instead he was given less attractive employment in a different enterprise at a lower rate of pay.

Both the BCIE and the BUEE considered that the ongoing absence of, and delay in adopting, legislation setting out the roles and functions of employers' organizations was a major problem for their members and had an impact on many of the difficulties encountered today. The Deputy Minister of Labour handed a copy of the draft law on employers' organizations to the mission with a request for ILO technical comments before placing it before the Parliament later this autumn.

General considerations

The Minister of Foreign Affairs referred more explicitly to the prospects of a commission of inquiry. He stated in no unclear terms that the Belarusian Government was less productive under explicit pressure and requested that this be taken into account in the establishment of a commission of inquiry. He considered that it would be more advisable, effective and wiser if the current dialogue were to continue as it is. The mission pointed out that it was important for the Government to ensure that there really was dialogue with all parties concerned, in particular the complainants, which did not seem to be the case now. In addition, continuing the dialogue should not result in the disappearance of these organizations. The Minister expressed his hope that the Minister of Labour would make sure that no organizations were eliminated and suggested that they would be guided by the representative strength of the unions concerned, rather than the ambition of individuals.

The Deputy Prime Minister suggested that the National Council for Labour and Social Issues should play a significant role in ensuring that all voices were heard. He stated that the Government was sure it would find positive solutions for uniting the trade unions to the satisfaction of all.

The head of the OSCE mission also referred to the public statement of the President of Belarus that the Chairpersons of the REWU and the AAMWU had to be removed within two months. He noted that the Government appeared to be following two diverging roads: one led to greater openness with the international community, the other appeared to lead to greater repression of civil liberties and freedoms within the country demonstrated by attacks on the press, journalists and NGOs. He stated that the new legislation concerning mass demonstrations was very damaging in this respect. In his opinion, it was not possible to disassociate these recent attacks from the issue of a referendum permitting a third term for the President.

In the final meeting at the Ministry of Labour, the Deputy Minister emphasized that establishing a commission of inquiry would not help to develop social dialogue. She recalled the openness demonstrated by the Government to resolve the issues related to the case demonstrated by: (1) the invitation to the current mission to visit the country; (2) the level of the meetings scheduled for the mission; (3) the regular dialogue with the ILO, supplying of all reports requested, etc; and (4) the attendance of the Minister and officials at the Governing Body and Conference. She recalled that the CDTU also had a place on the National Council for Labour and Social Issues even though this could not at all be justified by the amount of its membership. Trade unions exist and are developing and wage agreements were still being concluded.

As for the CFA's recommendations, she insisted that the Government did not interfere in the development of trade unions and the elections of Mr. Kozik were legitimate from a formal point of view. As for any questions as to the spirit of the elections, that was a matter only within the competence of the union itself. She did not see what more the Government should, or could, do concerning the trade union situation. However, consideration would also be given to finding a way of establishing an independent investigation, although it was likely to be difficult to find agreement

amongst the parties in this respect. As for the legislation, this should be amended taking into account the concerns of all, but this was a very long process.

V. Conclusions

While having taken due note of the high-level meetings scheduled and the repeated expressions of a desire to cooperate on the part of the Government, the mission notes with regret that despite long and detailed discussions, the government officials tended to repeat previously stated positions and explanations without indicating specific steps taken or envisaged to implement the CFA's recommendations. The mission was regularly reminded that Belarus was a new State and as such had a lot of work to do to build up its own legal foundation, but that this necessarily took time, and any pressure in this regard would not be appreciated.

The mission was concerned that on virtually all of the recommendations dating back to the CFA's first examination in 2001, no satisfactory solutions had been reported. The simple recommendation for reinstatement in their jobs of three dismissed trade union officers had not been resolved, yet such a small effort could have been a sign of the Government's readiness to react positively to the Committee's recommendations. No progress has yet been made either in respect of Presidential Decree No. 2 despite earlier assurances from the Government that it would amend the decree. This was all the more disconcerting in light of the fact that not only the complainant organizations, but also the employers' organizations consider that this decree is inappropriate for social partner organizations and an obstacle to their organizational rights.

The CFA's recommendations also concerned the amendment of two presidential decrees, which had restricted freedom of association rights. It was not at all obvious that the recently adopted law on gatherings, meetings, street processions, demonstrations and picketing had, in fact, resolved the issues relating to demonstrations and mass meetings in a satisfactory manner. The law did not seem to be well known, as hardly any reference to it was made in different discussions until, upon a direct question by the mission, a copy of it was provided in the meeting with the Minister of Justice. Furthermore, it was not evident that a new law would, in fact, override a presidential decree. There seems to be a considerable degree of confusion on the relationship, and potential conflict between a presidential decree and a law.

No independent inquiry had so far been initiated following on the CFA recommendations to establish independent investigations, having the confidence of all parties concerned, into the allegations of government interference in the FPB, ASWU and other elections, although material related to trade union elections had previously been transmitted to the ILO. Further material was given to the mission. This material by and large covered the election process itself instead of the general circumstances in which the elections took place. It is to be noted that while elections may have been formally conducted according to existing rules, the allegations were of a broader nature, as they concentrated on interference in order to achieve a certain election result. This process had involved the presence and active participation of government authorities and managers at different meetings of the trade unions.

In fact, it appears that the participation of government authorities, including ministers and deputy ministers, as well as managers of state enterprises seems to be a current practice. While it is understandable that such interaction between the trade unions, management and authorities often takes place for the purpose of discussing economic questions or assessing collective bargaining outcomes, there remains, regrettably, a wide scope for either government authorities or managers pressuring the members of trade unions or, indeed, for soliciting the interventions of the authorities or managers in order to influence the outcome of an election or decisions by workers on joining or leaving trade union bodies.

One example of the kind of interaction was the decision by the Plenum of the Agricultural Sector Workers' Union to remove Mr. Yaroshuk from his post of President, as one of the first speakers on the relevant agenda item had been the Minister of Agriculture. (The Protocol was given to the mission as evidence that decisions had been taken legally.) There is, in fact, a considerable potential for confusion, and misuse, which is created by the still unclear state of labour – management relations due to the slow transition process from old trade union structures into ones which make the distinction between trade unions and management, as well as government, and which can ensure that there is no interference by any side in the internal affairs of others.

In this context, it is of particular concern that the highest authority of the country has reportedly called for measures for the removal of two trade union leaders from their positions. On an earlier occasion, in 2000, in the context of allegations on orders by the Presidential Administration for interference in internal matters of the trade unions – and in particular the trade union elections of precisely the same organizations that are at issue today – an ILO mission was assured that presidential instructions for such interference were no longer operational.

In the absence of an independent inquiry, and moves to set up such an inquiry, the mission felt obliged to note to the authorities that the recommendations of the Committee on Freedom of Association were addressed to the Government which itself has the responsibility for following them up. To implement these recommendations, the Government could, in the view of the mission, take the initiative to negotiate with all parties directly concerned about the way in which such an investigation could be initiated and carried out. The process should enjoy the full confidence of all concerned. It should go without saying that any measures of interference should cease with immediate effect once such a process was negotiated and under way. Such a process must not be used to veil attempts to weaken and eliminate the complainant organizations in this case.

(Signed) Kari Tapiola
Karen Curtis

Appendix II

List of contacts

Government representatives

Mr. V. N. Drazhyn, Vice Prime-Minister of Belarus

Mr. A. A. Rumak, Deputy Director of the Department of Financial Relations of the Chief Economic Department

Ministry of Labour and Social Protection

Ms. E. P. Kolos, First Deputy Minister of Labour and Social Protection of Belarus

Mr. I. G. Starovoitov, Director of the Department of Partnership Policy and External Relations

Ms. L. A. Leshchinskaya, Deputy Director of the Department of Partnership Policy and External Relations

Ministry of Industry

Mr. I. I. Zolotorevich, Deputy Minister of Industry of Belarus

Mr. G. V. Chymansky, Deputy Head of the Department of Labour and Personnel

The Presidential Administration

Mr. N.M. Ivanchenko, Deputy Head of the Presidential Administration of Belarus

Mr. S. K. Pisarevich, Head of the Economic Department of the Presidential Administration

The Ministry of Justice

Mr. V. G. Golovanov, Minister of Justice of Belarus

Ms. A. N. Bodak, Director of the Department of Law-making Activity

Mr. M. M. Sukhinin, Head of the Department of Public Associations

Mr. A. A. Alyoshin, Head of the Department of External Relations Legal Provision

Ms. G. P. Podrezyonok, Head of the Department of Legislation on State Social Organization and Provision of Fundamental Rights and Freedoms of Citizens

The Ministry of Foreign Affairs

Mr. S. N. Martynov, Minister of Foreign Affairs of Belarus

Mr. S. F. Aleynik, Permanent Representative, Permanent Mission of the Republic of Belarus to the United Nations Office and Other International Organizations in Geneva

Ms. E. B. Cherekhovich, First Secretary of the Department of International Organizations of the Ministry of Foreign Affairs of Belarus

The State Committee on Aviation

Mr. F. F. Ivanov, Chairperson of the State Committee on Aviation of the Republic of Belarus

The Constitutional Court

Mr. G. A. Vasilevich, Chairperson of the Constitutional Court of the Republic of Belarus

Ms. K.I. Kenik, Judge of the Constitutional Court

Mr. V.I. Zhishevich, Head of the Secretariat of the Constitutional Court

Ms. A. P. Chichina, Assistant of the Chairperson of the Constitutional Court

Mr. A.I. Seledovsky, Head of the Department of Public Addresses and International Relations of the Constitutional Court

Representatives of workers' organizations

The Federation of Trade Unions of Belarus

Mr. L. P. Kozik, Chairperson of the Federation of Trade Unions of Belarus

Mr. E. B. Matulis, Deputy Chairperson

Mr. M. V. Grafinin, Head of the Chief Department of Information and Monitoring

Ms. E. V. Sedina, Head of the Department of International Relations

Mr. V. F. Naumchik, Chairperson of the Agricultural Complex Workers Trade Union

Mr. L.S. Sushkevich, Chairperson of the Belarusian Trade Union of the Cultural Sector Workers

Mr. V. V. Fedorov, Chairperson of the Belarusian Trade Union of Industry

Mr. M. E. Obrazov, Chairperson of the Belarusian Trade Union of the Workers of Public and Other Establishments

Mr. V. V. Garunovich, Deputy Chairperson of Minsk City Association of Trade Unions

Mr. A.S. Kartsev, Chairperson of the Trade Union of Minsk Tractor Works

Mr. A. N. Vysotsky, Chairperson of the Trade Union of Minsk Automobile Plant

Mr. V. A. Nikolaenko, Chairperson of the Trade Union of Minsk Refrigerator Plant "Atlant"

The Belarusian Congress of Democratic Trade Unions

Mr. A. I. Yaroshuk, Chairperson of the Belarusian Congress of Democratic Trade Unions

Mr. N. V. Kanakh, Deputy Chairperson

Mr. V. I. Odynets, Lawyer of the CDTU

Mr. V. P. Drugakov, Chairperson of the Free Trade Union of Metal Workers

The Belarusian Trade Union of Radio Electronic Industry Workers

Mr. G. F. Fedynich, Chairperson

Mr. A. A. Dorogokupets, Deputy Chairperson

The Belarusian Trade Union of Automobile and Agricultural Engineering

Mr. A.I. Bukhvostov, Chairperson

The Belarusian Free Trade Union

Mr. G. A. Bykov, Chairperson

The Belarusian Trade Union of Air Traffic Controllers

Mr. Yu. F. Migutsky, Chairperson

Mr. O. A. Dolbik, Deputy Chairperson

The Minsk Regional Trade Union of the Cultural Sector Workers

Mr. V.A. Mamonko, Chairperson

Representatives of employers' organizations

The Belarusian Confederation of Industrialists and Entrepreneurs

Mr. V. V. Shashkov, Deputy Chairperson of the Belarusian Confederation of Industrialists and Entrepreneurs, Director General

Mr. E. Ch. Kisel, Deputy Director General, Director of the Belarusian Confederation of Industrialists and Entrepreneurs on Social and Labour Issues

The Belarusian Union of Employers and Entrepreneurs named after Prof. M. S. Kunyavsky

Mr. G.P. Badei, President of the Union of Employers and Entrepreneurs named after Prof. M.S. Kunyavsky

Ms. N. K. Naumovich, First Deputy Executive Director of the Union of Employers and Entrepreneurs named after Prof. M.S. Kunyavsky

OSCE

Mr. E. Heyken, Ambassador, Head of the OSCE Mission in Belarus

CASE NO. 2225

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

**Complaint against the Government of Bosnia and Herzegovina
presented by
the Confederation of Independent Trade Unions of
Bosnia and Herzegovina (CITU of BiH)**

Allegations: The complainant alleges that the Ministry of Civil Affairs and Communications unjustifiably refuses to register the Confederation of Independent Trade Unions of Bosnia and Herzegovina and its branch trade unions

- 363.** The complaint is contained in a communication from the Confederation of Independent Trade Unions of Bosnia and Herzegovina (CITU of BiH) dated 18 October 2002.
- 364.** In the absence of a reply from the Government, the Committee had to postpone its examination of the case twice. At its May-June 2003 meeting [see 331st Report, para. 8], the Committee issued 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 might present a report on the substance of the case at its next meeting if the information and observations of the Government had not been received in due time [GB.287/8, para. 8].
- 365.** Bosnia and Herzegovina 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

- 366.** In its communication of 18 October 2002, the Confederation of Independent Trade Unions of Bosnia and Herzegovina (CITU of BiH) alleges that the Ministry of Civil Affairs and Communications refuses to register the complainant and its branch trade unions – CITU members – thereby infringing Articles 3 and 7 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), ratified by Bosnia and Herzegovina.
- 367.** In particular, it is stated in the complaint that, in compliance with the Law on Associations and Foundations of Bosnia and Herzegovina, both the complainant and its members filed an application for registration with the Record of Associations and Foundations of Bosnia and Herzegovina in the Ministry of Civil Affairs and Communications on 24 May 2002. The complainant states that, as all legal conditions had been met, the Ministry was expected to make a decision on registration within the 30-day deadline established by article 32, paragraph 1, of the abovementioned law. However, registration did not take place. On 10 July 2002, the complainant addressed the Ministry for a second time, requesting registration. On 25 July 2002, the Ministry informed the complainant that it was impossible to carry out the registration because, prior to the submission of the application for registration to the Ministry, the complainant should have been registered in compliance

with the Law on Citizens' Associations at the level of the Federation of Bosnia and Herzegovina. The complainant adds that, by the same token, the Ministry contested as unlawful the earlier registration of the complainant at the Cantonal Court in Sarajevo and article 2 of the complainant's statute on its legal succession to the CTU of BiH. The Ministry also contested the right of the complainant to include the name Bosnia and Herzegovina in its title, pointing out that the enactment of the law on the use and protection of the name of Bosnia and Herzegovina was under way. The complainant adds that similar responses were given by the Ministry to the branch trade unions – members of the complainant.

- 368.** The complainant states that, in light of the above, it once again addressed the Ministry in order to explain that it was the legal successor of the former Confederation of Trade Unions of Bosnia and Herzegovina which had changed its name into the Confederation of Independent Trade Unions of Bosnia and Herzegovina at a Congress held in 1990. The new Confederation was registered by the Court of Appeals in Sarajevo, and had been functioning since 1990. The most recent amendments to its registration were also made by the Court of Appeals in Sarajevo in 1996. The complainant had not re-registered in line with the Law on Citizens' Associations of the Federation of Bosnia and Herzegovina as this law did not cover workers' organizations that functioned at the level of the Republic of Bosnia and Herzegovina but only in one of its two entities, i.e. the Federation of Bosnia and Herzegovina. Moreover, if an obligation to register pursuant to that law existed, the complainant would have never been able to amend its registration in 1996, as this law had already been enacted and had entered into force in 1995.
- 369.** The complainant states that, as indicated to the Ministry, pursuant to the modification of its registration in 1996, it continued to function in conformity with the regulations in force during that period pursuant to the transitory provisions contained in Annex II, clauses 2 and 4, of the Dayton Peace Agreement. More specifically, Annex II, clause 2, of the Dayton Peace Agreement provided that, when the Constitution entered into force, all laws, regulations and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina would remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina. Annex II, clause 4, set forth that, until superseded by applicable agreement or law, governmental offices, institutional and other bodies of Bosnia and Herzegovina would operate in accordance with the applicable law. The complainant states that the Law on Associations and Foundations of Bosnia and Herzegovina was the first enactment concerning the registration of associations and foundations at the level of the Republic of Bosnia and Herzegovina passed by the competent authority, i.e. the Parliamentary Assembly of Bosnia and Herzegovina pursuant to the Dayton Peace Agreement. Thus, the complainant submits that, in waiting for the Law on Associations and Foundations to be enacted before seeking a new registration, it acted in accordance with the applicable laws and regulations and that, consequently, the request for registration was unjustifiably refused.
- 370.** The complainant states moreover that the Ministry refused to approve the registration and enlist the complainant in the registry with a name that includes a reference to Bosnia and Herzegovina because, in its view, there was no sufficient legal basis to entitle the complainant to use this name. The complainant states that, in its response to the Ministry, it explained that the relevant legal basis can be found in the title of the applicable law itself, that is, the Law on Associations and Foundations of Bosnia and Herzegovina, and the fact that no legal provision contests the right to use this name. Moreover, the complainant counters the Ministry's argument that it will be possible to resolve the issue only after the enactment of the Law on the Use and Protection of the Name of Bosnia and Herzegovina, by submitting that the Law on Associations and Foundations of Bosnia and

Herzegovina and the application of its provisions is not conditional on the enactment of another law.

371. The complainant finally states that the Ministry has not responded to its request for information on the law which disallows its registration and the legal texts which empower the Ministry to decide on the use of the name Bosnia and Herzegovina.

B. The Committee's conclusions

372. *The Committee deplores the fact that, despite the time which has elapsed since the presentation of the complaint, and bearing in mind the extreme gravity of the allegations, the Government has not provided in due time the comments and information requested by the Committee, although it was invited to send its reply on several occasions, including by means of an urgent appeal at its June 2002 meeting. In these circumstances, and, in accordance with the applicable rule of procedure [see 127th Report of the Committee, para. 17, approved by the Governing Body at its 184th Session], the Committee is bound to present a report on the substance of this case, in the absence of the information it had hoped to receive in due time from the Government.*
373. *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 ensure respect for the rights of employers' and workers' organizations 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].*
374. *The Committee notes that the present complaint concerns allegations that the Ministry of Civil Affairs and Communications unjustifiably refuses to register the Confederation of Independent Trade Unions of Bosnia and Herzegovina (CITU of BiH) and its branch trade unions. The Committee notes with concern that this is the third case brought before it with regard to a refusal by the authorities to register a national employers' or workers' organization at the level of the Republic of Bosnia and Herzegovina [see Case No. 2053, 324th Report, paras. 219-234; Case No. 2140, 329th Report, paras. 290-298].*
375. *The Committee notes that the complainant, which is the successor to the Confederation of Trade Unions of Bosnia and Herzegovina, applied to the Ministry of Civil Affairs and Communications for re-registration in accordance with the Law on Associations and Foundations of Bosnia and Herzegovina and that the Ministry rejected the application on the following grounds:*
- *before applying for registration at the level of the Republic of Bosnia and Herzegovina on the basis of the Law on Associations and Foundations of Bosnia and Herzegovina, the complainant should have filed for registration at the level of the Federation of Bosnia and Herzegovina on the basis of the Law on Citizens' Associations;*
 - *since such application had not been made, the authorities contested the complainant's earlier registration with the Cantonal Court in Sarajevo and its succession to the Confederation of Trade Unions of Bosnia and Herzegovina;*
 - *there was no legal basis entitling the complainant to use the name Bosnia and Herzegovina and the issue could not be resolved before the enactment of the Law on Use and Protection of the Name of Bosnia and Herzegovina which was under way.*

- 376.** *The Committee notes that, according to the complainant, similar responses were given to its branch trade unions. The complainant states that it provided a detailed answer to the Ministry, indicating that:*
- *the Law on Citizens' Associations is not applicable to its case given that the complainant is a general confederation with activities at the national level of the Republic of Bosnia and Herzegovina and not the Federation of Bosnia and Herzegovina which is one of its two entities;*
 - *the complainant had already registered an amendment to its Constitution in 1996 and had continued to function in accordance with the applicable laws and regulations pursuant to Annex II of the Dayton Peace Agreement;*
 - *the right to use the name Bosnia and Herzegovina is implicit in the title of the applicable law itself, i.e. the Law on Associations and Foundations of Bosnia and Herzegovina, and the application of this law is not conditional on the enactment of another law. Finally, there is no legal text prohibiting the use of this name.*
- 377.** *The Committee recalls that the principle of freedom of association would often remain a dead letter if workers and employers were required to obtain any kind of previous authorization to enable them to establish an organization. While the founders of an organization are not freed from the duty of observing formalities which may be prescribed by law, such requirements must not be such as to be equivalent in practice to previous authorization, or as to constitute such an obstacle to the establishment of an organization that they amount in practice to outright prohibition [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 207]. The Committee also recalls that the formalities prescribed by law for the establishment of a trade union should not be applied in such a manner as to delay or prevent the establishment of trade union organizations. Any delay caused by authorities in registering a trade union constitutes an infringement of Article 2 of Convention No. 87 [see **Digest**, op. cit., 1996, para. 251].*
- 378.** *The Committee emphasizes that the right to official recognition through legal registration is an essential facet of the right to organize since it is a necessary condition for acquiring legal personality according to the Law on the Associations and Foundations of Bosnia and Herzegovina [article 28, paragraph 1]. The Committee recalls that the acquisition of legal personality by workers' organizations, federations and confederations shall not be made subject to conditions of such a nature as to restrict the exercise of the right to establish and join organizations of their own choosing [see **Digest**, op. cit., paras. 607 and 606].*
- 379.** *The Committee deplors the unreasonable period which has now elapsed since the initial filing of the registration request, i.e. May 2002, and considers that the rejection of the request for re-registration of a bona fide and longstanding organization, which has already been operating for a long time in the Republic, is a violation of Article 2 of Convention No. 87, ratified by Bosnia and Herzegovina. The Committee notes moreover that the grounds invoked for the refusal to register the complainant appear clearly unjustified. The Committee strongly requests the Government to take all necessary measures urgently with a view to rapidly finalizing the registration of the complainant and its members and to keep it informed of developments in this respect.*
- 380.** *The Committee notes that the complainant's request for registration was rejected in accordance with article 32 of the Law on the Associations and Foundations of Bosnia and Herzegovina, which authorizes the Minister of Civil Affairs and Communication to accept or refuse a request for registration within 30 days from its submission and provides that, if the Minister does not adopt a decision within 30 days, the request for registration shall be*

*considered as rejected. The Committee recalls that a provision whereby a minister may, at his discretion, approve or reject an application for the creation of a general confederation is not in conformity with the principles of freedom of association [see **Digest**, op. cit., 1996, para. 609]. More generally, a law providing that the right to association is subject to authorization granted by a government department purely in its discretion is incompatible with the principle of freedom of association [see **Digest**, op. cit., para. 245]. The Committee requests the Government to bring the legislation concerning the registration of employers' and workers' organizations into conformity with Convention No. 87. It reminds the Government that it can avail itself of the technical assistance of the Office in this regard. 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

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

- (a) The Committee deplores the fact that the Government has not replied to the allegations despite the fact that it was invited to do so on several occasions, including by means of an urgent appeal, and urges it to reply promptly.*
- (b) The Committee notes with concern that this is the third case brought before it with regard to a refusal by the authorities to register a national employers' or workers' organization at the level of the Republic of Bosnia and Herzegovina.*
- (c) Deploping the unreasonable period which has elapsed since the filing of the registration request by the complainant, and noting that the refusal to register a longstanding organization on clearly unjustified grounds constitutes a violation of Article 2 of Convention No. 87, ratified by Bosnia and Herzegovina, the Committee strongly requests the Government to take all necessary measures urgently with a view to rapidly finalizing the registration of the Confederation of Independent Trade Unions of Bosnia and Herzegovina (CITU of BiH) and its members, and to keep it informed in this respect.*
- (d) The Committee requests the Government to bring the legislation concerning the registration of employers' and workers' organizations into conformity with Convention No. 87. It reminds the Government that it can avail itself of the technical assistance of the Office in this regard.*
- (e) The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*

CASE NO. 2262

INTERIM REPORT

**Complaint against the Government of Cambodia
presented by
the Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC)**

Allegations: The complainant organization alleges that some 30 leaders and members of the Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC) have been dismissed because of their role in establishing a trade union in a private company

- 382.** The complaint is contained in a communication dated 25 April 2003 from the Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC).
- 383.** The Government provided its observations in a communication dated 28 May 2003.
- 384.** 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 complainant's allegations

- 385.** In its communication of 25 April 2003, the complainant organization states that Messrs. Hak Bun Thoeun and Chea Vichea, respectively General Secretary and President of the FTUWKC, and some 30 other union members, have been dismissed by the INSM Garment Factory (located in the Chum Chao District of Phnom Penh) as a sanction for helping to establish the trade union in that company, whose actions demonstrate its wish to destroy the union. The workers involved filed two complaints with the Government, which failed to protect their right to organize; instead, it used delay tactics and encouraged those leaders who had been dismissed to accept money from the management in order to eliminate the union. The complainants submit that they have exhausted the labour dispute system in the country and have waited six months for the law to be enforced by the Government, which has failed to ensure freedom of association, as guaranteed in the Cambodian Constitution and labour law and ILO Conventions.
- 386.** In a communication of same date, Ms. Muth Sour, Vice-President of the FTUWKC at the Top Clothes Garment Factory (located in the Ang Snoul District, Kandal Province, near Phnom Penh) states that she has been dismissed on 12 February 2003 because she had insisted that the management include some union activists on the list of shop steward candidates at the company. These actions violate articles 279, 280, 286 and 288 of the Cambodian labour law, dealing with representativeness of trade unions and their collective bargaining rights, as well as Conventions Nos. 87 and 98. According to the complainant, the factory management has taken retributive action against workers who wish to unionize and has generally subjected workers to poor treatment. On 18 February 2003, Ms. Muth Sour filed a complaint with the Minister of Labour, requesting to be reinstated in her previous position, but did not receive any reply. She also submitted a complaint to the Minister of Commerce, who has the power to punish factories that violate union rights, but no action was taken. The complainant organization submits that they have used all the

available procedures but that the Government fails to protect workers' right to organize trade unions.

387. In a communication dated 14 April 2003, Messrs. Kim Young, Sorn Mean and Ly Bunseyi, respectively, union President, Vice-President and Secretary of the Coalition of Cambodian Apparel Workers Democratic Union (CCAWDU) at the Splendid Chance Garment Factory (located in Phnom Penh) state that, soon after the creation of the union, the management of the factory started to intimidate them to prevent them from being active in the union. In late November 2002, the management asked the police to arrest them and have them appear in the Phnom Penh Court. The Court released them and they continued their organizational activities. They were dismissed as soon as the union was established in early January 2003. The complainants submitted three formal complaints on 7 January 2003 with the Ministry of Labour, the Ministry of Commerce and the National Assembly, asking for their reinstatement, but the authorities failed to address their complaints and to protect their right to organize, in violation of Cambodian law and Constitution.

B. The Government's reply

388. In its communication of 28 May 2003, the Government states in connection with the situation at the INSM Garment Factory (dismissal of General Secretary and President of the FTUWKC and of 30 union members) that the name mentioned in the complaint is Mr. Hak Bun Thoeun, whereas the case concerns a Mr. Hak Chan Thoeun. Therefore the Labour Inspection Department cannot ascertain whether this name is correct or not and the protection of the labour law cannot be applied. That being so, the plaintiff is fully entitled to file a complaint to the competent court.

389. As regards the dismissal of Ms. Muth Sour, Vice-President of the FTUWKC, at the Top Clothes Garment Factory, the Government indicates that this case could not be settled, in spite of a long process of conciliation. She maintained her position, without argument or realistic basis, that she was fired because she is the leader of the union. However, the management of the company also stands firm in its position that Ms. Muth Sour had made serious mistakes and did not want to employ her any more. The Ministry has already done all it could do, has no power to force the parties to comply with its opinion, and must let the parties continue with their case in the competent court.

390. With respect to the dismissal of trade union executives of the CCAWDU at the Splendid Chance Garment Factory, the Government states that this case has been investigated on 25 December 2002 by a group of people composed of officials from the Ministry of Social Affairs and Labour, Vocational Training and Youth Rehabilitation (MOSALVY) and of staff of the Employers' Association. After verification, they concluded that the case is groundless and that this was only a complaint without realistic basis and a misunderstanding.

391. The Government adds that the Ministry has done its best to protect the rights of trade unions by applying the provisions of the labour law, but that it cannot protect those who abuse the rights of the other party, or do not respect the law. In some cases, disputes have happened and have been settled by the parties themselves; the Ministry has no power to interfere in such cases. The complaint filed by Mr. Chea Vichea is groundless, and the trade unions under his leadership represent only a small number of workers. Many other workers' organizations, which are currently the most representative unions in Cambodia, comply with all the regulations issued by the Ministry.

C. The Committee's conclusions

392. *The Committee notes that this complaint concerns various allegations of anti-union discrimination, harassment and dismissals at three private companies in the garment and textile industry in Cambodia.*
393. *As regards the dismissal of the General Secretary of the FTUWKC at the INSM Garment Factory, the Committee notes that Mr. Hak Bun Thoeun alleges that he has been dismissed as a sanction for helping to establish a trade union in the company. The Government limits itself to stating that the name of the General Secretary mentioned in the complaint differs from the name mentioned (Mr. Hak Chan Thoeun) in “a” case on which it does not provide any detail; the Government adds that the Labour Inspection Department cannot ascertain whether this name is correct or not, that the protection of the labour law cannot be applied, and that the plaintiff should file a complaint to the competent court. Noting that this case involves the alleged dismissal of a senior trade union official for exercising rights protected by the applicable Conventions, both ratified by Cambodia, the Committee considers that in such a serious case, the authorities should not let a technicality impede the full application of legal provisions, the aim of which is precisely to protect trade union leaders and members workers against anti-union discrimination. The Committee requests the Government, in cooperation with the FTUWKC and the employer, to take appropriate steps to ascertain the identity of the person concerned and, once this is done, to ensure that this person is reinstated and enjoys full legal protection against acts of anti-union discrimination, or if such reinstatement is not possible, that this person is paid adequate compensation. The Committee requests the Government to keep it informed of developments in this respect.*
394. *As regards the substantive aspects of the situation at the INSM Garment Factory, 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; 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. Such guarantee in the case of trade union officials is also necessary to ensure 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**, 1996, 4th edition, para. 724]. The Committee also recalls that 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 [**Digest**, *op. cit.*, para. 703]. In addition, taking into account the financial incentives allegedly offered in order to eliminate the union, the Committee points out that the protection against anti-union discrimination is insufficient if the legislation is such that employers can in practice, on condition that they pay the compensation prescribed by law for unjustified dismissal, dismiss any worker, if the true reason is his trade union membership or activities [**Digest**, *op. cit.*, para. 707]. The Committee urges the Government to ensure, in cooperation with the employer concerned, that these principles are fully applied and to keep it informed of developments in this respect.*
395. *Regarding the President (Mr. Chea Vichea) and the 30 other union members of the FTUWKC who have also been dismissed at the INSM Garment Factory in similar circumstances, the Committee notes that the Government does not provide any information, and therefore requests it to provide its observations in this respect, after having obtained the relevant information from the employer concerned. The Committee also reminds the Government that the principles mentioned above apply in such circumstances; it urges it to ensure, in cooperation with the employer concerned, that the*

workers concerned are reinstated, and enjoy full legal protection against acts of anti-union discrimination, or if reinstatement is not possible, that they are paid adequate compensation. The Committee requests the Government to keep it informed of developments in this respect.

- 396.** *Concerning the case of Miss Muth Sour at the Top Clothes Garment Factory, the Committee notes that the allegations concern the dismissal of another FTUWKC official, in a context of anti-union discrimination. According to the information summarily provided by the Government, the parties differ completely in their appreciation of the situation: the complainant maintains that she has been dismissed because she is the leader of the union; the employer maintains that she has made serious mistakes and does not want to employ her any more. The Government adds that it has already done all it could do, that it has no power to force the parties to comply with its opinion, and must let the parties go on with the court case. The Committee requests the Government to provide it with a copy of the court's decision as soon as it is issued. If the dismissal resulted from Ms. Muth Sour's trade union activities, the Committee requests the Government to ensure that she is reinstated, and enjoys full legal protection against acts of anti-union discrimination, or if reinstatement is not possible, that she is paid adequate compensation. The Committee requests the Government to keep it informed of developments in this respect.*
- 397.** *As regards the situation at the Splendid Chance Garment Factory and the dismissal of three trade union officials of the CCAWU in that company, the Committee notes that these union officials were subjected to intimidation soon after the creation of the union, were once arrested by police and taken to court, and were dismissed as soon as the union was established in January 2003. According to the Government, this case has been investigated in December 2002 by a group composed of officials of the Ministry and of staff of the Employers' Association, which concluded that the case was groundless and was only a complaint without realistic basis. The Committee notes: the coincidental timing between the establishment of the union and the various acts of anti-union discrimination culminating in the dismissal of the three union executives; the fact that only some staff of the Employers' Association, and no representatives of the union, participated in the investigation in question; and that the investigation took place **before** the dismissals. The Committee emphasizes that complaints against acts of anti-union discrimination should normally be examined by national machinery which, in addition to being speedy, should not only be impartial but also be seen to be such by the parties concerned, who should participate in the procedure in an appropriate and constructive manner [see **Digest**, op. cit., para. 750], which was obviously not the case here. The Committee requests the Government to take appropriate measures so that the three union officials are reinstated, and enjoy full legal protection against acts of anti-union discrimination, or if reinstatement is not possible, that they are paid adequate compensation. The Committee requests the Government to keep it informed of developments in this respect.*
- 398.** *As regards the Government's contention that the trade unions under the leadership of the President of the FTUWKC represent only a small number of workers, the Committee emphasizes the importance 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**, op. cit., para. 274].*

The Committee's recommendations

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

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- (a) *The Committee requests the Government, in cooperation with the FTUWKC and the employer, to take appropriate steps to ascertain the identity of the complainant (Secretary General of the FTUWKC) dismissed at the INSM Garment Factory and once this is done, to ensure that this person is reinstated, and enjoys full legal protection against acts of anti-union discrimination, or if such reinstatement is not possible, that this person is paid adequate compensation. The Committee requests the Government to keep it informed of developments in this respect.*
- (b) *The Committee requests the Government to provide its observations regarding the dismissals of the President and 30 other union members of the FTUWKC at the INSM Garment Factory, after having obtained the relevant information from the employer. The Committee urges the Government to ensure, in cooperation with the employer concerned, that the workers concerned are reinstated, and enjoy full legal protection against acts of anti-union discrimination, or if reinstatement is not possible, that they are paid adequate compensation, in conformity with Conventions Nos. 87 and 98 both ratified by Cambodia. The Committee requests the Government to keep it informed of developments in this respect.*
- (c) *The Committee requests the Government to provide it with the court decision concerning the dismissal of Ms. Muth Sour at the Top Clothes Garment Factory. If the dismissal resulted from her trade union activities, the Committee requests the Government to ensure that she is reinstated, and enjoys full legal protection against acts of anti-union discrimination, or if reinstatement is not possible, that she is paid adequate compensation. The Committee requests the Government to keep it informed of developments in this respect.*
- (d) *The Committee requests the Government to take appropriate measures so that the three union officials of the CCWADU dismissed at the Splendid Chance Garment Factory are reinstated, and enjoy full legal protection against acts of anti-union discrimination, or if reinstatement is not possible, that they are paid adequate compensation. The Committee requests the Government to keep it informed of developments in this respect.*
- (e) *The Committee reminds the Government that it can avail itself of the technical assistance of the Office.*

CASE NO. 2218

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

**Complaint against the Government of Chile
presented by
the National Confederation of Health Care Workers
(CONFENATS)**

Allegations: Conclusion of agreements on public health service reform between government authorities and only two members of the CONFENATS national executive (comprised of 15 members) who did not hold a mandate to do so, and acceptance by these two persons of a government proposal to close negotiations on adjustments to remuneration and other terms of employment despite the fact that such acceptance should have been submitted to consultation through a national (trade union) referendum; intervention by the authorities in the internal organization of CONFENATS by holding meetings and assemblies of CONFENATS affiliates in order to pressure members and put forward the views of the authorities in negotiations; use of police violence against trade union officers and members (detention, beating, assault on a trade union officer, hindering the exercise of the right to assemble and to demonstrate; judicial proceedings and imposition of a penalty against the President of CONFENATS for allegedly creating a public disturbance)

- 400.** The complaint is contained in a communication of the National Confederation of Health Care Workers (CONFENATS) dated 30 July 2002. The organization sent additional information in a communication of December 2002.
- 401.** The Government replied in a communication dated 9 April 2003.
- 402.** Chile has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainant's allegations

- 403.** In its communications of 30 July and December 2002, the National Confederation of Health Care Workers (CONFENATS) alleges that its legitimate and autonomous

representation was disregarded through the conclusion of agreements between government authorities and persons claiming to represent the health workers' union; its current president and national executive have been disregarded, which constitutes interference in the organization's internal affairs, and foments discord and deceit among its members. This occurred on two occasions. First, an attempt was made to impose on CONFENATS a 26-point agreement on public health system reform, falsely claiming involvement of the organization by having it signed by only two members of the national executive (comprised of 15 members), neither of whom hold the office of president or have received a mandate for the purpose – this despite the express reservation put forward by the official delegation concerning the signing of that document during the negotiation of the agreement. To make matters worse, an official ceremony was held in the Government Palace, which was attended by the Vice-President of the Republic and several ministers and broadcast over the radio and television, and to which the persons who had supplanted the legitimate and lawful representatives of the Confederation were expressly invited.

- 404.** A similarly despicable procedure occurred a few weeks later, this time in the form of a document containing a proposal by government representatives to close the negotiations on remuneration and other terms and conditions of employment, which, as agreed by the CONFENATS national assembly, should have been submitted to consultation through a national and universal referendum to be held in July 2002, in order to approve or reject it. Notwithstanding the fact that the government negotiators were fully aware of the organization's decision to submit the proposal to democratic consultation of the membership, they did not hesitate to contrive to have a very small minority of the officers sign the agreement, substituting themselves illegally for the will of the majority of the members of the national executive. It should be pointed out in this respect that the Minister of Health expressed to these officers the "commitment to working together for a strong and representative organization" – a clear and obvious sign of intervention in CONFENATS' internal affairs. In the referendum subsequently held by CONFENATS in July 2002, 18,075 workers rejected the Government's proposal and 843 approved it – representing 60 per cent of CONFENATS members.
- 405.** CONFENATS further alleges direct intervention by government authorities in the internal organization of the Confederation: disregarding its representative trade union organs and organizational structure, several representatives of the Government, exceeding their authority, organized meetings and assemblies of CONFENATS affiliates in different public health establishments across the country, pressuring members to attend the meetings, at which they put forward their views on the negotiations and issues being discussed with the trade union's national executive. These constitute repeated and continuous acts of flagrant interference in the Confederation's internal activities. In so doing, they bypass the trade union's executive organs elected by the members and bring direct pressure to bear on members to accept their views, which openly contradict the opinions expressed by the national executive.
- 406.** In addition, CONFENATS points out that, during discussions on the changes in remuneration and terms of employment which will accompany the public health system reform, and the salary adjustments described above, there have regrettably been repeated instances of police intervention and use of force. The police have used violence against trade union members and officers, who were detained, beaten (including an assault on trade union officer, Mr. Mauricio Loo Vidal), and prevented from meeting and demonstrating at their workplaces and in public areas; these acts included the trial of and imposition of a penalty against the national president of the organization in a local police court on 10 May 2002 for allegedly creating a public disturbance. It should be pointed out that the excessive use of force by the police was backed by the government authorities, despite the seriousness of the injuries inflicted on members.

B. The Government's reply

- 407.** In its communication dated 9 April 2002, the Government refers to the allegation that legitimate representation by the CONFENATS executive was disregarded through the signing of agreements between Ministry of Health authorities and persons who were not entitled to represent the workers. The Government states that, as part of the challenge of health care reform – one of the main tasks facing the Government – the Ministry of Health considered it a priority task to reach agreement with the different health unions on issues relating to their professional and occupational demands, especially wage increases and demands. Since the first year of President Lagos' administration, with Ms. Michelle Bachelet as Minister of Health, talks, consultations and negotiations were held with the different unions in the public health sector. Dialogue committees had been set up, and had been functioning for over two years, with regular meetings to hear views prior to embarking on the health system reform known as the AUGE plan.
- 408.** The Government points out that, with regard to the health sector reform and its implications and impact, in the first half of 2002 the health sector unions decided to engage in dialogue and negotiate with the Ministry of Health, which led to the establishment of the National Council of Health Unions (CONGRES). This has been, and still is, the main interlocutor of the Government, through the Ministry, and all the agreements adopted together have been complied with. Thus, on 13 May 2002, the Ministry of Health and CONGRES signed an "Agreement for better health and health care for all the inhabitants of Chile". This document was ratified on 19 May 2002 at a ceremony held at the Palacio de la Moneda (the Government Palace), and although some of the officers of CONFENATS did not sign it, others did, in agreement with CONGRES.
- 409.** The Government adds that, through the Ministry of Health, it has continued to negotiate specific issues essentially relating to remuneration, public service career development and terms of employment (in a manner that is fairly consistent with the recommendations of ILO Convention No. 151), with the different trade unions in the national health-care system. Accordingly, in parallel with negotiations with CONGRES, channels of communication and dialogue have been maintained with the Confederation of Municipal Health Workers (CONFUSAM), with which agreement was reached on 14 March 2002, and with CONFENATS, an organization grouping together the regional federations of public health employees who mainly work in the hospital system. The latter expressed its willingness to initiate a bargaining process, as it had already done with the Government, through a negotiating committee comprised of the CONFENATS officers.
- 410.** The Government points out that on 12 July 2002 an agreement was signed between the Ministry of Health and CONFENATS, represented by officers, Mr. Claudio Capees and Mr. Roberto Zambrano, two of the eight members of the abovementioned negotiating committee. The agreement was also signed by the executive committees (represented by their presidents) of seven of the 13 regional federations which made up CONFENATS at that time. The main points of agreement are as follows:
- by 31 July at the latest, the Ministry of Health was to submit a Bill to Parliament containing provisions for:
 - the introduction of a performance allowance equivalent to an 11 per cent adjustment in the base remuneration;
 - payment of an advance in the last quarter of 2002, and of a bonus to all health service employees;

- improvement of the system of merit-based promotion of permanent officials by developing an accreditation system taking into account continuous training variables, performance evaluation and qualified experience. The Ministry's proposal to introduce a system of promotion through internal competition for management and professionals is to be maintained;
- implementation of an incentive system to encourage retirement of staff qualifying for retirement;
- normalize staffing levels through administrative measures, according to vacant permanent posts;
- increase investment in staff training; participation of the most representative health workers' organization in training committees;
- maintain the current system of staffing based on posts rather than hours.

411. The Government goes on to state that it is clear that all of the above are aimed at improving the terms of employment of public health workers through salary increases, greater participation and a substantial increase in staff training. The agreement is the result of the work of a negotiating committee comprised of all of the health unions and the different services of the Ministry of Health. When the time came to sign the agreement and publicize it, the top leadership of the CONFENATS refused to sign it, disregarding and spurning the work that had been accomplished, which meant going back to square one. Nevertheless, the agreement was ratified by seven of the 13 regional federations, representing 80 per cent of the CONFENATS membership. This agreement, which by any standard represents a step forward in the conditions of employment of health workers, was disregarded by the CONFENATS executive committee. Its refusal to sign it is the result of internal problems in the union, manifested in failed elections, officers virtually being removed from office and the establishment of a parallel trade union organ. The problems relating to elections and challenging of officers occurred in 1999 and 2000. The Government emphasizes that the degree of representativity of the officers who signed the agreement with the Ministry of Health is not a matter for the Government to settle, but that it is the trade union organization itself which must determine its representative bodies. The agreement briefly outlined in the preceding paragraphs is an expression of the trade union officers' willingness to reach agreements that would benefit both parties and protect the workers' rights.

412. The Government reached a similar agreement with the National Federation of University Professionals in the Health Services (FENPRUSS) on 26 July 2002. In addition to the many meetings and forums for dialogue set up with the health sector unions, at the same time the Government has complied with previous agreements principally relating to payment of various bonuses and improvements in terms of employment.

413. The Government states that, through the bodies responsible for supervision of compliance with labour legislation, as well as the press, it was aware that most of the trade union officers of CONFENATS had resigned from leadership of the Confederation, having decided to set up a new confederation temporarily to follow up on the agreements set forth in a Bill now before Parliament.

414. "FENATS Unitaria" is a legally constituted trade union organization that cannot be disregarded by the Government, in so far as it meets all the conditions required to function according to the law. FENATS Unitaria was founded on 21 October 2002, with a membership of approximately 15,000 workers in Regions III, V, VII, VIII, IX and X and the metropolitan area. Its provisional executive committee was comprised of 12 officers.

Subsequently, according to the records filed with the Labour Directorate, the first congress of the national confederation FENATS Unitaria was held in the city of Temuco on 16 January 2003, at which a definitive executive committee comprised of 15 officers was elected. FENATS Unitaria was established under the protection of ILO Convention No. 87 and in the exercise of the fundamental right of freedom of association.

- 415.** Regarding the accusation that the Ministry of Health has interfered in the internal affairs of CONFENATS, the Government states that this is not true, since it is clear from press statements by ministry authorities that the latter have on numerous occasions expressed their willingness to continue supporting the trade union movement in all its manifestations, without any interference whatsoever. The Ministry's web site contains the following statement: "We are now forging a major alliance with the workers in order to improve the quality of work in hospitals to provide better care to users." The Ministry concludes by stating its commitment to working together for a strong and representative health workers' organization. In this respect, it should be pointed out that the spirit of these statements by the outgoing Minister of Health, Mr. Osvaldo Artaza, is in full conformity with Article 6 of Convention No. 151, which provides as follows: "Such facilities shall be afforded to the representatives of recognised public employees' organisations as may be appropriate in order to enable them to carry out their functions promptly and efficiently, both during and outside their hours of work."
- 416.** As regards the alleged direct intervention by the health authorities in the organization and functioning of CONFENATS by organizing meetings and assemblies of its members in the various public health establishments in the country, without taking the national executive into consideration, the Government states that the campaign to publicize the Government's activities, through the Ministry of Health, jointly with the trade unions, reflects the Ministry's intention to disseminate as clearly as possible the scope of the agreements reached in order to ensure that all the public health employees in Chile have a better knowledge and understanding of them. The Ministry convenes all the employees of a given establishment to these dissemination events, irrespective of the union to which they belong, and it is therefore utterly untrue and incorrect that the health authorities have interfered in the functioning of CONFENATS. It should be made clear that at no time did any authority whatsoever of the Ministry of Health or other government department attempt to influence the decisions, functioning, establishment or administration of any trade union organization. Respect for one of the principles governing the functioning of the Government in labour matters, i.e. permanent and constructive dialogue with all of the trade unions, cannot be considered as undue interference.
- 417.** As regards the use of police violence against members and officers of CONFENATS who were allegedly detained, beaten and prevented from demonstrating at their workplaces and public areas (including the detention of and imposition of a penalty by a court against the president of FENATS, Mr. Jorge Araya Guerra, and the secretary of FENPRUSS, Mr. Mauricio Loo Vidal), the Government states that the actions of the police forces are dictated by the normal procedures in the event of disturbances in public areas which disrupt civic order – acts which are covered by Chilean legislation. Within this legal framework, which applies to each and every one of the country's inhabitants, the competent bodies of the judiciary branch, which is independent of the Government, decided to impose a penalty on Mr. Jorge Araya, without the Government of Chile having interfered in any way in his being sentenced to a fine. This penalty was suspended by the court for one year. The alleged assault on Mr. Mauricio Loo Vidal occurred during a protest by a minority group of health workers outside the National Congress, while members of Parliament were discussing issues relating to the health reform.
- 418.** The accusation of anti-union practices levelled by CONFENATS against the Government of Chile reflects the current political and trade union situation in the country, in terms of

opposition to processes of dialogue and negotiation from which both parties stand to benefit. Lastly, with a view to further improving the national health system, together with the workers employed in it, the Government declares that both it and the different authorities of the Ministry of Health reiterate their willingness to continue dialogue with each and every one of the health unions, in an effort to achieve a health system which is egalitarian, fair and comprehensive for all of Chile's inhabitants.

C. The Committee's conclusions

- 419.** *As regards the allegation concerning the conclusion of agreements on public health sector reform between government authorities and only two members of the National Confederation of Health Care Workers (CONFENATS) national executive committee (comprised of 15 members) who did not hold a mandate to do so, and the acceptance by these two persons of a government proposal to close negotiations on adjustments to remuneration and other terms of employment despite the fact that such acceptance should have been submitted to a national (trade union) referendum, the Committee notes that the Government states that: (1) the agreement referred to by the complainant (CONFENATS) was signed and ratified by some of the officers of the Confederation (two of the eight participating in the negotiating committee); (2) on 12 July another agreement (on salary adjustment and other issues) was signed with two officers of CONFENATS, which was also ratified by the executive committees (represented by their presidents) of seven of the 13 regional federations affiliated to CONFENATS (80 per cent of the CONFENATS membership); (3) the refusal by the CONFENATS executive to sign the agreement is the result of internal problems within the Confederation, and the degree of representativity of the officers who signed the agreement with the Ministry of Health is not a matter for the Government to settle; (4) most of the officers of CONFENATS left the Confederation and established a new confederation (FENATS Unitaria); and (5) the authorities engaged in similar negotiations with other trade union organizations in the sector.*
- 420.** *In the Committee's view, the conclusion by the authorities of agreements with a reduced number of representatives (two) despite the massive rejection of the Government's proposal by the workers, and without a mandate from the trade union organs could, in certain circumstances, constitute an anti-union practice. In this case, however, the negotiation of agreements with representatives who do not hold a mandate from the trade union organs of CONFENATS occurred in the context of a major conflict within a trade union which in fact led to the establishment of a new trade union confederation. In this respect, the Committee notes that, according to the Government, the presidents of seven of the 13 regional federations affiliated to CONFENATS (80 per cent of the membership) signed the (second) agreement concluded on 12 July 2002. The Committee observes that the complainant has not cited government pressure on the two trade union representatives in question to sign the agreements to which the complainant objects. In these circumstances, the Committee concludes that the actual facts appear to have occurred in the context of an internal conflict within the complainant organization, on which the Committee is not in a position to decide.*
- 421.** *As regards the alleged interference by the authorities in the internal organization of CONFENATS, by organizing meetings and assemblies of CONFENATS affiliates to bring pressure to bear on members and put forward the authorities' views in the negotiating process, the Committee notes that the Government states that: (1) the campaign to publicize the Government's activities, through the Ministry of Health, jointly with the trade unions, reflects the Ministry's intention to disseminate as clearly as possible the scope of the agreements reached; (2) there was no attempt to influence the decisions or functioning of any trade union organization, but only to conduct permanent and constructive dialogue with all of the trade union organizations; and (3) the Ministry convened all of the employees of a given establishment irrespective of the trade union organization to which*

they belonged, and hence it is untrue and incorrect that the authorities interfered in the functioning of CONFENATS. In these circumstances, given that, according to the Government, these were information meetings to which all the workers of the establishments were convened, the Committee will not pursue its examination of these allegations further.

422. *As regards the allegation of the use of police violence against trade union officers and members (detentions, beatings, assault on trade union officer, Mr. Mauricio Loo Vidal, preventing the exercise of the right of assembly and demonstration on 10 May 2002; judicial proceedings and imposition of a penalty against the President of CONFENATS, Mr. Jorge Araya, for alleged creating a public disturbance), the Committee notes that the Government points out that the actions of the police forces are dictated by the normal procedures in the event of disturbances in public areas which disrupt civic order, and hence the Government did not interfere in the penalty imposed by the judicial authority on trade union officers, Mr. Jorge Araya (a fine suspended for one year) and Mr. Mauricio Loo Vidal. The Committee observes that the Government does not specify what constituted the disturbances disrupting civic order and reminds the Government of the principle that the authorities should resort to the use of force only in situations where law and order is seriously threatened. The intervention of the forces of law and order should be in due proportion to the danger to law and order that the authorities are attempting to control and governments should take measures to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations which might result in a disturbance of the peace [see **Digest of decisions and principles of the Freedom of Association Committee**, 1996, para. 137].*

423. *The Committee requests the Government to forward to it the decisions handed down against trade union officers, Mr. Jorge Araya and Mr. Mauricio Loo Vidal (indicating, if they are not stated in the decisions, the specific acts of which these persons are accused) and further information concerning the alleged assault against trade union officer, Mr. Mauricio Loo Vidal, and the public disturbance leading to police intervention in the demonstrations by CONFENATS officers and members on 10 May 2002.*

The Committee's recommendation

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

The Committee requests the Government to forward to it the decisions handed down against trade union officers, Mr. Jorge Araya and Mr. Mauricio Loo Vidal (indicating, if they are not stated in the decisions, the specific acts of which these persons are accused) and further information concerning the alleged assault against trade union officer, Mr. Mauricio Loo Vidal, and the public disturbance leading to police intervention in the demonstrations by CONFENATS officers and members on 10 May 2002.

CASE NO. 2046

INTERIM REPORT

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

- the Colombian Union of Beverage Industry Workers (SINALTRAINBEC)
- the National Union of Bavaria S.A. Workers (SINALTRABAVARIA) and
- the National Union of Caja Agraria Workers (SINTRACREDITARIO)

Allegations: Dismissals and disciplinary measures against workers belonging to SINALTRABAVARIA for participating in a strike in the company on 31 August 1999; failure to comply with the collective agreement, refusal to deduct trade union dues, intimidation of workers to force them to sign a collective agreement and preventing the union from entering the premises to advise workers in that connection, the refusal to allow trade union leave and the dismissal of many officials and members of various branches and pressure to accept a voluntary retirement plan; the refusal to register the trade union organization USITAC, alleged by SINALTRABAVARIA and SINALTRAINBEC, dismissals, disciplinary measures and transfers for trying to establish this organization; mass dismissals due to the conversion of the Caja de Crédito Agrario into the Banco de Crédito Agrario and dismissal of trade union officials in disregard of their trade union immunity and failure to comply with the orders for reinstatement by the Caja de Crédito Agrario of some of these officials. A number of allegations presented by SINALTRABAVARIA, including denial of leave for trade union affairs, pressure on workers to resign from the union, disciplinary measures, requests to revoke trade union registration and the untimely closure of enterprises, among others

- 425.** The Committee last examined this case at its March 2003 meeting [see 330th Report, paras. 507-527]. The National Union of Bavaria S.A. Workers (SINALTRABAVARIA) sent new allegations in communications dated 14, 21 and 27 March, 12 May, April and 11 June 2003. The Colombian Union of Beverage Industry Workers (SINALTRAINBEC) sent new allegations in a communication dated 21 February 2003.
- 426.** The Government sent its observations in communications dated 18 February, 5 May, 14 August, 15 and 27 October 2003.
- 427.** Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

428. At its March 2003 meeting, on examining allegations of acts of discrimination and anti-union practices in various companies, the Committee formulated the following recommendations [see 330th Report, para. 527]:

- (a) as regards the alleged dismissals and disciplinary measures against members of SINALTRABAVARIA for having participated in the strike of 31 August 1999, the Committee requests the Government to take measures to expedite all proceedings that may be initiated and to keep it informed of any judicial decision that will be issued;
- (b) as regards the new and serious allegations by SINALTRABAVARIA concerning failure to apply the collective agreement, the refusal to deduct union dues, intimidation of workers to make them sign a collective agreement and preventing the union from entering the premises to advise workers in that connection, the refusal to allow trade union leave and the dismissals of many officers and members of various branches and pressure to accept a voluntary retirement scheme, the Committee requests the Government to take steps to ensure that these inquiries are concluded without delay and to continue to keep it informed of the outcomes thereof;
- (c) the Committee requests the complainants to provide their comments concerning the Government's observations according to which certain investigations cannot be concluded because the complainant organization does not attend hearings;
- (d) as regards the recent allegations of anti-union persecution against the 47 founders of the Colombian Union of Food, Beer, Malt, Drinks, Juices, Refreshments, Mineral Water Workers of Colombia (USITAC) in Baranquilla on 16 March 2002, disciplinary measures to remove the trade union immunity of William de Jesús Puerto Cano, José Evaristo Rodas and other officials of the organization, the seizure of trade union information bulletins about the foundation of USITAC, pressure on the workers which resulted in eight of them leaving the union, as well as on the denial of paid trade union leave to trade union officer William de Jesús Puerto Cano, the Committee requests the Government to carry out an inquiry into these matters and to send its observations thereon; meanwhile, the Committee requests the Government to fully guarantee the trade union rights of the founders of USITAC;
- (e) with respect to the mass dismissals due to the conversion of the Caja de Crédito Agrario into the Banco de Crédito Agrario, the Committee requests the Government to continue to keep it informed of efforts to find an agreed solution;
- (f) as to the dismissals of officers due to failure to recognize their union immunity and failure to comply with the orders for reinstatement of some of those officers by the Caja de Crédito Agrario, the Committee again urges the Government to take measures without delay to ensure compliance with the court orders for reinstatement. The Committee requests the Government to keep it informed thereof.

B. New allegations

429. In communications dated 21 February, 14, 21 and 27 March, April and 11 June 2003, the Colombian Union of Beverage Industry Workers (SINALTRAINBEC) and the National Union of Bavaria S.A. Workers (SINALTRABAVARIA) indicate that the Ministry of Labour, in resolution No. 00680 of 7 June 2002, decided to register the Colombian Union of Food, Beer, Malt, Drinks, Juices, Refreshments, Mineral Water Workers of Colombia (USITAC), comprising workers from the Bavaria Enterprise Group, but, following an action for protection of constitutional rights (*tutela* proceedings) lodged by the enterprise, it revoked this decision in resolution No. 00027 of 15 January 2003. This resolution was based on the misuse of the right of association for the successive establishment of trade unions. Subsequently, the organization once again tried to apply for registration but, in resolution No. 000272 of 28 February 2003, this was refused, indicating that the previous

resolution was final and that the only way to overthrow this was through judicial proceedings.

- 430.** Moreover, SINALTRAINBEC indicates that the USITAC trade union officials Omar de Jesús Ruiz Acevedo, Carlos Alberto Monsalve Luján and Humberto de Jesús Alvarez Muñoz, with regard to whom the enterprise requested the lifting of trade union immunity for having established the new trade union organization USITAC [see 330th Report, paras. 511 and 522] were, in fact, dismissed and that this was approved in resolution No. 01702 of 6 August 2002 of the Ministry of Labour. The complainant organization adds that, on 12 February 2003, Jorge Alberto Arboleda Muñoz was notified that he was being transferred, in spite of there being no proceedings to request due authorization for this. Furthermore, various members of USITAC and SINALTRAINBEC (José Heriberto Aguirre, José Absalón Muñoz, Víctor Emilio Sánchez Duque, Ancízar Restrepo Jaramillo, José Luis Restrepo Pabón) were dismissed by means of false disciplinary reports.
- 431.** SINALTRABAVARIA states that various members who were also founders of USITAC were dismissed. USITAC trade union members and founders who were dismissed: César Antonio Castro Gómez, José Luis Zambrano Julio, Luis Carlos Villafañe de la Rosa, Neiver Truyol López, Edgardo Antonio Amaya Villalobos, Maicle Antonio Salinas Valdez (trade union official), Antonio Celestino Polo Meriño, Jaime de Jesús Echeverri Orozco (trade union official), Walter Chamorro Romero, Cristóbal Rafael Castro López, Jorge Luis Carrat Arrieta, Antonio José Campo Vásquez (trade union official), William Alberto de Avila Jiménez, Ubadel Cristino Baldovino Galvis, Julio Alonso Bolaños Rua, Jesús María Caballero Caro, Wilfrido Alberto Camacho Castaño, Frank Alberto Egurrola Mendoza, Walberto Enrique Amaranto Zárate, Abel Antonio Bolívar Orozco, Orlando Enrique Torres Díaz, Javier Humberto Sosa Márquez, Jaime Manuel González Cortés, Nacim Martín Pérez Charris, Lacides de Jesús de la Hoz López, Manuel Antonio Lozada Flórez, Adolfo Barrios Julio, Ever Jesús Moreno Estrada, Reinaldo García García, Antonio Parra Montesinos, Julio César Vega Chacón, Roberto Mario Doria Caro, Miguel Angel Ruiz Chavez, Alfredo Guerrero Ruiz, Gustavo Alberto Gutiérrez Márquez, Edrulfo Montero Saldoval, Juan Carlos Serrano Ardila, Ernesto Carlos Gulfo Arnedo, Darío Rafael Fontalvo Matute, Alicia Elvira Ortega Rendón, Wilfrido Enrique Pérez Alvarez, José del Rosario Flórez Campis, Germán Alonso Prado Antequera, Jairo Alberto Cantillo Cantillo, Javier Enrique Caro Marchena, Elkin Camelo Baiter, Guido Rafael Charris Gutiérrez, Rubén Darío Gómez Ariza, Francisco Javier Lobo Alvarez, Uriel de Jesús Muñoz Pascuales, Jorge Luis Ortega Martínez, Jairo Otálora Qintero, Rubén Rafael Otto Robles Echeverría, Martín Augusto Vásquez Oliveros, Heliberto Roa Ayala, Edwin Alberto Rodríguez Lacera, Asdrúbal Alfonso Tette Torres. The workers who were dismissed lodged claims in the ordinary courts for respect of the trade union immunity of founders and *tutela* proceedings for respect of their right of association. The *tutela* proceedings were denied. The complainant organization adds that a number of trade union officials were sanctioned with between one and 60 days' suspension. Moreover, pressure is being brought to bear on workers to leave the trade union; if they do not, disciplinary proceedings are initiated against them or they are dismissed without just cause. According to the complainant organization, the enterprise does not recognize the necessary guarantees for the exercise and development of trade union administration, refusing trade union leave and refusing trade union officials of SINALTRABAVARIA access to workplaces.
- 432.** The enterprise imposed a collective agreement that offered economic benefits and better working conditions on those that signed it and is promoting this agreement through a campaign to discredit SINALTRABAVARIA. The complainant organization indicates that, in spite of the reports denouncing this to the Ministry of Labour, the latter endorsed the collective agreement. The Bavaria S.A. enterprise requested immediate repeal of the registration resolutions of the industrial trade unions SINALTRABET and UNITAS, which is currently being carried out.

- 433.** The Ministry of Social Protection gives precedence to the Bavaria S.A. enterprise as when the trade union requests a visit by labour inspectors to verify anti-union activities in the enterprise the Ministry of Labour is slow to take action, which forces the trade union to stop making requests as it will not be able to prove the reported activities. The same delays take place with regard to registration of new executive committees, clearly obstructing trade union activities.
- 434.** The enterprise hires workers that it has itself dismissed, but it hires them as a labour cooperative, which means that health, pension and benefits plans are not available and there are long working days, without the possibility of joining a trade union. Moreover, when the enterprise dismisses workers, it does not comply with the provisions of the collective agreement, saying that these are extremely onerous.
- 435.** With regard to the trade union organization not attending conciliation hearings, as stated by the Ministry of Social Protection [see 330th Report, para. 527(c)], indicated by the Government, SINALTRABAVARIA indicates that in some cases it has no faith in the efficiency and impartiality of the Ministry of Social Protection. For example, with regard to the numerous untimely closures of factories, the complainant organization indicates that it submitted administrative claims, but, on discovering that the representative of the enterprise, which had participated in those closures, was in fact the Deputy Minister of Labour, it preferred to abandon its claims. Surprisingly, and in spite of this voluntary abandonment, the Ministry issued resolution No. 0015 of 10 January 2003, supporting the Bavaria S.A. enterprise without taking into account the abandonment of claims. This also occurred with the claim submitted in April 2002 against the Bavaria S.A. enterprise for violation of the collective agreement. Faced with the delay and inefficiency of Inspector No. 10, the complainant organization abandoned its claim and, in spite of that, resolution No. 2557 of 19 November 2002 was issued in favour of the enterprise. The complainant organization sent a protest letter on 28 November 2002 and the Inspector annulled the resolution on 28 March 2003. The complainant organization states that it also did not attend the hearing called by Inspector No. 10 of Cundinamarca as it was not notified of this in time.
- 436.** Finally, with regard to the untimely closure of the Aluminium Container Factory “COLENVASES” at the end of 1999, which involved the dismissal of 42 workers and seven trade union officials without lifting of trade union immunity and without having complied with the resolution of the Ministry of Labour authorizing the closure and ordering that paragraphs 14 and 51 of the collective agreement in force be complied with prior to closure, the complainant organization indicates that the enterprise refused to comply with paragraph 14 stating that, as the closure was authorized by the Ministry of Labour, it did not have to comply with the agreement. Paragraph 14 lays down that:

... exclusively for cases of total or partial closure of one or a number of its factories, subsidiaries or departments or of a reduction in staff, the enterprise, with the agreement of the executive committee of SINALTRABAVARIA, will transfer available or redundant workers to other departments and will grant them a period of up to 12 months, from the date of the notification of the transfer, to accept the benefits in the new factory or department mentioned in this paragraph. If, for any reason, the worker does not accept the transfer, he has the right to be paid an amount equivalent to 95 days of the basic wage for each year of service and the proportion thereof for a part year.

The complainant organization alleges that, of the 125 workers affected, only 57 workers received a vacant post. The enterprise dismissed some workers and forced others to resign from the trade union with the offer of a transfer or an economic plan and with the threat of dismissal if they did not resign. Neither did the enterprise comply with article 51 of the agreement, which lays down that a worker shall receive 75 per cent of his/her pension if

he/she has more than 15 years of service and less than 20 and is made redundant without just cause, once he/she reaches 50 years of age.

C. The Government's reply

- 437.** In communications dated 18 February, 5 May, 14 August, 15 and 27 October 2003, the Government indicates, with respect to paragraph (a) of the Committee's recommendations, regarding the alleged dismissals and disciplinary measures against workers belonging to the National Union of Bavaria S.A. Workers (SINALTRABAVARIA) having participated in the strike of 31 August 1999, that there are currently three proceedings under way before ordinary labour courts 16 and 99 of the Circuit Labour Court, relating to Alfonso Maigual, José Luis Salazar Portilla and Luis Alfredo Velásquez Quintero. These proceedings are at the preliminary stage and, once the respective decisions have been handed down, the Government will send these to the Committee.
- 438.** With respect to paragraph (b) regarding intimidation of workers to make them sign a collective agreement, the Government indicates that the employer has the right to sign collective agreements with workers not belonging to trade unions and that these may coexist with collective labour agreements. However, this general rule is subject to the exception found in article 70 of Law No. 50 of 1990 which states "when the trade union or trade unions cover more than one-third of the workers in an enterprise, the enterprise may not sign collective agreements or extend those currently in force". The Government adds that faced with signing the collective agreement, some workers lodged claims for protection of constitutional rights, which was rejected by the courts as being inappropriate in this situation. In effect, the courts considered that the case should be decided in the ordinary labour courts. The Government indicates that the Ministry of Social Protection instituted an administrative labour investigation and that Labour Inspector No. 12 closed the file on the investigation by the Decree of 20 March 2003 because the organization did not meet the requirements of the office, thereby indicating lack of legal interest. With respect to the alleged violations of the collective agreement, the Government states, as it has previously done, that the Ministry of Social Protection carried out two administrative labour investigations, issuing resolutions Nos. 2553 and 2554 of 19 November 2002, through the Cundinamarca Territorial Directorate, in which it decided not to take administrative measures "as these concerned legal issues, which are the prerogative of the courts, and the employees of the Ministry of Labour cannot pronounce on rights or decide issues such as those raised in these cases, because in order to decide such matters it would be necessary to make value judgements". These resolutions are final as the motions for annulment and appeal were submitted outside the time limit. The Government indicates that the two other resolutions are pending. With regard to the untimely closure of enterprises, the Administration of the Inspection and Oversight Group of the Cundinamarca Territorial Directorate in resolution No. 00015 of 10 January 2003, abstained from issuing administrative measures as it considered that there was no closure of the enterprise or collective dismissal of workers, but that the workers accepted voluntarily a retirement plan or freely rejected this without there being any unilateral dismissal by the enterprise. With regard to the refusal to negotiate, in accordance with resolution No. 002455 of 5 November 2002, the Administration of the Inspection and Oversight Group abstained from taking administrative measures, a decision that was confirmed by the Cundinamarca Territorial Directorate in resolution No. 2979 of 27 December 2002. With regard to the refusal to deduct trade union dues, the Government indicates that, in the decision of 22 August 2002, the Cundinamarca Divisional Council of the Judiciary, upheld by the Superior Council of the Judiciary, refused the protection of constitutional rights requested by SINALTRABAVARIA as the enterprise acted in accordance with the provisions of article 400 of the Substantive Labour Code (duty of the trade union organization to communicate its list of members so that the enterprise may

carry out the check-off facility) and that moreover, there were judicial means to appeal against this refusal.

- 439.** With respect to paragraph (d) regarding the allegations of anti-union persecution, the Government notified the territorial directorates of Antioquia and Atlántico to look into the legal basis for an administrative inquiry.
- 440.** With respect to paragraph (e) regarding the closing down of the Caja de Crédito Agrario and the mass dismissals of workers, the Government indicates that the national Government, using its legal and constitutional powers ordered this closure, with there remaining only a manager entrusted with the closure. The Government indicates that the Banco de Crédito Agrario is a distinct entity and has no legal link with the Caja de Crédito Agrario. The Government also refers to the decision of the Supreme Court of Justice, T-550-00, which lays down that, when it is obviously impossible to order that a closed public institution be reinstated, the only viable procedure is for the workers to claim the relevant indemnification in accordance with the law.
- 441.** With respect to paragraph (f) regarding the failure to comply with the orders for reinstatement of the workers of Caja de Crédito Agrario, the Government indicates that, as there was no possibility of complying with the legal rulings, it took conciliation measures with some workers and that the other workers are entitled to initiate legal action for indemnification. The Government stated that it would keep the Committee informed of any proceedings begun in this respect.
- 442.** As regards the Colombian Union of Food, Beer, Malt, Drinks, Juices, Refreshments, Mineral Water Workers of Colombia (USITAC), SINALTRABET and UNITAS, the Government indicates that the Ministry of Social Protection cannot register these trade union organizations due to their non-compliance with the labour legislation in force. These organizations have not complied with the requirements imposed to industry unions; in addition, the by-laws of USITAC contain a large number of provisions that are not in conformity with the Constitution and the legislation. The Government wonders whether these organizations really defend trade union rights as a social objective, or are in fact trying to maintain the job stability of their leaders by abusing the law and ignoring social objectives. Trade union privileged protection is a constitutional concept protecting freedom of association that applies in the first place to trade unions; the protection of job stability of workers' representatives is only a secondary protection. This is why in its judgement c 381 of 2000, the Constitutional Court indicated that "... this privilege is more a guarantee of freedom of association than a protection of the right to work of organized workers". The Government rejects the complainant's interpretation of Article 8 of Convention No. 87, which provides that: "The law of the land shall not be such as to impair, nor shall it be applied as to impair, the guarantees provided for in this Convention"; this does not mean that trade union organizations which do not comply with the legislation (requirements which are not challenged by the ILO supervisory bodies) can be treated on the same footing as those which do respect the legal framework. In other words, Convention No. 87 does not apply to organizations which are not in line with the legislation. The Government indicates that article 333 of the Colombian Constitution deals with economic freedom, whose objective is to seek better efficiency and productivity; this is why, in exercising that freedom, companies are able to offer retirement packages with compensation, suspend some work teams and unilaterally terminate workers' contracts, on condition that they pay the compensation which workers are entitled to. The Government adds, with regard to disciplinary measures, that all workers, regardless of whether or not they are members of a trade union, should respect internal work rules establishing the obligations of parties and elaborated by the employer without intervention by the administrative authorities.

443. As regards the closing of the Colenvases plant, which led to the dismissal of 42 workers, and of seven trade union leaders in violation of their trade union preferential rights, and in violation of the labour ministry resolution authorizing said closing provided that clauses 14 and 51 of the collective agreement were applied, the Government indicates that SINTRALBAVARIA has challenged Resolutions Nos. 2169 of 7 September 1999, 2627 of 22 October 1999 and 2938 of 20 December 1999 before the administrative court, and that it will provide a copy of the relevant decisions.
444. As regards the alleged Government's favouritism towards the Bavaria S.A. enterprise, the Government rejects these allegations and indicates that the Vice-Minister of Labour, in conformity with the applicable legislation, declared that he was not competent with respect to any procedure involving the Bavaria S.A. enterprise, which demonstrates the transparency and impartiality of the Ministry.

D. The Committee's conclusions

445. *Regarding the alleged dismissals and disciplinary measures against members of the National Union of Bavaria S.A. Workers (SINALTRABAVARIA) for having participated in the strike of 31 August 1999, the Committee notes the Government's information that, currently, three proceedings are under way before ordinary labour courts 16 and 99 of the Circuit Labour Court, relating to Alfonso Maigual, José Luis Salazar Portilla and Luis Alfredo Velásquez Quintero. These are at the preliminary stages and, once the respective decisions have been handed down, the Government will send these to the Committee. The Committee notes that the Government does not indicate whether the proceedings refer to dismissals or disciplinary measures, nor whether these are the only proceedings under way. The Committee regrets that four years on from the events, there has still been no legal ruling in that regard and recalls that "justice delayed is justice denied" [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 56]. The Committee expresses its firm hope that the Government will take all possible measures to ensure that the workers and trade union officials who were dismissed or disciplined as a result of the strike of 31 August 1999 will, as soon as possible, have their cases dealt with in the labour courts. The Committee requests the Government to keep it informed in this respect.*
446. *With regard to the allegations by SINALTRABAVARIA concerning intimidation of workers to make them sign a collective agreement and preventing the union from entering the premises to advise workers in that connection, the Committee notes the Government's statement that the employer has the right to sign collective agreements with workers who do not belong to trade unions and that these may coexist with collective labour agreements. The Committee also notes the Government's statement that, faced with signing the collective agreement, some workers lodged claims to protect their constitutional rights and that this was rejected by the courts as being inappropriate in this situation and that the administrative investigation was closed. However, the Committee notes that the question of fact in the investigation was the pressure to sign a collective agreement and the restrictions imposed on trade union officials to enter the premises to advise the workers, and it recalls that governments should guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers, in order to apprise them of the potential advantages of unionization [see **Digest**, 4th edition, 1996, para. 954]. Moreover, regarding the signing of collective agreements, the Committee recalls that in its examination of similar allegations in the framework of two complaints presented against the Government of Colombia, it emphasized "that the principles of collective bargaining must be respected taking into account the provisions of Article 4 of Convention No. 98" and that "collective agreements should not be used to undermine the position of the trade unions" [see 324th Report, Case No. 1973, and 325th Report, Case No. 2068 (Colombia)].*

The Committee requests the Government to take steps to ensure that the trade union organization can negotiate freely and that workers are not intimidated into signing a collective agreement against their will and without the advice from the trade union organization to which they belong. The Committee requests the Government to keep it informed in this respect.

- 447.** *Regarding the failure to apply the collective agreement, the Committee notes the Government's statement that the Ministry of Social Protection, in resolutions Nos. 2553 and 2554 of 19 November 2002, issued by the Cundinamarca Territorial Directorate, decided not to take administrative measures "as these concerned legal issues, which are the prerogative of the courts, and the employees of the Ministry of Labour cannot pronounce on rights or decide issues such as those raised in these cases, because in order to decide such matters it would be necessary to make value judgements". The Committee notes that according to the Government these resolutions are final and that two resolutions are still pending. The Committee requests the Government to keep it informed of the results of the decisions that are pending.*
- 448.** *Regarding the untimely closure of enterprises, the dismissal of many officers and members of various branches and pressure to accept a voluntary retirement scheme, the Committee notes the Government's statement that the Administration of the Inspection and Oversight Group of the Cundinamarca Territorial Directorate, in resolution No. 00015 of 10 January 2003, abstained from issuing administrative measures as it considered that there was no closure of the enterprise or mass dismissal of workers but that the workers had accepted voluntarily a retirement plan or had freely rejected this without there being any unilateral dismissal by the enterprise. The Committee notes that the allegations examined refer to pressure on workers to accept a voluntary retirement plan and that the Government makes no reference to this situation. The Committee requests, therefore, that the Government carry out an investigation to determine whether the retirements were in effect voluntary, or whether pressure was brought to bear on the workers, and to keep it informed in this respect.*
- 449.** *Regarding the refusal to deduct trade union dues, the Committee notes the Government's statement that in the decision of 22 August 2002, the Cundinamarca Divisional Council of the Judiciary, upheld by the Superior Council of the Judiciary, decided not to admit the protection of the constitutional rights initiated by SINALTRABAVARIA as the enterprise acted in accordance with the provisions of article 400 of the Substantive Labour Code, according to which the trade union organization is obliged to communicate the list of members to the enterprise so that it can carry out the check-off facility. Moreover, according to the Government, the trade union organization has at its disposal legal recourse through the ordinary courts to claim these deductions. The Committee requests SINALTRABAVARIA to provide the enterprise with the list of trade union members concerned, so as to ensure that the deduction of trade union dues is carried out without delay.*
- 450.** *Regarding the fact that SINALTRABAVARIA did not attend the hearings of the administrative authority in the framework of the investigations, the Committee notes the explanation of the complainant organization that on a number of occasions and in view of the lack of confidence in the impartiality of the administrative institutions it decided to abandon the claims it had begun and that, in spite of this, the administrative authority issued a resolution in favour of the enterprise. The Committee notes that on other occasions it did not attend hearings because it had not received timely notification of these. The Committee believes that when complainant organizations abandon their administrative claims, the administrative authority must abstain from issuing a resolution on the issue. On the other hand, the Committee requests the Government to ensure that*

notification of hearings, in the framework of the administrative proceedings in progress, take place expeditiously and within the legal time limits.

- 451.** *With regard to the mass dismissals due to the conversion of the Caja de Crédito Agrario into the Banco de Crédito Agrario, the Committee notes that the Government once again states that the Banco de Crédito Agrario is a distinct entity and has no legal link with the Caja de Crédito Agrario, and that referring to a ruling of the Supreme Court of Justice, it states the obvious impossibility of ordering reinstatement in a closed public entity and that the only possible solution is for workers to claim indemnification in accordance with the law. In these circumstances, taking into account the importance of compensating workers without delay when they are dismissed, in this case as a result of the closure of the Caja de Crédito Agrario, the Committee requests the Government to keep it informed of any legal action begun by the workers to obtain compensation and expresses its firm hope that, as this is an issue of labour debt, these claims will be examined with all possible speed.*
- 452.** *With regard to the dismissal of trade union officers despite their trade union immunity and failure to comply with the orders for reinstatement of some of those officers by the Caja de Crédito Agrario, the Committee notes the Government's statement that, as reinstatement was impossible, it took conciliation measures with some workers and other workers were able to claim compensation through the courts. Taking into account that, with regard to the trade union officials, there are already legal rulings ordering their reinstatement and that, according to the Government's statement, this is impossible, the Committee requests the Government to take steps to find a solution that the administration and the trade union officials in question can agree upon, which might consist of compensation. The Committee requests the Government to keep it informed in this respect.*
- 453.** *With regard to the allegations of anti-union persecution against the 47 founders of the Colombian Union of Food, Beer, Malt, Drinks, Juices, Refreshments, Mineral Water Workers of Colombia (USITAC), the disciplinary measures to remove the trade union immunity of William de Jesús Puerto Cano, José Evaristo Rodas and other officials of the organization, the seizure of trade union information bulletins about the founding of USITAC, pressure on the workers which resulted in eight of them leaving the union, as well as the denial of paid trade union leave to trade union officer William de Jesús Puerto Cano, the Committee regrets that the Government has sent no observations and notes that, according to the new allegations presented by the complainant organizations SINALTRABAVARIA and SINALTRAINBEC, the registration of USITAC ordered in resolution No. 680 of 7 June 2002 of the Ministry of Labour was revoked by resolution No. 00027 of 15 January 2003 as a result of an action to protect constitutional rights brought by the Bavaria S.A. enterprise. Subsequently, the registration was once again requested and once again denied as, according to the administrative authority, the previous resolutions were final and legal recourse was the only option; this situation also prevails as regards SINALTRABET and UNITAS. The Committee notes that the Government states that these organizations have not been registered because they did not comply with legal requirements, and wonder whether their ultimate objective is exclusively the job stability of their leaders. The Committee has pointed out that the International Labour Conference, by including the words "organizations of their own choosing" in Convention No. 87, made allowance for the fact that, in certain countries, there are a number of different workers' and employers' organizations which an individual may choose to join for occupational, denominational or political reasons; it did not pronounce, however, as to whether, in the interests of workers and employers, a unified trade union movement is preferable to trade union pluralism. The Conference recognized thereby the right of any group of workers (or employers) to form organizations in addition to the existing organization if they think this desirable to safeguard their material or moral interests [see **Digest**, 4th edition, 1996, para. 286]. The Committee requests the Government to take steps to ensure that USITAC,*

SINALTRABET and UNITAS are registered in the trade union registry without delay as soon as the legal requirements are complied with and to keep it informed in this respect.

- 454.** *With regard to anti-union discrimination against the founders of USITAC, the Committee notes that the complainant organizations allege the dismissal of some of the workers for whom the enterprise had requested the lifting of trade union immunity (Omar de Jesús Ruiz Acevedo, Carlos Alberto Monsalve Luján, Humberto de Jesús Alvarez Muñoz) and further dismissals of trade union officials and members who enjoyed trade union immunity in their capacity as founders and other trade union members as a result of the creation of USITAC. The Committee regrets that the Government has restricted its answer to the fact that the territorial directorates of Antioquia and Atlántico were notified to look into the legal basis for an administrative investigation and recalls that measures taken against workers because they attempt to constitute organizations or to reconstitute organizations of workers outside the official trade union organization would be incompatible with the principle that workers should have the right to establish and join organizations of their own choosing without previous authorization [see **Digest**, 4th edition, 1996, para. 301]. The Committee requests the Government to take the necessary steps to ensure that an investigation into the allegations of dismissal of founders, trade union officials and members of USITAC is carried out and, if it is confirmed that these dismissals took place for anti-union reasons, that the workers affected are reinstated without delay and, in case the reinstatement is not possible, that they be fully compensated. The Committee requests the Government to keep it informed in this respect.*
- 455.** *As regards the closing of the Colenvases plant, which led to the dismissal of 42 workers, and of seven trade union leaders in violation of their trade union preferential rights, and in violation of the labour ministry resolution authorizing said closing provided that clauses 14 and 51 of the collective agreement were applied, the Committee notes that, according to the Government, SINALTRABAVARIA has challenged Resolutions Nos. 2169 of 7 September 1999, 2627 of 22 October 1999 and 2938 of 20 December 1999 before the administrative court, and that it will provide a copy of the relevant decisions. The Committee requests the Government to provide a copy of these decisions as soon as they are issued.*
- 456.** *With regard to the allegations relating to the administrative sanctions imposed on the workers of SINALTRABAVARIA, the Committee notes that according to the Government all workers, including trade union members, are subject to the internal work rules which establish the obligations of the parties. The Committee acknowledges that all workers in an enterprise must comply with the internal disciplinary rules. Nevertheless, the Committee emphasizes that disciplinary rules, and the sanctions entailed by failure to comply with them, should not be used as further measures of anti-union discrimination. The Committee requests the Government to take measures for the holding of an independent investigation to determine whether the internal work rules have been applied uniformly to all workers, regardless of whether or not the workers are unionized, and to keep it informed in this respect. The Committee regrets that the Government has not sent its observations on the dismissals alleged by SINALTRAINBEC and on the numerous allegations of anti-union discrimination presented by SINALTRABAVARIA: pressure on workers to resign from the trade union; denial of trade union leave and access to working areas by trade union officials of SINALTRABAVARIA; delay on the part of the Ministry of Labour in carrying out labour inspections aimed at verifying anti-union activities in the enterprise and in the registration of new executive committees; hiring by the enterprise, as a labour cooperative of workers that it had dismissed.*

The Committee's recommendations

457. *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 dismissals and disciplinary measures against members of the National Union of Bavaria S.A. Workers (SINALTRABAVARIA) for having participated in the strike of 31 August 1999, the Committee expresses its firm hope that the Government will take all possible measures to ensure that all workers and trade union officials who were dismissed and disciplined as a result of this strike will, as soon as possible, have their cases dealt with in the labour courts, and requests the Government to keep it informed in this respect.*
- (b) With regard to the allegations presented by SINALTRABAVARIA concerning intimidation of workers to make them sign a collective agreement and preventing the union from entering the premises to advise workers in that connection, the Committee requests the Government to take the necessary steps to ensure that the trade union organization can negotiate freely and that workers are not intimidated into signing a collective agreement against their will and without the advice from the trade union organization to which they belong. The Committee requests the Government to keep it informed in this respect.*
- (c) With regard to non-compliance with the collective agreement by the Bavaria S.A. enterprise, which gave rise to resolutions Nos. 2553 and 2554 of 19 November 2002 in favour of the enterprise, the Committee requests the Government to keep it informed of the outcome of the appeals against these.*
- (d) With regard to the untimely closure of enterprises, the dismissal of many officers and members of various branches and pressure to accept a voluntary retirement scheme, the Committee requests the Government to carry out an investigation to determine whether the retirements were in effect voluntary or whether pressure was brought to bear on the workers, and to keep it informed in this respect.*
- (e) The Committee requests SINALTRABAVARIA to provide the list of trade union members to the enterprise so as to ensure that the deduction of trade union dues is carried out without delay.*
- (f) With regard to the complainant organization not attending hearings called by the Ministry of Labour, the Committee considers that whenever the complainant organizations abandon the administrative claims they have filed, the administrative authority should refrain from issuing resolutions in this respect. The Committee requests the Government to ensure that notification of hearings in the framework of the administrative proceedings in progress, take place expeditiously within the legal time limits.*
- (g) With regard to the mass dismissals due to the conversion of the Caja de Crédito Agrario into the Banco de Crédito Agrario, the Committee requests the Government to keep it informed of any legal action begun by the workers to obtain compensation for dismissal following the closure of the Caja de Crédito Agrario and expresses its firm hope that, as this is an issue of labour debt, these claims will be examined as quickly as possible.*

- (h) *As regards the dismissal of trade union officers due to failure to recognize their trade union immunity and failure to comply with the orders for reinstatement of some of those officers by the Caja de Crédito Agrario, taking into account that the legal rulings ordered reinstatement and according to the Government this is impossible, the Committee requests the Government to take steps to find a solution that can be agreed upon by the administration and the trade union officers in question, which might consist of compensation. The Committee requests the Government to keep it informed in this respect.*
- (i) *The Committee requests the Government to take steps to ensure that USITAC, SINALTRAINBEC and UNITAS are registered in the trade union registry without delay as soon as the legal requirements are complied with and to keep it informed in this respect.*
- (j) *With regard to the dismissals of trade union officers and members who enjoyed trade union immunity in their capacity as founders and other trade union members as a result of the creation of USITAC, the Committee requests the Government to take the necessary steps to ensure that an investigation in this regard is carried out and, if it is confirmed that these dismissals occurred as a result of anti-union discrimination, that it immediately ensure the reinstatement of the workers affected and, if the reinstatement is not possible, that they be fully compensated. The Committee requests the Government to keep it informed in this respect.*
- (k) *As regards the closing of the Colenvases plant, which led to the dismissal of 42 workers, and of seven trade union leaders in violation of their trade union preferential rights, and in violation of the labour ministry resolution authorizing said closing provided that clauses 14 and 51 of the collective agreement were applied, the Committee requests the Government to provide a copy of the relevant court decisions as soon as they are issued.*
- (l) *With regard to allegations relating to administrative sanctions imposed on the workers of SINALTRABAVARIA, the Committee requests the Government to take measures for the holding of an independent investigation to determine whether the internal work rules have been applied uniformly to all workers regardless of whether or not the workers are unionized, and to keep it informed in this respect.*
- (m) *With regard to the allegations relating to dismissals presented by SINALTRAINBEC and the allegations of anti-union discrimination presented by SINALTRABAVARIA: disciplinary measures against workers and pressure on them to resign from their trade unions; denial of trade union leave and access of trade union officials belonging to SINALTRABAVARIA to workplaces; delay on the part of the Ministry of Labour to carry out labour inspections to confirm anti-union activity in the enterprise and in the registration of new executive committees; hiring by the enterprise, as a labour cooperative of workers that it had dismissed. The Committee requests the Government to send its observations without delay so that it may examine the case in full possession of the facts*



Part II

CASE NO. 2258

INTERIM REPORT

Complaints against the Government of Cuba presented by

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

— **the Latin American Central of Workers (CLAT)**

supported by

— **the World Confederation of Labour (WCL)**

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

458. The complaints in the present case are contained in communications from the International Confederation of Free Trade Unions (ICFTU) (15 April 2003) and the Latin American Central of Workers (CLAT) (28 April 2003). The World Confederation of Labour (WCL) supported the complaint of CLAT in a communication dated 9 May 2003. The Government sent its observations in communications dated 16 May and 6 June 2003.

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

A. The complainants' allegations

460. In its communication of 15 April 2003, the International Confederation of Free Trade Unions (ICFTU) states that the Cuban authorities only recognize one trade union central, the Central Organization of Cuban Trade Unions (CTC), which is under the strict control of the State and the Communist Party, which appoints its leaders. The Government prohibits independent trade unions. Collective bargaining does not exist. The right to strike is not authorized by law and practically does not exist. The Government has not fulfilled any of its promises to reform the Labour Code. In reality, there are a number of independent trade unions, which carry out their activities in a very hostile environment. Workers who try to join these trade unions are persecuted and can lose their jobs.

461. The ICFTU, looking back over what has happened with the independent trade unions, describes events that have taken place and that have harshly affected the activity of these trade unions with an escalation in arrests and harassment of those involved in "counter-revolutionary" activities since 2001.

462. In 2001, the following events took place:

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

463. In 2002, the following events took place:

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

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

464. With regard to 2003, according to ICFTU sources, on 18 March, in the television programme “Round Table” transmitted by Cuban television, the main speaker, Ricardo Alarcón de Quesada, President of the National Assembly of People’s Power (the Cuban Parliament) stated that “the counter-revolutionaries would be judged in accordance with Law No. 88, which relates to the protection of the national independence and economy of the Republic of Cuba, and the Criminal Code in force, which is Law No. 62”. A police operation, already organized against the political opposition, came into effect immediately following the programme and 40 people opposing the regime were arrested by state security agents. These detentions, now amounting to some 78 members, took place as a result of government accusations of treason and conspiracy with the United States Interests Section in Havana. The official government statement said that “they have been arrested by the relevant authorities and will be brought before the courts”. As well as the detentions that took place, all the books in the trade union library of CUTC were confiscated as was a computer, two fax machines, three typewriters and considerable documentation belonging to the trade union.

465. According to the ICFTU, among the detained were the following:

- (1) Pedro Pablo Alvarez Ramos, Secretary-General of CUTC, detained at Villa Marista, general headquarters of state security in Havana, and sentenced to 25 years in prison.
- (2) Iván Hernández Carillo, member of the National Executive Committee of CONIC, beaten and handcuffed to an iron grill. There is a prosecution request for 25 years’ imprisonment that has still not been confirmed. He was transferred to the state security provincial headquarters in the province of Matanzas, where he is being held in solitary confinement.
- (3) On 19 March 2003, Carmelo Díaz Fernández, member of the National Executive Committee of CUTC and Deputy Director of the National Trade Union Training Centre, was detained and taken to state security headquarters. The First National Trade Union Training Seminar, which was planned to take place from 25 to 27 March 2003, had to be postponed as a result of the detention of the organizers. He was sentenced to 15 years’ imprisonment.
- (4) Miguel Galván, another Deputy Director of the Training Centre, who was also detained, has been sentenced to 20 years’ imprisonment.
- (5) Héctor Raúl Valle Hernández, Vice-President of CTDC, was sentenced to 20 years’ imprisonment for the alleged crime of “acts against the territorial independence or integrity of the State”.
- (6) Oscar Espinosa Chepe, member of CUTC was sentenced to 20 years’ imprisonment.
- (7) On 20 March, at 8 o’clock in the morning, Nelson Molinet Espino, Secretary-General of CTDC, was violently evicted from the place where he had declared a hunger strike and was sent to his house on threat of detention. However, on the same day, he was

once again detained and taken to state security headquarters and sentenced to 20 years' imprisonment.

- (8) Víctor Manuel Domínguez García, Director of the National Centre for Trade Union and Labour Training (CNCSL), has had his freedom of movement limited and has been threatened with detention.

466. Furthermore, the ICFTU points out that Aleida de las Mercedes Godines, Secretary-General of CONIC, and Alicia Zamora Labrada, Director of the Trade Union Press Agency Lux Info Press, were two state security agents who were infiltrated into the independent trade union movement. They were identified by the Cuban Government itself in a public ruling against the dissidents. According to information received, Ms. Godines had been infiltrated into the independent trade union movement 13 years ago. She communicated on a number of occasions with both ORIT, the Inter-American Regional Organization of Workers of the ICFTU, and with the ICFTU to request persistently that CONIC be affiliated to both organizations. The ICFTU attaches a press clipping (*Granma* of 11 April 2003).

467. In its communication of 28 April 2003, the Latin American Central of Workers (CLAT) states that Pedro Pablo Alvarez, Secretary-General of CUTC and trade union members Oscar Espinosa Chepe and Carmelo Díaz Fernández, were detained and have been sentenced to 25, 20 and 15 years' imprisonment, respectively, for having expressed openly, publicly and democratically their opinions, in legitimate use of their rights as workers and trade union officials, which shows, once again, the lack of trade union freedom in Cuba. The charges laid against the abovementioned trade union officials do not relate to reality (as is the case, for example, of their receiving funding from a certain country), nor are they, in general, criminal issues; they are arguments that hide a clear political intention, and in no way do they conflict with the responsibility of trade union officials in a free and democratic society. Furthermore, the repressive attitude of the Government of Cuba against CUTC and its officials is nothing new.

468. CLAT also refers to the complaint presented by the World Confederation of Labour (WCL) on 26 March 1998 in Case No. 1961, which has already been examined by the Committee on Freedom of Association.

469. In its communication of 9 May 2003, the WCL supports the claim presented by CLAT on 28 April 2003. The WCL highlights that a number of trade union officials belonging to CUTC, among whom was Pedro Pablo Alvarez, Secretary-General of CUTC, were wrongly detained and sentenced to a number of years in prison. The sentences applied to Pedro Pablo Alvarez, Oscar Espinosa Chepe and Carmelo Díaz Fernández, were for 25, 20 and 15 years' imprisonment, respectively. Added to this is the confiscation of trade union materials found in the CUTC library. Harassment against members of CUTC, according to the WCL, is not a recent event. In Case No. 1961, already examined by the Committee on Freedom of Association, there is abundant proof of this and of the arbitrary behaviour of the Government of Cuba against an independent trade union organization such as CUTC.

B. The Government's reply

470. In its communication of 16 May 2003, the Government states that legislation in force and daily practice in all centres of labour activity in Cuba guarantee the full exercise of trade union activity and the widest enjoyment of the right of freedom of association. This is confirmed by the existence of 19 national trade unions, 5,426 trade union offices with 50,356 territorial trade union officials and 109,522 grass-roots trade union branches with 714,593 trade union officials.

- 471.** The existence of one trade union central has not been imposed by the Government, nor does it relate to any provision that has not been approved by the sovereign will of Cuban workers. The fight for unity in the trade union movement in Cuba has a long and respected tradition which dates back to the nineteenth century and which was strengthened in the difficult and bloody days of workers' demands in the first-half of the twentieth century. In 1938 – long before the triumph of the Cuban revolution and the popular referendum that established the socialist constitution of the country in 1976 – the Workers' Confederation of Cuba was established, through the free and democratic decision of Cuban workers of the time, which, in the following year, became the Central Organization of Cuban Trade Unions. The unity of the workers' movement has been a deciding factor in the history of the independence of the Cuban nation: first, in the fight against Spanish colonialism, subsequently, in the confrontation with North American neo-colonialism and, since 1959, in defence of the Government, which, for the first time in the long history of the country, is exercised by Cuban workers.
- 472.** Following the triumph of the Cuban revolution, impostor trade union officials arrived and endeavoured to impose the Batista dictatorship. The strategic objective was to divide the Cuban trade union movement in order to destroy worker power in Cuba. This clearly subversive activity benefited from numerous resources flowing from official North American funds. There were those who tried to cover up their subversive activities against the constitutional order freely given by Cuban workers by taking the guise of trade union officials, no less.
- 473.** Neither the Labour Code in force, nor complementary legislation, establish prerequisites or conditions for the establishment of trade unions. All Cuban workers have the right freely to join trade unions and to establish trade union organizations without need for prior authorization. All trade unions and the Central Organization of Cuban Trade Unions are fully independent of the Government, the employers and any other commitment that is not the defence of the interests of their worker members. The Government cannot interfere in their activities. They draw up and approve their statutes and regulations, adopt the structure of their organizations, their methods and ways of working, according to their interests, without any control, supervision or interference from any government or party department or employee. The workers belonging to each union nominate and elect their trade union officials at the various levels, from grass-roots workers' assemblies to the regularly held congresses, with the greatest respect for the most strict trade union democracy. Trade union representatives are democratically elected by the workers, they take part with broad powers in the management councils where decisions are taken that affect them, and this both at the basic enterprise level and at the level of the bodies and institutions of the central state administration itself.
- 474.** It is totally incorrect for the ICFTU to allege that there are no collective labour agreements in Cuba. These are agreed individually in all labour centres of the country, in accordance with the laws and regulations of the ILO, the practical application of which has been communicated in the framework of the reports on Convention No. 98. The Labour Code lays down the necessary guarantees for the full exercise of trade union activity in all labour centres of the country and for the broadest participation of workers and their representatives in the adoption of decisions that affect their widest interests.
- 475.** The right to strike is not prohibited in Cuban legislation. However, with the institutionalization of state power in which workers have a decisive influence in the executive, legislative and judicial functions, the exercise of the right to strike has not been necessary. Moreover, this has been possible, thanks to the effective development and implementation of a number of mechanisms to resolve labour disputes, in which trade union representatives have a broad capacity and mandate to speak and to vote. If, at any

time, Cuban workers decided to have recourse to strike action, nothing would prevent them from exercising this right.

- 476.** Worker participation takes place in a normal and institutionalized manner. The effective and direct participation in the distribution and enjoyment of the wealth created by labour has enhanced the focus on collaboration and not on conflict. Cuban workers, collective owners of the basic means of production of the country, are aware that the resources of the country and the wealth that they create will not go to swell private, national or foreign bank accounts. They take part in social dialogue that is participatory and democratic, which enables them every day to better their working and living conditions, in spite of the impact of the blockade against Cuba.
- 477.** The Labour Code is regularly revised and improved from proposals received by the trade union representatives themselves. The most recent proposals for the revision of the Labour Code are currently being analysed and revised. The draft has been submitted to the trade unions and the Central Organization of Cuban Trade Unions for consultation. The latter, at its XVIIIth Congress, agreed to take the draft to the workers for consultation via meetings in labour centres where comments and proposals will be collected for the trade unions to discuss with government representatives. The changes to the Labour Code are not a “government promise” as stated by the ICFTU, neither is this an intellectual exercise in legal technique. This is a democratic and participatory process. The need to change the Labour Code arises out of the change in socio-economic conditions in which the productive activity of the country takes place. The Labour Code needs to reflect these realities and must provide a solution to the problems arising out of development. ILO technical cooperation activities are being implemented in the country. As can be seen, the Cuban Government fully respects the right of workers to be consulted with regard to the new Labour Code.
- 478.** Those people identified by the ICFTU as alleged “independent trade union members” are neither trade union members nor independent. These people have been recruited by the United States Interests Section in Havana to carry out subversive activities against the constitutional order established by the workers of Cuba. Their wages are paid by a foreign power, which is carrying out a policy that is hostile to the Cuban population and Cuban workers, from whose territory they carried out numerous attacks and terrorist activities with impunity that have cost the lives or have caused the permanent mutilation of almost 5,000 Cuban workers.
- 479.** These people have no labour link with any of the Cuban workers’ collectives. They receive large amounts of money from the Government of the United States, which allows them to live without working, betraying the most valuable interests of Cuban workers.
- 480.** In recent months, in particular, the people mentioned by the ICFTU, following instructions from the United States Interests Section in Havana, have intensified their subversive activities in order to force provocation which serves to justify direct military aggression.
- 481.** The Helms-Burton Act, approved in 1996 in clear violation of international law, among other issues, openly encourages the creation of and provides financial assistance to groups and individuals who carry out activities against Cuban constitutional order. The United States Agency for International Development (USAID), in accordance with this and other anti-Cuban laws, is used to channel funds for subversive activities in Cuba. In the year 2000 alone, this agency allocated US\$8,099,181 to this. This figure has reached US\$22 million in the past three years.
- 482.** Organizations of Cuban origin located in southern Florida, supported and protected by the United States Government, promote, finance and implement with impunity terrorist

activities against the country, which have caused enormous human and material damage to workers. These activities include pressure and threats against foreign investors not to invest in Cuba to the detriment of economic development and the creation of employment in the country. In the face of the lack of support from among the Cuban people, the major priority has been to fabricate provocation that will encourage direct military attack by the United States against the island.

483. In 1999, Cuba, with as much right as any other country, and with more reason as the country that is assaulted and directly affected by the hostile policy of the United States, adopted Law No. 88, entitled “Law of Protection of National Independence and Cuban Economy”. This Law provides, among other issues:

Article 5.1. Those who seek information to be used in applying the Helms-Burton Law, the blockade and the economic war against our people, aimed at destroying internal order, destabilizing the country and to destroy the socialist state and the independence of Cuba, will be imprisoned.

484. None of the charges attributed to any of those people identified by the ICFTU bears any relation to the right to establish trade unions or any other field of activity of the ILO. All the people mentioned were judged and sentenced with all guarantees of due process for their activities in the service of a foreign power that maintains a hostile policy towards Cuban workers.

485. In the cases mentioned in the report of the ICFTU, summary or expedited proceedings were used in full accordance with the legislation in force and from the gravity of the crimes committed. This establishes the power of the President of the Supreme Court to shorten the period for enforcement of a sentence; this places no limitations on the guarantees of due process. This proceeding exists in the legislation of more than 100 countries throughout the world. In Cuba, the law on rules of legal procedure in criminal cases dates from 1888; it was enforced as the law on procedure up until 1973, at which point new regulations were adopted that drew largely on this.

486. All the defendants were aware of the charges being brought against them and had the opportunity to refute all that they considered relevant before the sentenced was passed. They were charged before the proceedings opened and they were given the opportunity, as are all those in Cuba, of presenting their explanations, considerations, opinions or any other element of interest relating to the charge.

487. All the defendants exercised their right to professional representation by counsel for the defence who, according to Cuban legislation, can be chosen by the defendant or, failing that, by the court. Fifty-four defence counsel took part in the 29 proceedings. Of the 54 defence counsel, 44 (80 per cent) were chosen by the defendants; ten were court-appointed lawyers.

488. All the defendants exercised their right to have their hearing heard by already established courts. No special – ad hoc – court was established to try them. Their proceedings took place in the relevant provincial courts, according to Cuban law; they were tried by judges who had been nominated prior to charges being laid, judges who already existed and worked in those courts. No emergency judges were nominated, nor were special tribunals set up.

489. All the defendants exercised their right to be heard by pre-existing courts and judges for their hearings; there was a hearing at which the defendant appeared, where he/she exercised the right to intervene to the end, where he/she replied to questions by the counsels for defence and prosecution, where witnesses and experts were called and heard, and were questioned by the counsel for the defence.

- 490.** There was a hearing because the law does not allow a court to make a decision without a hearing, in which, if the defendant pleads guilty or agreement is reached, a sentence can be handed down. In Cuba, hearings are compulsory. Nobody is judged through documentation or without having their opinions and statements and those of their lawyers heard. The hearings were also public. An average of 100 people took part in each hearing. In total, almost 3,000 people took part in 29 hearings, basically relations, as well as witnesses, experts and, on average, around 100 people per hearing.
- 491.** All the defendants and their lawyers exercised their right to present proof in their favour that, as well as the proof presented by the police, was taken into account by the Prosecutor's Office. Each defendant was able to present witnesses. The counsel for the defence presented 28 witnesses who had not previously been called by the Prosecutor's Office, of whom 22, the large majority, were authorized by the courts to stand as witnesses. The counsel for the defence had prior access to the file of the charge.
- 492.** Those who were sentenced have the right to appeal these sentences in a higher court than that in which they were sentenced, in this case the Supreme Court, and Cuban legislation respects that right scrupulously.
- 493.** The Government states that it has been most transparent and meticulous with regard to the physical security and the physical and moral integrity of each of the defendants at all stages of the process. There is not the least bit of evidence, the least suspicion, of coercion, pressure or threat, much less blackmail.
- 494.** The Government has the duty and the right to defend the independence of its people, using the legal means established in the country, within strict respect of national laws and ratified international instruments.
- 495.** The right to a legitimate defence is laid down in the United Nations Charter. Cuba continues to be assaulted by the United States on economic, political and propaganda levels. The person who collaborates with these aims is committing a serious crime. In the cases mentioned, there is the aggravating factor of having carried out these activities for money provided by the power that maintains a hostile and aggressive policy against the Cuban nation.
- 496.** The people mentioned by the ICFTU, as has been stated, were not detained or sentenced for being trade union members. To cite only one example, in the proceedings for Oscar Espinosa Chepe, false trade union official of the non-existent CUTC, irrefutable proof was submitted that from January 2002 up until January 2003, over just one year, he received from abroad US\$7,154 for his subversive activities. In his case, US\$13,660 was found in the lining of a suit, apart from the US\$7,000 he received during the year. This person has had no known labour connection for approximately ten years.
- 497.** The people mentioned were judged and punished for facts and behaviour that are typified in the legislation as crimes, with extensive proof, evidence from experts and witnesses and with procedural guarantees, the protection of criminal procedure Law No. 5 of 1997 and article 91 of the Cuban Criminal Code, Law No. 62 of 1987, which came in turn from the Spanish Criminal Code.
- 498.** This article has been part of Cuban criminal legislation since the time when Cuba was a Spanish colony and it appears almost verbatim in the criminal codes of other countries. It lays down: "Actions aimed at undermining the sovereignty and territorial integrity of the State. Any person who executes an action in the interest of a foreign State with a purpose of harming the independence of the Cuban State or the integrity of its territory shall incur a sentence of ten to 20 years of denial of liberty or death." This clause has existed as such

since the 1936 Social Defence Code in Cuba, which came in its turn from the Spanish code.

- 499.** The Government states that from the comprehensive information that it has presented to the Committee on Freedom of Association, this body will be in a position to conclude its examination of Case No. 2258.
- 500.** In its communication of 6 June 2003, the Government reiterated that none of those detained, and mentioned by the ICFTU in its report, were deprived of their liberty or sentenced because they were trade union members, as none of them were carrying out trade union activities in any labour centre in the country. In fact, not one of them has any labour links because they have been expelled or removed from their workplaces. Far from defending the interests of Cuban workers, they unconditionally support the blockade.
- 501.** These people were judged and sentenced by competent courts for facts and behaviour typified in the laws of the country as crimes, with comprehensive material proofs, evidence from experts and witnesses. The proceedings against them fulfilled all criteria for guarantees of due process, which in Cuba are fully compatible with international norms in force on this subject. It states, moreover, that it has been most transparent and meticulous with regard to the physical and moral security of each one of the defendants at all stages of the proceedings and that there is not the least evidence or suspicion of coercion, pressure or threats.
- 502.** These activities were carried out in the legitimate exercise of the right of free will of the country and in defence of its national security. It reiterates that none of the charges laid against any of those people mentioned by the ICFTU bears any relation to the right of association or any other right that falls within the responsibility of the ILO.
- 503.** In addition to what has been previously stated, the Government states that in the searches carried out in the homes of those who were sentenced, documents, money, materials and means were confiscated that have no relationship to any trade union activity but are used in conspiracy activities to subvert Cuban constitutional order. The detention, household searches, confiscation of resources and materials, as well as the proceedings against each one of these people were carried out strictly within the law, as has always been done for this type of proceeding in the country.
- 504.** The claim in the report on Víctor Manuel Domínguez García is not true, as no type of legal or any other action has been carried out against this person.
- 505.** All the defendants made use of defence counsel services, and defence counsel had access to the documents that contained the prosecution files before the hearing, among other established procedural guarantees. All recognized the charges laid, duly signing their declarations before the acting body for judicial hearing. The charges were duly proven in the hearings, which were held on 3 and 7 April 2003.
- 506.** None of the people mentioned had been elected “trade union official” by any collective labour body. All of them had a standard of living above the Cuban average and other incidental expenses without working. They received frequent supplies of cash and materials to carry out illegal and hostile activities against the established constitutional order.
- 507.** The inappropriately named “Single Council of Cuban Workers” (CUTC), and the other factions calling themselves “trade unions” and which only exist on the payroll of the United States Interests Section in Havana, far from defending the interests of Cuban workers, carried out activities in unconditional support for the economic, commercial and

financial blockade criticized in successive resolutions of the United Nations General Assembly.

508. The purported foreign representative of the non-existent “CUTC” is René Laureano Díaz Gonzáles, a resident of Miami, and President of the so-called “Trade Union Federation of Electric, Gas and Water Plant of Cuba in Exile”, who, before leaving the country, was directly involved in an explosives attack carried out in 1960 against the Thermolectric Power Station in Tallapiedra, Havana. He has taken part in a number of other terrorist activities against Cuban workers. He has personally funded and directed various terrorist organizations such as the “Rebel Army in Exile”, the “Comandos Eléctricos” and the “Comandos Mambises”. Through the previously mentioned organizations, he has attempted to introduce false currency in Cuban territory to sabotage the economy and to recruit activists whom he has trained in carrying out acts of sabotage against the national electricity and energy system and assassination attempts on the life of the Cuban Head of State.

509. The Government also provides further information on the people mentioned in the complaint:

- Pedro Pablo Alvarez Ramos, detained on 18 March 2003, prosecuted under preliminary investigation file No. 374/03, with a prosecution request for life imprisonment, based on article 91 of the Criminal Code, for “acts against the territorial independence or integrity of the State”. He was sentenced by the appropriate court to 25 years’ imprisonment. The CUTC referred to, an illusory and non-existent organization, over which Mr. Alvarez was the self-styled president, has the singular characteristic that it does not form a group of workers. He does not work and he supports himself on financing received from terrorist organizations in Miami and from the Government of the United States. In spite of his known activities in conspiring against and subverting Cuban constitutional order, which includes public support for the blockade, he has close links with the illegal activities of the abovementioned terrorist René Laureano Díaz Gonzáles.
- Oscar Espinosa Chepe, detained on 19 March 2003, prosecuted under preliminary investigation file No. 351/03, with a prosecution request for 25 years’ imprisonment, based on Law No. 88 (already explained in the initial communication sent on 16 May 2003). This demand was upheld by the appropriate court. Mr. Chepe is a self-styled member of the national executive committee of the non-existent CUTC. Through Pedro Pablo Alvarez Ramos, he has similar links with the terrorist organizations of Cuban origin in Miami and with United States federal agencies, the intelligence services, among others. He is paid to fabricate false information against the Cuban political system and economy. He has actively worked to prevent foreign investment in Cuba. He took part in a number of meetings with employees from the United States Interests Section in Cuba from whom he received money and instructions for conspiring against Cuban constitutional order.
- Carmelo Agustín Díaz Fernández, detained on 19 March 2003, prosecuted under preliminary investigation file No. 347/03, with a prosecution request for 15 years’ imprisonment, based on article 91 of the Criminal Code for “acts against the territorial independence or integrity of the State”, and sentenced by the appropriate court to 16 years’ imprisonment. He is the self-styled official of the non-existent “Independent Trade Union Press Agency”. His activities, ordered and financed by the United States Government, include fabrication and dissemination of false news, inciting public disorder and direct action, using any means possible, against the constitutional order of the country. Previously, he was expelled from another faction for taking, for his own personal ends, funds received by the faction, taking advantage

of his position of “treasurer” in this faction. He has been employed by the purportedly named “Radio Martí” (a subversive service against Cuba of the official radio programme Voice of America) and by “Voice of the Foundation”, a peripheral service of the terrorist Cuban-American National Foundation. He has also maintained permanent links with employees of the United States Interests Section in Cuba, who have entrusted him with a number of subversive activities against Cuban constitutional order and the search for information relating to Cuban national security.

- Héctor Raúl Valle Hernández, detained on 19 March 2003, prosecuted under preliminary investigation file No. 341/03, with a prosecution request for 15 years’ imprisonment, based on article 91 of the Criminal Code for “acts against the territorial independence or integrity of the State”, and sentenced by the appropriate court to 12 years’ imprisonment. He has a comprehensive history of anti-social behaviour and is involved in illegal activities such as the trafficking and sale of dollars and the illegal resale of products stolen from businesses in the country. All the activities that he has carried out have been aimed at justifying his inclusion in the “political refugees” programme established by the United States Interests Section in Cuba. His priority is to obtain a visa, by this means, to emigrate to the United States. He was involved in attempts to leave Cuba illegally in 1995, 1996, 1998, 2000 and 2002; on the most recent occasion, he was returned by American coast guards. He received money for his purported function of “vice-president” of the non-existent “Confederation of Democratic Workers of Cuba”. He had links with terrorist organizations located outside of Cuba, such as the so-called “Free Homeland Foundation” and the “Democratic Party 30 November, Frank País” from which he received funding to recruit “new people” for subversive activities in Cuba and the organization of activities against the constitutional order.
- Iván Hernández Carrillo, detained on 18 March 2003, prosecuted under preliminary investigation file No. 19/03, with a prosecution request for 30 years’ imprisonment, based on Law No. 88, and sentenced by the appropriate tribunal to 25 years’ imprisonment. He has a comprehensive record of anti-social activities. It is not known whether he has ever worked. He lived on payments from terrorist groups of Cuban origin in Miami and from the United States Government for his subversive activities against Cuban constitutional order. He was warned on a number of occasions, in accordance with Cuban legislation, by the appropriate authorities, with regard to his participation and organization of illegal and damaging activities against constitutional order, including a number of activities against public order. In 1997, a file in the preliminary stages was opened on him for illegal activities in the service of the United States Interests Section in Havana. He has maintained systematic links with the United States Interests Section, from which he received funding to carry out subversive activities against the constitutional order of the country.
- Miguel Galván Gutiérrez, detained on 18 March 2003, prosecuted under preliminary investigation file No. 341/03, with a prosecution request for life imprisonment, based on article 91 of the Criminal Code for “acts against the territorial independence or integrity of the State”, and sentenced by the appropriate court to 26 years’ imprisonment. He worked for false information agencies created and financed by the Central Intelligence Agency, with the aim of disseminating false information about Cuban life. He swindled a number of people, to whom he offered “guarantees” that their requests to emigrate to the United States would be accepted in exchange for which he would use their signatures to support counter-revolutionary plans to subvert Cuban constitutional order, accepted in a referendum by more than 97 per cent of the Cuban population. He has regular links with members of terrorist organizations based in Miami and with employees of the United States Interests Section in Havana, from

whom he received subversive materials, equipment and funding to carry out activities against the Government.

- Nelson Molinet Espino, tried for an assassination attempt against a public official, under accusation No. 10083/96, preliminary investigation file No. 31/96. He did not work. As the so-called secretary of the non-existent CTDC, which groups together a small number of people who have no labour links, he organized unrelated activities that had no bearing on protecting the rights of workers and that, on the contrary, were a threat to the physical security and integrity of Cuban workers. Among these should be mentioned support for aggressive raids on Cuban sovereign territory carried out by sea and by air by terrorist groups from Miami. He carried out a number of activities aimed at increasing the negative impact of the blockade. He maintained regular links with the United States Interests Section in Havana, from which he received materials and instructions for his subversive activities. He was detained on 20 March 2003, with a prosecution request for 20 years' imprisonment, under article 91 of the Criminal Code, preliminary investigation file No. 345/03. He was sentenced by the appropriate court.
- Víctor Manuel Domínguez. The claim in the report is false as he enjoyed freedom of movement and activity and was not the subject of any type of legal proceedings or administrative proceedings of any other kind.

510. The Government states that, as can be seen, the abovementioned people are not trade union members. They took instructions from the United States Interests Section in Havana. All of them supported the United States Government blockade against the Cuban people. They were all responsible for carrying out activities to promote and to justify military aggression against the Cuban people. The Committee on Freedom of Association should take into consideration that these were not trade union members carrying out their legitimate right to action to protect the interests of workers. Much less were they tried for activities defending workers. The Government believes that this information will be sufficient for any objective and impartial body to consider closed any examination of a communication based on false arguments, as is the case with the complaint against Cuba by the ICFTU, which has given rise to Case No. 2258. The Government reiterates its full commitment to freedom of association and protection of the rights of workers. The Government will continue to refute false complaints put forward by false trade union officials against the great process of social transformation undertaken by Cuban workers. The Government is always ready to cooperate with the Committee on Freedom of Association of the ILO as it carries out its mandate.

C. The Committee's conclusions

511. *The Committee notes that in the present complaint the complainant organizations have presented allegations referring to the following issues:*

The authorities recognize only one trade union central controlled by the State and by the Communist Party and prohibit independent trade unions, which have to carry out their activities in a very hostile environment; non-existence of collective bargaining; non-recognition of the right to strike; arrest and harassment of trade union members, threats of criminal penalties; physical violence, unlawful entry, trials and sentencing of trade union officials to long prison terms; confiscation of trade union property and infiltration of state agents into the independent trade union movement.

The authorities recognize only one trade union central controlled by the State and by the Communist Party and prohibit independent trade unions, which have to carry out their activities in a very hostile environment

- 512.** *The Committee notes the Government's statements with regard to the allegations and, in particular, the Government's statement: (1) that the single trade union central in existence (that currently brings together 19 national trade unions, 5,426 trade union offices with 50,356 territorial trade union officials and 109,522 grass-roots trade union branches with 714,593 trade union officials) has not been imposed by the Government, is exclusively the result of the sovereign will of the workers, and dates back to before the revolution as it was established in 1938 as the Workers' Confederation of Cuba which became, in the following year, the Central Organization of Cuban Trade Unions (CTC); (2) neither the Labour Code in force in Cuba, nor complementary legislation, lays down requirements or conditions for the establishment of trade unions; all Cuban workers have the right freely to join a trade union and to establish trade union organizations, without need for prior authorization; (3) the trade unions and the CTC are fully independent of the Government (which cannot interfere in their activities), employers and any other commitment that is not the protection of their worker members; (4) workers belonging to each trade union draw up and approve their statutes and regulations, adopt the structure of their organizations, their methods and ways of working, according to their interests, without any control, supervision or interference from any public official, government department or political party; they nominate and elect their trade union officials at the various levels, with absolute respect for the most strict trade union democracy; (5) the trade representatives democratically elected by the workers take part with broad powers in the management councils where decisions are taken that affect them, and this both at the basic enterprise level and at the level of the bodies and institutions of the central state administration.*
- 513.** *With regard to these allegations, the Committee is bound to take into account that in Cuba there is only one officially recognized trade union central that is mentioned in the legislation. On a number of previous occasions it has received complaints concerning the non-recognition of trade union organizations other than the officially recognized existing trade union structure, in particular, from the Confederation of Democratic Workers of Cuba (CTDC) (Case No. 1805) and from the Single Council of Cuban Workers (CUTC). (Case No. 1961), also mentioned in the present case. The Committee stresses that when national legislation designates a particular trade union or employers' organization for recognition it violates the intent and provisions of Conventions Nos. 87 and 98.*
- 514.** *In this respect, the Committee notes that in its last report adopted in 2002, the Committee of Experts on the Application of Conventions and Recommendations referred to the need to remove from the Labour Code of 1985 the reference to "Confederation of Workers". The Committee emphasizes that trade union pluralism must remain possible in all cases and that the law should not institutionalize a de facto monopoly; even in a situation where at some point all workers have preferred to unify the trade union movement, they should still remain free to choose to set up unions outside the established structures should they so wish. The Committee stresses that when national legislation designates a particular trade union or employers' organization for recognition it violates the intent and provisions of Conventions Nos. 87 and 98.*
- 515.** *In these circumstances, the Committee emphasizes that in accordance with Convention No. 87, ratified by Cuba, workers should have the right to establish in full freedom the organizations that they consider necessary independently of whether they support or not the social and economic model of the Government, including the political model of the country, and that it is for these organizations to decide whether they shall receive funding for legitimate activities to promote and defend human rights and trade union rights. All*

trade union options that do not resort to violence should be able to exist and to express their views. Noting that the proposals for revision of the Labour Code are being studied, the Committee asks the Government to adopt without delay new provisions and measures to recognize fully in law and in practice the right of workers to establish the organizations that they consider necessary at all levels, and the right of these organizations freely to organize their activities. The Committee requests the Government to keep it informed in this respect.

- 516.** *The Committee also notes the Government's statement that the CUTC is an illusory and non-existent organization that does not group together workers but rather a small number of people who do not work, and that it maintains itself by funding received from abroad. According to the Government, the so-called "Single Council of Cuban Workers" (CUTC) and the other factions that call themselves "trade unions" do not protect the interests of Cuban workers and support unconditionally the economic, commercial and financial blockade imposed against the Cuban people.*
- 517.** *The Committee also notes that according to the Government the foreign representative of the non-existent "CUTC" is the president of what is known as the "Trade Union Federation of Electric, Gas and Water Plant of Cuba in Exile" who, before leaving the country, was directly involved in an explosives attack carried out in 1960 against the Thermoelectric Power Station in Tallapiedra, Havana, and has taken part in a number of other terrorist activities against Cuban workers.*
- 518.** *In this respect, the Committee must recall that, according to the ILO, "the term 'organization' means any organization of workers or of employers for furthering and defending the interests of workers or of employers". As the Committee has already indicated in its examination of Case No. 1961 [see 328th Report, paras. 40-43], the CUTC is affiliated to the Latin American Central of Workers (CLAT) and to the World Confederation of Labour (WCL), international trade union organizations, and it requested registration from the Ministry of Justice in 1995. The Committee requests the complainant organizations to send a copy of the statutes of each of the organizations mentioned in the complaint (CUTC, CONIC and CTDC), so that it might examine this aspect of the case in full knowledge of the facts.*

Non-existence of collective bargaining

- 519.** *The Committee notes the Government's statement that: (1) the allegation by the ICFTU that there are no collective labour agreements in Cuba is completely untrue. These are agreed on an individual basis in each of the labour centres of the country, in accordance with laws and regulations of the ILO, the practical application of which has been communicated in the framework of the reports on Convention No. 98; and (2) the Labour Code establishes the necessary guarantees for the full exercise of trade union activity in all labour centres of the country and for the broadest participation of workers and their representatives in the adoption of decisions that affect their widest interests.*
- 520.** *The Committee requests the Government to provide detailed information on the various collective agreements signed in recent years (the parties to the agreements, the subject matter of the agreements, the number of workers covered in the private sector and in the public sector).*

Non-recognition of the right to strike

- 521.** *The Committee notes the Government's statement that the right to strike is not prohibited in Cuban legislation; however, with the institutionalization of state power, in which workers have a decisive influence in the executive, legislative and judicial functions, the*

exercise of this right has been unnecessary. According to the Government, this has also been possible due to the effective development and implementation of a number of mechanisms for resolving labour disputes, in which trade union representatives have a broad capacity and mandate to speak and to vote. The Government emphasizes that, should Cuban workers decide to resort to strike action, nothing prevents them from exercising this right.

- 522.** *In this respect, the Committee recalls that “it has always recognized the right to strike by workers and their organizations as a **legitimate means** of defending their economic and social interests [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 474]. The Committee requests the Government to take measures to ensure the effective recognition of the right to strike and guarantee that no one will be discriminated against or suffer prejudice in their employment as a result of the peaceful exercise of the right to strike. The Committee requests the Government to keep it informed in this respect.*

Detention of trade union members; physical violence, trials and sentencing of trade union officials to long prison terms

- 523.** *The Committee notes with deep concern the allegations relating to the detention and the extremely harsh sentencing of trade union officials of CUTC, CONIC and CTDC. The Committee highlights, in particular, that the complainant organizations confirm that these people are trade union members. The allegations of the ICFTU, CLAT and WCL cover the following sentences: sentences of 15 to 26 years’ imprisonment for trade union members Pedro Pablo Alvarez Ramos (25 years, according to the Government), Carmelo Diaz Fernández (15 years, according to the Government), Miguel Galván (26 years, according to the Government), Héctor Raúl Valle Hernández (12 years, according to the Government), Oscar Espinosa Chepe (25 years, according to the Government) and Nelson Molinet Espino (20 years, according to the Government); according to the ICFTU, there is also a prosecution request for 25 years’ imprisonment for Iván Hernández Carillo (the Government states that he was sentenced to 25 years’ imprisonment), who, moreover, has been beaten.*

- 524.** *The Committee also notes the Government’s statements that none of the people mentioned by the ICFTU were trade union members, nor were they tried, deprived of their freedom or sentenced for being trade union members or for carrying out trade union activities in defence of workers; none of them carried out trade union activities at their labour centre and none of them had any labour links; none of these people had been elected “trade union official” in any centre of the country. The Government states that: (1) all of these people had a standard of living that was higher than the Cuban average and other incidental expenses without working with money that they received from abroad to carry out activities that were illegal and contrary to constitutional order; (2) none of the charges against them had any bearing on the right to association or any other area of activity falling under the purview of the ILO; (3) these people were tried and sentenced by courts for facts and conduct typified as crimes; (4) the searches of the homes of those who had been sentenced led to the confiscation of documents, money, materials and means that were used in conspiracy activities to subvert Cuban constitutional order; (5) all of the defendants recognized the charges against them, duly signing their declarations before the judicial body; the charges brought were duly tried in legal hearings.*

- 525.** *With regard to the reasons for the proceedings against those people mentioned in the complaints, the Committee notes the Government’s statement that they were tried and sentenced for activities classified as crimes by Cuban legislation, and that the hearings and sentencing of these people were carried out in legitimate exercise of the right of free determination of the country and in defence of its national security; all those sentenced are*

responsible for carrying out activities aimed at promoting and justifying military aggression and restricting the right to free determination of the Cuban people. According to the Government, the people mentioned were tried and sentenced under the protection of Criminal Procedure Law No. 5 of 1977 and article 91 of the Cuban Criminal Code, Law No. 62 of 1987. Article 91 lays down:

Acts against the territorial independence or integrity of the State. Whoever executes an action in the interest of a foreign State with the purpose of harming the independence of the Cuban State or the integrity of its territory shall incur a sentence of ten to 20 years of denial of liberty or death.

- 526.** *The Committee notes the Government's statement that those who were sentenced enjoyed all the guarantees of due process (which it listed) although it acknowledged that this was a summary hearing (on the authority of the President of the Supreme Court) and stated that this in no way limited the guarantees of due process. The Committee notes the Government's statement that the detentions, search of houses and confiscation of resources and means were carried out within the law. The Committee notes the Government's information on detentions and sentencing of specific people referred to as trade union members by the complainant organizations (allegations relating to 2003) or on the records of these people. According to the cases, they are accused in the Government's reply of the following charges (mostly non-specific): funding by organizations that the Government qualifies as terrorist organizations, providing services to these organizations, subversive and conspiratorial activities, support for the blockade against Cuba, links with intelligence services in a foreign country (accepting money and instructions), fabrication of false information to support the blockade, obstructing foreign investment, acts against the territorial independence or integrity of the State, inciting public disorder, direct activities against constitutional order, links with foreign employees, the search for information relating to Cuban security, records of anti-social behaviour, trafficking and sale of dollars, illegal resale of products stolen from businesses in the country, receiving funding for recruitment of people to carry out subversive activities, activities against public order, being in the service of false information agencies, swindling various people to gain support for counter-revolutionary plans, receiving subversive material and funding for activities against the Government.*
- 527.** *However, the Committee notes that some of the charges or records indicated by the Government are too vague or are not necessarily criminal and can come under the definition of legitimate trade union activities, while the legislation cited by the Government envisages sentences that could include death.*
- 528.** *The Committee must remind the Government that detention and sentencing of trade union officials or members for reasons relating to activities to defend the interests of workers is a serious violation of public freedoms in general and trade union freedoms in particular. Taking into account the various cases presented to the Committee relating to harassment and detention of members of trade union organizations that are independent of the established structure, and also taking into account that the sentencing was handed down in summary hearings of very short duration, the Committee requests the Government to take steps to release immediately the people mentioned in the complaints. The Committee requests the Government to send copies of the criminal sentences handed down against these people and regrets that this has still not taken place in spite of the request to this effect made by the Office on 22 May 2003 in the framework of the procedure in force.*
- 529.** *Finally, the Committee notes that the Government denies utterly that Víctor Manuel Domínguez García, Director of the National Centre for Training, had been the subject of any proceedings against his freedom of movement.*

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

530. *The Committee regrets that the Government has made no reply to this allegation and urges it to send its observations without delay.*

Infiltration of State agents into the independent trade union movement

531. *The Committee notes the allegations of the ICFTU, which state that Aleida de las Mercedes Godines, Secretary of CONIC, and Alicia Zamora Labrada, Director of the Trade Union Press Agency Lux Info Press, were two state security agents infiltrated into the independent trade union movement (the former for 13 years, according to information received from the ICFTU). The Committee notes that the ICFTU has attached a press clipping (*Granma* of 11 April 2003) that confirms these allegations. The Committee notes that the Government has made no reply to these allegations and urges it to send detailed observations in this respect without delay.*

ICFTU allegations for 2001 and 2002 (threats against trade union members, sentencing of a trade union member to two years in prison, violence against trade union members, detentions, searches of houses, and attempts by the police to prevent a trade union congress)

532. *The Committee notes with regret that the Government has not given specific replies to the following allegations:*

2001

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

2002

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

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

533. *The Committee urges the Government to send detailed observations on these allegations without delay.*

534. *The Committee urges the Government to accept a direct contacts mission.*

The Committee's recommendations

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

- (a) *The Committee emphasizes that, in accordance with Convention No. 87, ratified by Cuba, workers should have the right to establish, in full freedom, the organizations that they consider necessary irrespective of whether or not they support the social and economic model of the Government, including the political model of the country, and that it is for these organizations to decide whether they shall receive funding for legitimate activities to promote and defend human rights and trade union rights.*
- (b) *Noting that the proposals for revision of the Labour Code are currently being considered, the Committee requests the Government to adopt, without delay, new provisions and measures to recognize fully in law and in practice the right of workers to establish the organizations that they consider necessary at all levels, and the right of these organizations freely to organize their activities. The Committee requests the Government to keep it informed in this respect.*
- (c) *The Committee requests the complainant organizations to send a copy of the statutes of each of the organizations mentioned in the complaint (Single Council of Cuban Workers (CUTC), Independent National Workers' Confederation of Cuba (CONIC) and Confederation of Democratic Workers of Cuba (CTDC)).*
- (d) *The Committee requests the Government to provide detailed information on the various collective agreements signed in recent years (the parties to the agreements, the subject matter of the agreements, the number of workers covered in the private sector and in the public sector).*
- (e) *Noting that it has always recognized the right to strike as a legitimate right of workers and their organizations in defence of their economic and social interests, the Committee requests the Government to take measures to ensure the effective recognition of the right to strike and guarantee that no one will be discriminated against or suffer prejudice in their employment as a result of the peaceful exercise of this right. The Committee requests the Government to keep it informed in this respect.*

- (f) *The Committee is extremely concerned to note the allegations relating to the detention and the extremely harsh sentencing (between 15 and 26 years' imprisonment) of trade union officials of CUTC and CTDC.*
- (g) *The Committee must remind the Government that the detention and sentencing of trade union officials or members for carrying out activities to defend workers' interests is a serious violation of public freedoms in general and trade union freedoms in particular. The Committee requests the Government to take steps to release immediately the people mentioned in the complaints: Pedro Pablo Alvarez Ramos, Carmelo Díaz Fernández, Miguel Galván, Héctor Raúl Valle Hernández, Oscar Espinosa Chepe, Nelson Molinet Espino and Iván Hernández Carrillo. The Committee also requests the Government to send copies of the criminal sentences handed down against these people.*
- (h) *The Committee regrets that the Government has not replied to the allegations relating to the confiscation by the police in March 2003 of books from the CUTC trade union library, a computer, two fax machines, three typewriters and numerous documentation. The Committee urges the Government to send its observations without delay.*
- (i) *The Committee regrets to note that the Government has not replied to the allegations of the International Confederation of Free Trade Unions (ICFTU), according to which Aleida de las Mercedes Godines, Secretary of CONIC, and Alicia Zamora Labrada, Director of the Trade Union Press Agency Lux Info Press, were two state security agents infiltrated into the independent trade union movement (the former 13 years ago, according to information received from the ICFTU). The Committee urges the Government to send detailed observations in this respect without delay.*
- (j) *The Committee notes with regret that the Government has given no specific reply to the allegations of the ICFTU relating to years 2001 and 2002 (threats against trade union members, sentencing of a trade union member to two years in prison, violence against trade union members, detentions, searches of houses and attempts by the police to prevent a trade union congress). The Committee urges the Government to send detailed observations on these allegations without delay.*
- (k) *The Committee urges the Government to accept a direct contacts mission.*

CASE NO. 2201

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

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

- **the International Union of Food, Agricultural,
Hotel, Restaurant, Catering, Tobacco and Allied
Workers' Associations (IUF) and**
- **the Ecuadorian Confederation of Free Trade
Union Organizations (CEOSL)**

Allegations: Violation of the right to strike at the Los Alamos ranch. Specifically, an invasion by hundreds of armed attackers who shot at the strikers, wounding 12 workers (two seriously), abuse of workers and looting of their property, and the introduction onto the ranch of strike-breakers supported by hired assassins

536. The Committee examined this case at its November 2002 meeting and submitted an interim report to the Governing Body [see 329th Report, paras. 493-511, approved by the Governing Body at its 285th Session (November 2002)]. The Government sent further observations in communications dated 14 November 2002 and 8 January and 30 April 2003.

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

A. Previous examination of the case

538. The complainant organizations had alleged serious violations of the right to strike at the Los Alamos ranch in May 2002. According to the complainants, the response to the strike was an invasion of the plantations by hundreds of armed and hooded men, who wounded 12 workers (two seriously). It was also alleged that the attackers abused a group of 60 to 80 workers and looted workers' belongings; the attackers were subsequently evacuated by helicopter. Finally, it was alleged that, when negotiations began, the employers brought in strike-breakers accompanied by hired assassins [see 329th Report, para. 506].

539. As regards the labour aspects of the conflict at the Los Alamos ranch, the Committee noted at its November 2002 meeting that the allegations were connected with the negotiation of a collective agreement and that the complainant recognized that there had been negotiations, but stated that the employers would not compromise and, while acknowledging that the labour legislation was not being complied with, still ignored the issues of reinstatement of the dismissed workers, job security and compensation for the injured. The Committee noted that the Government had provided information on the steps taken by the authorities in accordance with the normal procedures for labour disputes (independent mediation and the simultaneous intervention of three Conciliation and Arbitration Tribunals) [see 329th Report, para. 509].

540. The Committee made the following recommendations [see 329th Report, para. 511]:

As regards the allegations of serious wounding of trade unionists and abuse and aggression against strikers and their property at the Los Alamos ranch, the Committee emphasizes the gravity of the allegations. The Committee urges the competent authorities to ensure immediately that an investigation and legal proceedings are commenced to find out what happened, define responsibilities, punish the guilty parties, and award compensation and prevent such incidents happening again. The Committee requests the Government to inform it in this respect.

The Committee requests the Government to encourage negotiation in good faith between the parties with a view to the conclusion of a collective agreement on general working conditions, hopes that the three Conciliation and Arbitration Tribunals will pronounce without delay on other, more specific issues relating to the strike at the Los Alamos ranch (dismissals, compensation of the injured, the introduction of strike-breakers, etc.) and requests the Government to inform it in this respect.

B. The Government's replies

541. In its communications of 14 November 2002 and 8 January and 30 April 2003, the Government states that at the time when the current complaint was made there were no trade unions at the Los Alamos ranch and it is inappropriate to speak of the serious wounding of "trade unionists". While it is true that there were alleged criminal acts on the premises of the Los Alamos ranch, these are not related to the infringement of the rights embodied in ILO Conventions Nos. 87 or 98, but are purely of a criminal nature. The alleged injured parties did not submit specific accusations and as a result the criminal proceedings were based on the accused's statement and the subsequent indictment. On 28 January 2003, the judicial authority adopted a ruling whereby 16 individuals were charged as the alleged culprits of the offence defined in section 162 of the Penal Code in accordance with section 470 of the same Code without ordering preventive detention, in accordance with the provisions of section 173 of the Code of Penal Procedure. Section 162 of the Penal Code provides penalties for civilians who carry firearms without authorization, while section 470 defines as an offence a dispute or assault in which more than two people are involved and which causes wounds or injuries, without stating who caused the injuries; in such cases, the alleged culprits are deemed to be those who exercised violence against the aggrieved party. In addition section 173 of the Code of Penal Procedure provides that if the penalty for the offence is not longer than one year, preventive detainment will not be ordered; the same applies in private actions (in this case there was no specific accusation). This explains why those accused have not been detained. The judge will determine the penalty to be applied, depending on the severity of the various actions that contributed to the offence or crime.

542. As regards the labour aspects of the complaint, the Government states that the Ministry of Labour and Human Resources set up a specialized commission of investigation, in which a workers' representative participated, and which concluded as follows:

- the lists of demands submitted included individuals who no longer worked at the enterprise (including those who presented themselves as leaders of the "special committee" of workers);
- most of the workers were placed by private placement agencies that have their own trade unions which cannot conclude collective agreements with the *Industrial Bananera Los Alamos*, although they could do so with the private agencies in question;
- the parties did not meet at the mediation stage (owing in particular to the fact that the workers failed to attend on three occasions and the employer failed to attend on one);

- some dismissals of workers occurred before the submission of the lists of demands; on 8 March 2002 the employers appeared before the head of the labour inspectorate to announce the unilateral termination of employment of 43 workers, as well as the amounts of compensation that would be paid. As a result, a further administrative procedure is not possible, as there is no legislation in the country providing for the reinstatement of workers dismissed in this way;
- the collective agreements submitted by the trade unions from the private placement agencies (BEDUCORP S.A., CLIADI S.A. and NEMRO S.A.) were returned to the workers on 6 December 2002 for them to comply with the legal requirements that were missing from their demands;
- the rulings of the Conciliation and Arbitration Tribunals are similar for CLIADI S.A., NEMRO S.A. and BEDUCORP S.A., owing to the basic similarity of the circumstances relating to the claims; in the ruling, the proceedings instituted were declared to be null and void as a result of various defects and failure to meet legal requirements;
- on 14 October 2002, the Conciliation and Arbitration Tribunals, in a majority decision, rejected the appeal lodged by the workers, for the following reasons: (1) according to the records of the assembly on 23 September 2002, the (former) strikers who requested the appeal presented 144 signatures with their appeal; (2) examination of those signatures shows that some signatures were repeated, and it was found that some of the people on the list did not work at the enterprise in question, which was substantiated by records of social security contributions made in February 2002; the fact that 29 of the workers in question claim not to have attended the assembly on 23 September 2002; and that as a result it is not their signatures that appear on the record (these claims have been recognized and endorsed before a public notary); and (3) the ruling of the Tribunal that the lists of demands is null and void cannot be appealed against. For all these reasons, it was decided to close the case definitively.

543. The specialized commission of investigation noted an omission on the part of the labour inspector who received notification of the strike, in that he failed to implement the provision of section 506 of the Labour Code and its amendments by failing to obtain immediate assistance with a view to safeguarding order and safety (of employers and workers) and preventing the involvement of strike-breakers. This particular circumstance was taken into consideration by the Ministry of Labour, and had an adverse influence on the subsequent course of events.

544. Lastly, the Government forwarded a police report of September 2002 according to which the former workers were no longer in the vicinity and both employers and workers were working normally.

C. The Committee's conclusions

545. *First, the Committee notes the Government's statements to the effect that in the present case there are no grounds for alleging wounding of "trade unionists" or any other criminal acts linked with the violation of rights embodied in ILO Conventions Nos. 87 or 98, since at the time when the complaint was made there were no trade unions at the Los Alamos ranch. Nevertheless, the Committee emphasizes that in its reply the Government stated that most of the workers were placed by private employment agencies which had their own trade unions, but that these unions were not able to conclude a collective agreement with the Industrial Bananera Los Alamos (although they were able to do so with the private agencies).*

546. *As regards the allegations regarding the wounding of workers (12 were injured, two of them seriously), abuse and assaults against strikers and their property, dating from May 2002, the Committee notes the Government's statements regarding the criminal proceedings in which 16 individuals have been charged with unlawful possession of firearms and assault involving more than two persons causing injuries. The Government also states that the labour inspector failed to obtain assistance to safeguard the physical safety of persons and public order and prevent the involvement of strike-breakers. The Committee deplures, and emphasizes the gravity of the allegations regarding different acts of violence and intimidation resulting from a strike, and notes 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 in a climate free of violence, pressure or threats of any kind; and that it is for governments to ensure that this principle is respected. The Committee requests the Government to forward the text of the court ruling handed down, and hopes that those who suffered injury or loss of property will be properly compensated. Lastly, the Committee requests the Government to take measures to prevent violence against workers in the future in connection with collective disputes, and to ensure that the labour inspection authority immediately requests assistance from the police in protecting the physical integrity of individuals when they are under real threat during such disputes.*
547. *As regards those aspects of this case relating to labour rights (dismissals of workers, difficulties with collective bargaining), the Committee notes the Government's statements made during the previous examination of the case, to the effect that two special workers' committees disputed the right to represent workers. The Committee notes the Government's latest statements to the effect that the workers' lists of demands included many individuals who had already ceased to work at the undertaking when the demands were presented; that the workers failed to attend three mediation meetings, and the employers failed to turn up at one; that 43 workers had been dismissed before the list of demands was presented and all of them received compensation for untimely dismissal; that there are furthermore no laws in the country which provide for the reinstatement of unfairly dismissed workers; that the collective agreements presented in the private employment agencies did not meet legal requirements; and that legal requirements were not met with regard to workers' claims. The Committee notes that the Conciliation and Arbitration Tribunals have definitively closed the file, according to the Government. Under the circumstances, and bearing in mind the various problems that arise from this case and the absence of any possibility of new judicial proceedings, the Committee appeals to the Government to promote dialogue and collective bargaining in future in respect of all workers employed at the Los Alamos ranch.*
548. *The Committee requests the Government to take measures to amend the legislation so that workers dismissed for the exercise of their trade union rights can be reinstated in their posts.*
549. *Noting that the penal legislation applicable in this case with respect to serious acts of violence gave rise to sanctions of only one year imprisonment, the Committee requests the Government to take measures so that sanctions for such violent acts against trade unionists are sufficiently dissuasive.*

The Committee's recommendations

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

- (a) *The Committee deplors the violent acts perpetrated against strikers and workers at the Los Alamos ranch in May 2002 and requests the Government to communicate the text of the ruling handed down, and hopes that those who suffered injury or loss of property will be properly compensated.*
- (b) *The Committee requests the Government to take measures to prevent violence against workers in the future in connection with collective disputes, and to ensure that the labour inspection authority requests immediate assistance from the police in protecting the physical integrity of individuals when they are under real threat during such disputes.*
- (c) *The Committee appeals to the Government to promote in future dialogue and collective bargaining in respect of all workers employed at the Los Alamos ranch.*
- (d) *The Committee requests the Government to take measures to amend the legislation so that workers dismissed for the exercise of their trade union rights can be reinstated in their posts.*
- (e) *The Committee requests the Government to take measures so that sanctions for serious violent acts against trade unionists are sufficiently dissuasive.*

CASE NO. 2227

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

**Complaints against the Government of the United States
presented by**

- **the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and**
- **the Confederation of Mexican Workers (CTM)**

Allegations: The complainants allege that, following the Supreme Court decision in the case of Hoffman Plastic Compounds v. National Labor Relations Board, on the basis of their immigration status, millions of workers have lost the only protection that had been available to ensure respect for their freedom of association rights

- 551.** The complaints are contained in communications from the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM) dated 18 and 30 October 2002, respectively.
- 552.** The Government sent its reply in a communication dated 9 May 2003.
- 553.** The United States has ratified neither the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), nor the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 554.** In its communication of 18 October 2002, the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO), a federation of 66 national and international unions in the United States, representing approximately 13 million working men and women, submitted a complaint concerning actions of the United States Government directly and indirectly affecting these workers. The Confederation of Mexican Workers (CTM) submitted a complaint in a communication dated 30 October 2002 on the same issue on behalf of its 5.5 million members who have close family and labour ties with Mexican workers working abroad and whose rights are directly and indirectly affected by the United States Government action denounced hereafter.
- 555.** The complainants refer to the United States Supreme Court ruling in March 2002 in the case of *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* that an undocumented worker, because of his immigration status, was not entitled to back pay for lost wages after he was illegally dismissed for exercising rights protected by the National Labor Relations Act (NLRA). By this decision, the complainants contend that millions of workers in the United States lost their only protection of the right to freedom of association, the right to organize, and the right to bargain collectively. The Supreme Court had overruled a decision by the National Labor Relations Board (NLRB) and a federal appeals court that granted back pay to the worker. The *Hoffman* decision and the continuing failure of the United States administration and Congress to enact legislation to correct such discrimination puts the United States squarely in violation of its obligations under ILO Conventions Nos. 87 and 98 and its obligations under the ILO's 1998 Declaration on Fundamental Principles and Rights at Work. From a human rights and labour rights perspective, workers' immigration status does not diminish or condition their status as workers holding fundamental rights.
- 556.** The background of the case concerns the Hoffman Plastic Compounds Company which hired Jose Castro in May 1988. In December 1988, Castro and his co-workers began a union organizing campaign. In January 1989, management laid off Castro and three other workers because of their efforts to form and join a trade union. In January 1992, the NLRB ordered Hoffman to offer reinstatement and back pay for lost wages for these four workers. In June 1993, at a hearing to fix the amount owed to each worker, Jose Castro acknowledged that he did not have proper work authorization papers. Because of this, reinstatement was no longer available as a remedy for Castro. However, earlier NLRB and court decisions left open the possibility of enforcing the NLRB's back pay remedy. Hoffman refused to pay the back pay.
- 557.** In September 1998, the NLRB decided that Hoffman should pay Castro back pay for the period of time between his discharge and the date of his admission that he lacked documentation. In that decision, the NLRB said, "the most effective way to accommodate and further [United States] immigration policies ... is to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees". The NLRB ordered Hoffman to pay US\$66,951 in back pay to Jose Castro.
- 558.** Hoffman refused to pay Castro and filed an appeal. In 2001, the Federal Court of Appeals upheld the NLRB's order. Hoffman appealed to the Supreme Court. In its March 2002 decision, the Supreme Court reversed the decisions of the appeals court and of the NLRB by a 5-4 vote, denying all back pay to Jose Castro after his unlawful dismissal. The Supreme Court held that, for undocumented workers who suffer reprisals for union organizing activity, the immigration law's prohibition on unauthorized employment is superior to the labour law's protection of the right to form and join a union. This decision and its impact on the right to freedom of association of all workers is the subject of this complaint.

- 559.** ILO Convention No. 87 protects the right of workers “without distinction whatsoever” to establish and join organizations of their own choosing. The *Hoffman* decision, including the failure of the United States administration to propose and Congress to enact legislation remedying the injustice, creates a distinction based on immigration status – a clear violation of Convention No. 87. The rights contained in Convention No. 87 are fundamental human rights that belong to all workers regardless of their immigration status. However, the *Hoffman* decision establishes a subclass of workers who cannot obtain the same remedies for violations of their rights available to all other workers. A majority of these workers in the United States are Mexican, making them the single largest national group affected by the decision.
- 560.** There are 8 million undocumented workers in the United States. Nearly 60 per cent of them are migrant workers from Mexico. Already subject to widespread exploitation and abuse in their wages and working conditions, they are now left with no protection whatsoever if they exercise rights of association, organizing and bargaining to defend themselves. The discrimination created by the *Hoffman* decision prevents these workers from exercising their right to establish and join organizations of their own choosing.
- 561.** ILO Convention No. 98 requires “adequate protection against acts of anti-union discrimination”. The *Hoffman* decision nullifies such protection for millions of workers based on their immigration status. Back pay for lost wages is an integral and necessary element of a system for protecting against acts of anti-union discrimination. This is especially true in the United States, where the NLRA allows no fines or other penalties against employers who violate workers’ trade union rights.
- 562.** The complainants contend that the United States falls far short of the Committee on Freedom of Association’s affirmation of “the need to ensure by specific provisions accompanied by *civil remedies and penal sanctions* the protection of workers against acts of anti-union discrimination at the hands of employers”. United States law provides only civil remedies such as reinstatement and back pay.
- 563.** The Supreme Court earlier decided that undocumented workers who are illegally dismissed for union activity are not entitled to reinstatement to their jobs. Back pay for lost wages was the *only* remedy available to such workers, and back pay was the *only* economic cost faced by an employer who illegally dismissed workers for union organizing activity – until the *Hoffman* decision, which eliminated this last defence.
- 564.** Back pay does not only serve the purpose of compensating victims. It also serves a deterrent purpose. Back pay discourages employers from violating workers’ rights because they know they will face an economic cost for violations. Other remedial measures under the NLRA include an order to “cease and desist” the unlawful conduct, and an order to post a written notice on the company bulletin board stating “we will not” repeat the unlawful conduct. Experience has shown that these are not remedies taken seriously by employers and do not serve as any meaningful deterrent to prevent repeat violations.
- 565.** The complainants emphasize that they do not concede that back pay is a *sufficient* remedy for violations of workers’ rights, but it is the *only* remedy with economic impact under United States labour law. Where undocumented migrant workers are involved, back pay is the only potential deterrent to unlawful discrimination, because reinstatement is not possible. Eliminating the back pay remedy grants carte blanche to employers to violate undocumented workers’ rights with impunity, and discourages workers from exercising their rights. As the dissenting justices in the *Hoffman* case put it: “in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity ... [T]he backpay remedy is necessary; it helps make labor law enforcement credible; it makes clear that violating the labor laws will not pay.”

- 566.** In a 1992 complaint to the Committee on Freedom of Association involving workers' organizing rights in the United States, the United States Government cited the back pay remedy as one of the "legal remedies available under the NLRA [that] are effective to redress violations of organizational rights" and noted further that "the NLRB has broad remedial authority to take such action as is necessary to effectuate the policies of the NLRA" [see 284th Report, Case No. 1523, para. 159].
- 567.** By eliminating the back pay remedy for undocumented workers, the *Hoffman* decision annuls protection of their right to organize. The decision grants license to employers to violate workers' freedom of association with impunity. Workers have no recourse and no remedy when their rights are violated. The fact that a judicial decision, rather than a statutory provision, has caused immigrant workers to lose their right to back pay is immaterial. Absent congressional action to overturn the effect of *Hoffman*, that decision amends the NLRA, and it is no longer the case that back pay remedies are available to all workers covered by that statute. The result is the same as if Congress had amended the NLRA to condition back pay on immigration status. In fact, a recent report by the United States Government Accounting Office, the investigative arm of the United States Congress, concluded that "since back pay is one of the major remedies available to workers for a violation of their rights, the Court's decision [in *Hoffman*] effectively diminishes the bargaining rights of such workers under the NLRA".
- 568.** Instead of respecting, promoting and realizing fundamental principles and rights at work, in particular the principles of freedom of association and collective bargaining, the *Hoffman* decision mocks, impedes and abandons them. The *Hoffman* decision has a profound effect on all workers, not just undocumented workers directly affected. Most undocumented workers are employed in workplaces with documented migrant workers and with United States citizens. Before the *Hoffman* decision, union representatives assisting workers in an organizing campaign could say to all of them, "we will defend your rights before the National Labour Relations Board and pursue back pay for lost wages if you are illegally dismissed". Now they must add: "except for undocumented workers – you have no protection". The resulting fear and division when a group of workers is deprived of their protection of the right to organize has an adverse impact on *all* workers' right to freedom of association and right to organize and bargain collectively.
- 569.** The *Hoffman* decision also promotes new and perverse forms of discrimination. It creates an incentive for employers to hire undocumented workers because of their new vulnerability in union organizing efforts, rather than hire documented workers or citizens. As is often the case, the employer only needs to look at false work papers so that he or she has a defence against sanctions for "knowingly" hiring an unauthorized worker. The resulting discrimination is twofold: discrimination in hiring against documented workers and citizens, but only so the employer can further discriminate against the undocumented. To stop an organizing campaign from even getting off the ground, employers can threaten to dismiss undocumented workers, telling them they have no protection under the NLRA. And then if workers do get a campaign off the ground, employers can carry out the threat, dismissing them with impunity.
- 570.** Instead of realizing the principles of freedom of association, the *Hoffman* decision destroys the principles. The decision is a vengeful assault on workers' fundamental rights. Instead of protecting workers' rights the Supreme Court's decision penalizes workers who exercise fundamental rights. The decision rewards the violators and punishes the victims.
- 571.** The complainants explain that both the NLRB and the Supreme Court treated the *Hoffman* case as one requiring a balancing of labour law and immigration law. The NLRB and the four-justice minority of the Supreme Court gave priority to labour law. The five members of the Supreme Court who voted to deny workers' rights gave priority to immigration law,

despite the fact, as pointed out by the four judges who dissented, that “*all* the relevant agencies (including the Department of Justice) have told us [that] the NLRB’s limited backpay order will *not* interfere with the implementation of immigration policy”.

- 572.** According to the complainants, a “balancing” approach is a fundamentally mistaken treatment of the case. Both the NLRB and the Supreme Court failed to take into account international human rights law and international labour rights norms. They also failed to consider United States obligations as a member of the ILO. Still, the decision of the NLRB and the opinion of the four dissenting justices were consistent with ILO freedom of association principles, even if they were not based on those principles.
- 573.** The complainants emphasize that they are not asking the Committee on Freedom of Association to interpret or intrude on United States immigration law. The right of every country to establish immigration rules is not in question here. The question is whether countries can set immigration rules that violate human rights. Fundamental rights cannot be balanced against policy options. Human rights cannot be abrogated to achieve policy goals but rather must always have priority over these goals. Policy options must be formulated in compliance with basic human rights standards. In this respect, the complainants refer to the Committee’s conclusions in Case No. 2121 involving denial of the right to freedom of association of undocumented foreign workers in Spain [see 327th Report, para. 561] and various other precedents of the Committee’s examination of cases concerning foreign workers.
- 574.** The *Hoffman* decision has direct repercussions on the exercise of trade union rights as it impacts workers in connection with the free choice of their trade union, results in the dismissal of certain workers, and creates other prejudice due to union membership. The decision applies immigration law in such a way as to hinder the free exercise of trade union rights. As such, the *Hoffman* decision constitutes a violation of workers’ rights to form and join trade unions and their right to adequate protection against acts of anti-union discrimination.
- 575.** Moreover, the *Hoffman* decision has had devastating effects in the months since it was issued. Employers have made threats against workers, telling them of the decision and emphasizing that they can be dismissed for trade union organizing with no right to reinstatement or back pay. Workers have abandoned many trade union organizing campaigns because of the fear instilled by the *Hoffman* decision. Employers have also threatened workers with dismissal if they complain about minimum wage or overtime violations, health and safety violations, or any other claim before a government labour law enforcement agency.
- 576.** While in the wake of the *Hoffman* decision worker protection agencies, such as the Department of Labor and the Equal Employment Opportunity Commission, have reaffirmed their commitment to enforcing the laws under their jurisdiction without regard to immigration status, these agencies have conceded that, under the logic of *Hoffman*, they cannot seek back pay on behalf of undocumented workers for work not performed. Moreover, the fate of common law and statutory remedies, such as damages for pain and suffering caused by sexual harassment, lost wages caused by the failure to promote an employee because of his or her nationality and other remedies, are now at stake. Employers will try to extend the logic of *Hoffman* to defeat any meaningful relief for victims of discrimination who lack proper work authorization or who are afraid to have their immigration status become an issue.
- 577.** The complainants argue that it is now up to the executive and the legislature to act to overturn the *Hoffman* decision, however, the administration has not promoted legislation to accomplish this, and Congress has thus far failed to act. As a result, the complainants

conclude that the United States remains in clear and open violation of its obligations as a Member of the ILO. The complainants therefore request the Committee to call upon the United States Government to take the measures needed to fulfil its obligations regarding freedom of association and protection of the right to organize and bargain collectively for all workers without distinction whatsoever and to suggest to the Government the availability of relevant forms of tripartite cooperation regarding the issues raised in this complaint.

B. The Government's reply

- 578.** In its communication dated 9 May 2003, the Government observes that the complaints in this case have alleged that the United States Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* violates fundamental rights of freedom of association and protection of the right to organize and bargain collectively with respect to migrant workers in the United States. In particular, the complainants allege that the *Hoffman* case creates a distinction based on immigration status that violates United States obligations under Conventions Nos. 87 and 98 as well as the 1998 ILO Declaration on Fundamental Principles and Rights at Work. In this respect, the Government first recalls that the United States has not ratified ILO Conventions Nos. 87 and 98, and therefore has no international law obligations pursuant to these instruments and thus no obligation to accord their provisions' domestic effect in United States law. Nonetheless, the Government affirms that, on numerous occasions, it has demonstrated that its labour law and practice are in general conformity with Conventions Nos. 87 and 98, and adds that the ILO supervisory bodies have generally upheld this view.
- 579.** Likewise, the Government states that the ILO Declaration is a non-binding statement of principles, is not a treaty and gives rise to no legal obligations. However, the United States Government has submitted annual reports under the follow-up procedures established by the ILO Declaration that demonstrate that it respects, promotes and realizes the fundamental principles and rights at work embodied in the Constitution of the ILO.
- 580.** As far as the present case is concerned, the Government's position is that the *Hoffman* decision does not conflict with the principles of freedom of association by creating a distinction based on immigration status. The *Hoffman* decision was very narrowly drawn – the Supreme Court limited *one* remedy under United States labour law on the ground that illegal immigrants may not be awarded back pay *for work not performed* and for a job obtained in the first instance by a *criminal fraud*. The United States Government has made clear that the decision will not be applied beyond this narrow scope, and United States courts since *Hoffman* have interpreted the decision just as narrowly.
- 581.** By way of background, the Government explains that Hoffman Plastic Compounds, Inc. which custom-formulates chemical compounds for businesses that manufacture pharmaceutical, construction and household products, hired Jose Castro in May 1988 to operate various blending machines. Before being hired for this position, Castro presented documents that appeared to verify his authorization to work in the United States. In December 1988, the United Rubber, Cork, Linoleum, and Plastic Workers of America began a union-organizing campaign at Hoffman's production plant. Castro and several other employees supported the organizing campaign and distributed authorization cards to co-workers. In January 1989, the employer laid off Castro and other employees engaged in these organizing activities.
- 582.** In January 1992, the National Labor Relations Board (NLRB) found that the employer unlawfully selected four employees, including Castro, for lay-off "in order to rid itself of known union supporters" in violation of section 8(a)(3) of the National Labor Relations Act (NLRA), which prohibits discrimination "in regard to hire or tenure of employment or

any term or condition of employment to encourage or discourage membership in any labor organization". To remedy this violation, the NLRB ordered that the employer: (1) cease and desist from further violations of the NLRA; (2) post a detailed notice to its employees regarding the remedial order; and (3) offer reinstatement and back pay to the four affected employees. The employer agreed to abide by the order.

- 583.** The parties proceeded to a compliance hearing before an administrative law judge (ALJ) to determine the amount of back pay owed to each of the employees. On the final day of the hearing, Castro revealed that he was born in Mexico and that he had never been legally admitted to, or authorized to work in, the United States. He admitted gaining employment with the employer only after tendering a birth certificate belonging to a friend who was born in Texas. He also admitted that he used this birth certificate to fraudulently obtain a California driver's licence and a social security card, and to fraudulently obtain employment following his lay off by Hoffman. Neither Castro nor the NLRB's General Counsel offered any evidence that Castro had applied or intended to apply for legal authorization to work in the United States. Based on this testimony, the ALJ found that the NLRB was precluded from awarding Castro back pay or reinstatement as such relief would be contrary to Supreme Court precedent and in conflict with the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. section 1324a, which makes it unlawful for employers knowingly to hire undocumented workers or for employees to use fraudulent documents to establish employment eligibility. This decision did not affect the award of reinstatement and/or back pay to the other three employees who were improperly laid off, with which the employer complied.
- 584.** The NLRB subsequently reversed the ALJ decision with respect to back pay (the impermissibility of reinstatement was not questioned). The NLRB thus found that Castro was entitled to US\$66,951 of back pay, plus interest. It calculated this back pay award from the date of Castro's termination to the date Hoffman first learned of his undocumented status, a period of four-and-a-half years. Employer petitions for review were denied at the Court of Appeals.
- 585.** The Government clarifies that, as far back as 1984, the Supreme Court confirmed that the NLRA applied to unfair labour practices committed against undocumented workers (*Sure-Tan*, 467 U.S. 883). Therein, the Court found that the definition of "employee" under the NLRA included "any employee" and did not list undocumented aliens as specifically exempted workers. In *Sure-Tan*, the employer was found to have committed an unfair labour practice in reporting undocumented workers to the Immigration and Naturalization Service in retaliation for their union activity. However, the Court found that the NLRB's authority to select remedies was limited by federal immigration policy. The Court thus held that "in computing back pay employees must be deemed 'unavailable' for work (and the accrual of back pay, therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States".
- 586.** In 1986, Congress enacted the IRCA, which embodied a comprehensive scheme prohibiting the employment of illegal aliens in the United States as a central focus of federal immigration policy. It did so by establishing an extensive "employment verification system" designed to deny employment to aliens who: (a) are not lawfully present in the United States; or (b) are not lawfully authorized to work in the United States. To enforce the verification system, the IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired. It is a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. Federal immigration law prohibits aliens from using or attempting to use any forged, counterfeit, altered, or falsely made document or any document lawfully issued to or with respect to a person other than the possessor for

purposes of obtaining employment in the United States. Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. Similarly, employers who violate the IRCA, either by knowingly hiring an unauthorized alien or failing to discharge the worker upon discovery of the worker's undocumented status, are punished by civil fines and may be subject to criminal prosecution.

- 587.** The *Hoffman* decision in March 2002 reaffirmed the Court's position in *Sure-Tan* in the context of the new federal immigration legislation. Therefore, in *Hoffman*, the Supreme Court determined that an NLRB award of back pay conflict with federal immigration policy, as expressed in the IRCA, encourage evasion of apprehension by immigration authorities, condone prior violations of immigration laws and encourage future violations. On this basis, the Court held that an undocumented worker was barred from a back-pay award where he had never legally been authorized to work in the United States. The Court concluded that back pay should not be awarded "for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud".
- 588.** It is particularly important to note that the *Hoffman* decision does not represent a significant change in the Supreme Court's view of the balance between United States immigration policy and labour law. Since the inception of the NLRB, the Court has consistently set aside awards of reinstatement or back pay to employees found guilty of serious illegal conduct in connection with their employment. In *Sure-Tan*, as noted above, the Court held that, in cases involving employees who were not lawfully entitled to be present and employed in the United States, with respect to back pay, the NLRB's authority was limited by federal immigration policy. The IRCA made it criminally punishable for an alien to obtain employment with false documents. The *Hoffman* decision is therefore consistent both with the interpretation of labour law in *Sure-Tan* and federal immigration policy as expressed in the IRCA.
- 589.** The Government asserts, however, that the decision does not restrict freedom of association on the basis of immigration status. The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances". The First Amendment freedom of association language provides workers, without distinction, with a constitutionally protected right to establish, join and participate in a labour union. This right applies to all persons in the United States, without regard to immigration status.
- 590.** The NLRA governs the relationship between most private employers and their non-supervisory employees. The declaration of policy in the NLRA states that it is the policy of the United States to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing ...". The NLRA relates to the right to organize as well as protection against anti-union discrimination. As noted above, the United States Supreme Court has confirmed that the NLRA applies to undocumented workers.
- 591.** The *Hoffman* decision did not alter or question, but rather confirmed, the principle that in the United States undocumented workers have the right to form and join trade unions. The Court specifically cited its earlier decision in *Sure-Tan* as to the applicability of the NLRA to undocumented workers. The decision therefore does not create any new authorization procedures – as was the situation in the Committee on Freedom of Association Case No. 2121 – that would have a discriminatory effect on the right of undocumented workers to form, join or participate in the trade unions of their choosing.

592. In fact, in response to the *Hoffman* decision the General Counsel of the NLRB specifically reaffirmed the following:

- It is unassailable that all statutory employees, including undocumented workers, enjoy protection from unfair labour practices and the right to vote in NLRB elections without regard to their immigration status.
- An employee's work authorization status is irrelevant to an employer's liability under the Act, and questions concerning that status should be left for the compliance stage of the case.
- An employee's immigration status is irrelevant to a unit determination or voter eligibility.

593. The sole issue in *Hoffman* was the authority of the NLRB to award back pay to undocumented workers in one distinct circumstance – that is, post-termination back pay for work not performed when the alien was not authorized to be present or employed in the United States. The Court found that such an award runs counter to policies underlying the IRCA, which the NLRB has no authority to enforce or administer. The award, thus, was beyond the bounds of the NLRB's remedial discretion. The Court was very clear that the limitation on back pay, however, did not affect the other remedies available to the NLRB and the courts in enforcing the NLRA:

Lack of authority to award backpay does not mean that the employer gets off scot-free. The Board here has already imposed significant sanctions against Hoffman – sanctions Hoffman does not challenge. These include orders that Hoffman cease and desist its violations of the NLRA, and that it conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices. Hoffman will be subject to contempt proceedings should it fail to comply with these orders. We have deemed such “traditional remedies” sufficient to effectuate national labor policy regardless of whether the “spur and catalyst” of backpay accompanies them.

594. The NLRB also confirmed the narrow effect of the *Hoffman* decision. In a July 2002 memorandum, the General Counsel reminded the NLRB regional offices that the Court's decision in *Hoffman* did not affect other Board remedies. Similarly, *Hoffman* has not affected enforcement of other laws governing the employment relationship (except where there are issues of back pay for work not performed). In June 2002, the Department of Labor issued a fact sheet making it clear that the *Hoffman* Court “did not address laws that the Department enforces, such as the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), that provide core labour protections for vulnerable workers”. The Department will continue to enforce the FLSA and MSPA, without regard to whether an employee is documented or undocumented, to ensure that employees are paid as required for hours actually worked.

595. The United States Equal Employment Opportunity Commission (EEOC), also in June 2002, released a statement stressing that the *Hoffman* decision does not affect the Government's ability to root out discrimination against undocumented workers. The Supreme Court's decision in *Hoffman* in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes. While *Hoffman* may affect a person's eligibility to receive some forms of relief once a violation is established, immigration status remains irrelevant to the EEOC when examining the underlying merits of a charge.

596. The Government emphasizes that United States federal district courts have also upheld this narrow view of *Hoffman* and cites a variety of cases distinguishing *Hoffman* and upholding awards for unpaid wages to undocumented workers for work actually performed.

597. In conclusion, the Government states that it has no legal obligation to give effect to the instruments referenced in the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) complaint. Moreover, it emphasizes that the *Hoffman* decision is not wide-ranging in that it affects only one of the remedies available in the enforcement of the NLRA. Discrimination against undocumented employees for union activity remains illegal after *Hoffman*, and there is no evidence that the decision has or will significantly erode fundamental worker protection. In fact, the United States Government has taken steps to have alleviate concerns that *Hoffmann* will be applied beyond its intended scope.

C. The Committee's conclusions

598. *The Committee notes that the allegations in this case refer to the consequences for the freedom of association rights of millions of workers in the United States following the United States Supreme Court ruling that, because of his immigration status, an undocumented worker was not entitled to back pay for lost wages after having been illegally dismissed for exercising the trade union rights protected by the National Labour Relations Act (NLRA).*

599. *The Committee takes due note, in the first instance, of the Government's reply to the complainants allegations concerning United States obligations under Conventions Nos. 87 and 98, as well as the ILO Declaration on Fundamental Principles and Rights at Work. The Government rightly states that having not ratified these two instruments, it has no international law obligations directly pursuant to Conventions Nos. 87 and 98. The Government adds that the 1998 ILO Declaration on Fundamental Principles and Rights at Work is a non-binding statement of principles that does not give rise to legal obligations.*

600. *The Committee would recall, however, that, since its creation in 1951, it has been given the task to examine complaints alleging violations of freedom of association whether or not the country concerned has ratified the relevant ILO Conventions. Its mandate is not linked to the 1998 ILO Declaration – which has its own built-in follow-up mechanisms – but rather stems directly from the fundamental aims and purposes set out in the ILO Constitution. The Committee has emphasized in this respect that the function of the International Labour Organization in regard to trade union rights is to contribute to the effectiveness of the general principle of freedom of association and to protect individuals as one of the primary safeguards of peace and social justice [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1994, para. 1, and Annex I, para. 23.] It is in this spirit that the Committee intends to pursue its examination of the present complaint.*

601. *The complaint stems from the United States Supreme Court ruling in **Hoffman Plastic Compounds, Inc. v. National Labor Relations Board**. In summary, this case concerned an undocumented worker, Jose Castro, who was fired from Hoffman Plastic for having supported a union organizing campaign and distributing union authorization cards to co-workers. The fact that this dismissal was in violation of section 8(a)(3) of the NLRA, which prohibits anti-union discrimination, is not contested. In light of this unlawful dismissal, the National Labour Relations Board (NLRB) ordered Hoffman to comply with the following remedies: (1) cease and desist from further violations of the NLRA; (2) post a detailed notice to its employees regarding the remedial order; and (3) offer reinstatement and back pay to the affected employees. At the compliance hearing before the administrative law judge (ALJ), Jose Castro admitted that he had never been legally admitted to, or authorized to work in, the United States and that he had gained his employment after having proffered fraudulent documents. Based on this testimony, the ALJ found that the NLRB was precluded from awarding Castro back pay or reinstatement as, in the ALJ's opinion, such relief would be contrary to Supreme Court precedent and in conflict with the Immigration Reform and Control Act of 1986 (IRCA), which makes it unlawful for*

employers knowingly to hire undocumented workers or for employees to use fraudulent documents to establish employment eligibility.

- 602.** *The NLRB subsequently reversed the ALJ decision with respect to back pay (the impermissibility of reinstatement was not questioned) and calculated the award from the date of Castro's termination to the date Hoffman first learned of his undocumented status, a period of four and-a-half years. Following denial of employer petitions for review by the Court of Appeals, Hoffman finally appealed to the Supreme Court against the NLRB award. The Supreme Court found in Hoffman's favour concluding that "allowing the NLRB to award back pay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in the IRCA".*
- 603.** *The Committee notes that the complainants challenge not only the conformity of the Supreme Court's decision in **Hoffman** with the principles of freedom of association, but also the inaction of the executive and legislative branches of the Government to redress this violation. The Committee emphasizes that it is not called upon to examine the specific acts of Hoffman Plastic Compounds, Inc., or to alter the effects of the Supreme Court decision in respect of the Hoffman Company. Moreover, the Committee wishes to make clear that its task is not to judge the validity of the majority of the Court in **Hoffman**, which is based upon complex internal legal issues and precedents, but rather to examine whether the outcome of this decision is such as to deny workers' fundamental right to freedom of association. The Committee further notes in this regard that the Government does not contest that undocumented workers should enjoy this fundamental right, to the contrary. This fact thus distinguishes this case from Case No. 2121 recently examined by the Committee (and raised by the complainant) concerning legislation adopted by the Spanish Government, which prohibited "irregular" foreign workers (those without proper working papers) from exercising the right to organize [see 327th Report, paras. 548-562]. In contrast with Case No. 2121, the Government's reply in the present case emphasizes that all workers, without regard to their immigration status, benefit from the constitutionally protected right to establish, join and participate in a labour union (First Amendment to the United States Constitution) and adds that the NLRA, which is aimed at protecting the exercise of full freedom of association, self-organization, and designation of representatives of their own choosing, also applies to undocumented workers.*
- 604.** *The question in this case is whether the remedies remaining for undocumented workers to protect them in their exercise of freedom of association rights after **Hoffman** can be considered sufficient to ensure that these rights have any real meaning. The Government has indicated in its reply that the **Hoffman** decision was drawn very narrowly and that the Supreme Court prohibited only one remedy, that of back pay for work not performed and for a job obtained in the first instance by a criminal fraud. The Committee further notes from the NLRB, General Counsel memorandum concerning the consequences of **Hoffman** on NLRB future procedure and remedies (attached to the Government's reply), that, even though the employer in **Hoffman** was unaware that the "discriminatee" was undocumented when it hired him (and therefore could potentially permit back pay remedies in cases where the discriminating employer knew of the undocumented status), "the clear thrust of the majority opinion precludes backpay for all unlawfully discharged undocumented workers regardless of the circumstances of their hire". The General Counsel thus recommends that, "[b]ecause the Court's considerations focused on the employee's wrongdoing and apply in equal measure whether or not the employer knowingly hired undocumented employees, backpay in either event should not be sought".*
- 605.** *The impact of **Hoffman** currently in United States practice is therefore not limited to employers who have been misled as to their workers' status, but includes undocumented workers hired by employers in full knowledge of their status and who may then subsequently be dismissed for exercising their fundamental right to organize in an effort to*

ensure respect for basic workers' rights. The consequences for the employer for illegally dismissing the undocumented worker are now limited to a cease and desist order in respect of violations of the NLRA and the conspicuous posting of a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices. The employer will be subject to contempt proceedings in certain circumstances should it not comply.

- 606.** *The complainants argue that these existing remedies are insufficient to protect foreign workers' freedom of association rights and describe a post-Hoffman workplace environment where either employers intimidate foreign workers into not exercising these rights or where these workers are quite simply too frightened to even try to exercise this basic right. According to the complainant, the impact on freedom of association rights is particularly devastating in light of the some 8 million undocumented workers in the United States. While, on the other hand, the Supreme Court states that it has deemed such remedies sufficient to effectuate national labour policy, it adds that "in light of the practical workings of the immigration laws, any perceived deficiency in the NLRA's existing remedial arsenal must be addressed by congressional action".*
- 607.** *The Government, in its reply, indicates a variety of measures that it has taken to ensure that Hoffman is not applied beyond its intended scope, including the drafting of Labor Department fact sheets to clarify that the decision does not affect the application of the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act concerning, in particular, minimum wages and overtime rates. It adds that the United States Equal Employment Opportunity Commission (EEOC) has released a statement stressing that, while the decision may affect a person's eligibility to receive some forms of relief once a violation is established, immigration status remains irrelevant to the EEOC when examining the underlying merits of a charge.*
- 608.** *The Committee wishes to make it clear that the issues arising from the main aims and objectives of the IRCA are not called into question here. No contention has been made that undocumented workers, unlawfully dismissed for exercising trade union rights, should be exempt from the IRCA for any violations they may have been found to commit. The Committee's concern is uniquely to examine whether the remedies that remain available under the NLRA are sufficient for effectively ensuring the basic trade union rights it purports to guarantee to all workers, including undocumented workers. The Committee recalls in this respect the importance it attaches to the principle that no person should be dismissed or prejudiced in his or her employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see **Digest**, op. cit., para. 748]. The basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed [see **Digest**, op. cit., para. 739].*
- 609.** *The Committee recalls that the remedies now available to undocumented workers dismissed for attempting to exercise their trade union rights include: (1) a cease and desist order in respect of violations of the NLRA; and (2) the conspicuous posting of a notice to employees setting forth their rights under the NLRA and detailing the prior unfair practices. Contempt sanctions for failure to comply are only available for violations of court-enforced NLRB orders obtained through litigation or formal settlements (detailed in NLRB General Counsel memorandum on procedures and remedies post-Hoffman). The Committee considers that such remedies in no way sanction the act of anti-union discrimination already committed, but only act as possible deterrents for future acts. Such an approach is likely to afford little protection to undocumented workers who can be indiscriminately dismissed for exercising freedom of association rights without any direct penalty aimed at dissuading such action.*

- 610.** *In light of all of the above considerations, the Committee concludes that the remedial measures left to the NLRB in cases of illegal dismissals of undocumented workers are inadequate to ensure effective protection against acts of anti-union discrimination.*
- 611.** *The Committee would not, however, go so far as to state what precise remedy or sanction should be made available and considers that, in the light of the **Hoffman** decision, this deficiency should be addressed by executive and congressional action so as to avoid any potential abuse and intimidation of such workers and any restrictions on their effective exercise of basic freedom of association rights. The Committee notes in this regard the good will demonstrated by the Government in the United States-Mexico Joint Ministerial Statement Regarding Labor Rights of Immigrant Workers (attached to the Government's reply), wherein the Labor Secretaries from both Governments reaffirm their commitment to fully enforce the applicable labour laws administered by their Departments to protect all workers (it should be noted, however, that the NLRA is not administered by the Department of Labor) and ask senior officials to consult on the implications of the **Hoffman** decision for the labour rights of immigrant workers in the United States and to explore areas of bilateral cooperation.*
- 612.** *The Committee thus invites the Government to explore all possible solutions, including amending the legislation to bring it into conformity with freedom of association principles, in full consultation with the social partners concerned, with the aim of ensuring effective protection for all workers against acts of anti-union discrimination in the wake of the **Hoffman** decision. The Government is requested to keep the Committee informed of the measures taken in this regard.*

The Committee's recommendation

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

*The Committee invites the Government to explore all possible solutions, including amending the legislation to bring it into conformity with freedom of association principles, in full consultation with the social partners concerned, with the aim of ensuring effective protection for all workers against acts of anti-union discrimination in the wake of the **Hoffman** decision. The Government is requested to keep the Committee informed of the measures taken in this regard.*

CASE NO. 2233

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

**Complaint against the Government of France
presented by
the National Union of Bailiffs (*Syndicat national des huissiers de justice*)**

Allegations: The complainant alleges failure to respect the right of bailiffs, as employers, to establish and join the organization of their own choosing, and failure to respect their right to free and voluntary collective bargaining, by virtue of their compulsory membership of the National Chamber of Bailiffs (Chambre nationale des huissiers de justice) and its exclusive competency in the area of collective bargaining

- 614.** The complaint is contained in a letter of 12 November 2002 from the National Union of Bailiffs (SNHJ).¹
- 615.** The Government replied in a letter dated 26 May 2003, and provided additional information in a letter of 20 August 2003.
- 616.** France 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

- 617.** The arguments set out in the complaint can be described as follows.
- 618.** The SNHJ registered its statutes on 11 October 1968. Since 1977, it has been a founding member of the National Union of Professionals. In a letter of 24 January 2000, the SNHJ acceded to the national collective agreement for bailiffs' employees of 11 April 1996 which governs relations between bailiffs and their employees. In a letter of 5 July 2000, the Director of Industrial Relations in the Ministry of Employment and Solidarity, following a request for review of its representativeness by the SNHJ itself, recognized that the organization is representative at national level in the profession of bailiff. Consequently, the SNHJ can participate, as an employers' organization, in negotiations of the national collective agreement for bailiffs' employees. The Ministry based its decision on the provisions of the Labour Code whereby an inquiry was opened pursuant to articles L.133-2 and L.133-3 of the Labour Code to determine the representativeness of the SNHJ. On this basis, the Ministry found that the SNHJ satisfied the criteria of representativeness set out in the Labour Code, in particular as regards criteria of members and activity.

¹ See Annex 1 for explanatory note on the characteristics of the status of bailiff (*huissier de justice*).

619. On 19 September 2000, the National Chamber of Bailiffs entered an appeal in the Paris Administrative Court seeking the cancellation of the Ministry's decision. The Administrative Court set aside the decision of the Ministry of Employment and Solidarity in a judgement given in public hearing on 16 October 2002 which the complainant enclosed in full with its complaint.

620. The Court based its decision on article 8² of Order No. 45-2592 of 2 November 1945 on the status of bailiffs. In the light of that article, the Court held:

... that it appears from these provisions that the legislator, notwithstanding the existence of freely constituted professional organizations, intended to reserve participation in the negotiation of collective agreements, as employer, to the National Chamber of Bailiffs alone, to the exclusion of any other employers' organization

The Court further held that Article 2 of Convention No. 87 had no direct effect in domestic law and could not be validly invoked.

621. The complainant organization believes that article 8 of the Order of 2 November 1945 violates the voluntary character of collective bargaining by giving authority to the National Chamber in all areas of collective and individual bargaining with employees' trade unions. Moreover, it is an exclusive authority that is thus attributed to the Chamber, to the detriment of all associations of bailiffs. In this regard, the complainant organization refers to Article 10 of the Order according to which bailiffs may form associations.³

622. The complainant organization further considers that the compulsory membership in the Chamber involves a restriction on the rights of employers to establish and join the organization of their own choosing and engage in collective bargaining and is thus in violation of Article 2 of Convention No. 87. Compulsory membership in the Chamber, given that the latter enjoys the powers of employers' organizations in the meaning of Article 10 of Convention No. 87, is contrary to the rules and principles of freedom of association. Finally, the complainant organization recalls that the voluntary negotiation of collective agreements, and thus the independence of the social partners in the bargaining process, is a fundamental aspect of the principles of freedom of association.

B. The Government's reply

623. In its reply, the Government states that the provisions of the Labour Code justify the participation of the SNHJ, as an employers' organization, in the collective bargaining process. According to the Government, this participation is exercised jointly with the National Chamber of Bailiffs. In support of its position, the Government presents the arguments on which it relied in the litigation proceedings before the administrative courts, after giving details of the present status of the proceedings.

Litigation proceedings

624. After recalling the proceedings in the administrative tribunal, the Government indicates that it entered an appeal to the Administrative Court of Appeal against the court's decision in a brief of 18 December 2002, annexed to its reply. In its appeal, the Government seeks the cancellation of the court's decision on the grounds that the affirmation of the monopoly

² See Annex 1 for the provisions of article 8 of Order No. 45-2592 of 2 November 1945.

³ See Annex 1 for the provisions of article 10 of Order No. 45-2592 of 2 November 1945.

of the National Chamber of Bailiffs in collective bargaining ignores the European and international law applicable in domestic law.

Arguments presented by the Government in the context of the litigation proceedings

625. Recalling the wording of articles 8 and 10 of the Order of 2 November 1945, the Government refers to an opinion of the *Conseil d'Etat* (the highest legal and advisory body in administrative matters) in 1949 and appended it to its reply. The opinion concerns the formation of professional organizations of notaries, solicitors, bailiffs and auctioneers, whose respective statutes are governed by Orders of 2 November 1945.

626. In its opinion and in the light of the provisions of the abovementioned Orders, the *Conseil d'Etat* recalls that the parties concerned are represented by a regional council or chamber and that the representation of their respective professions vis-à-vis the public authorities is delegated to their supreme council or National Chamber. The *Conseil d'Etat* recalls that, outside the attributions of the chambers or councils, members of the professions concerned are entitled to establish associations. At this point, it should be explained that a 1941 law banned them from forming trade unions. The *Conseil d'Etat* is therefore of the opinion that, in the Orders of 1945, the legislator:

... intended to reserve the exercise of trade union rights to the chambers or councils for each profession and thus to uphold the prohibition on forming trade unions, but conversely, for activities outside trade union rights, to authorize the formation of associations [...].

627. For its part, the Government accepts that the Order of 2 November 1945 applicable to bailiffs gives exclusive authority to the National Chamber in many areas. This exclusiveness stems from the following peculiarities of the Chamber: the obligation of all bailiffs to be a member of their professional order (a term which designates the organization of bailiffs in both local and national chambers), the particular control of the Order by the administrative or legal authority, functions of a public character and participation in the exercise of public authority. The Government distinguishes it in this regard from a trade union, which is a different kind of grouping since it is based on voluntary membership. It also points out that many employers' organizations or trade unions have now been formed in all the regulated legal professions in France.

628. However, the Government considers that the Chamber does not have exclusive authority in representing the profession in collective bargaining. In this regard, the Government indicates, firstly, that the 1949 opinion of the *Conseil d'Etat* was given when industrial relations between employers and employees were barely in their infancy. Secondly, the National Chamber of Bailiffs applies many provisions of the Labour Code relating to collective bargaining, indicating by that very fact that the Code applies to bailiffs.

629. In application of the provisions of the Labour Code and having regard for the principle of freedom of association, which has constitutional force, the Government considers that the National Union of Bailiffs can participate in collective bargaining and give its views, jointly with the National Chamber of Bailiffs, on questions relating to conditions of work in the profession. In this regard, the Government indicates that the SNHJ is legally constituted and that its existence and statutes have never been disputed since 1982. Referring to articles L.411-2 (on freedom to establish trade unions) and L.132-9 (on adhesion to a collective agreement), the Government explains that they do not repeal the Order of 2 November 1945 applicable to bailiffs. Nevertheless, they do not exclude certain occupations from their scope and article L.132-2 of the Labour Code states expressly that the provisions relating to rules of industrial relations between employers and employees "apply [...] to public and ministerial office". The Government therefore considers that the

Labour Code allows the SNHJ to take part in collective bargaining as an employers' organization, alongside the National Chamber of Bailiffs.

- 630.** In its appeal against the court's judgement, the Government adds that the participation of the SNHJ in collective bargaining does not conflict with article 8 of Order No. 45-2592. The shared powers are those related to collective bargaining and not those specific to the Chamber (such as disciplinary powers). Thus the Chamber's powers of negotiation on behalf of bailiffs in collective bargaining are juxtaposed with the power of the SNHJ but do not exclude it. The Government's appeal also rests on the specific matters which led it to conclude that the SNHJ is a representative organization, which was disputed by the National Chamber of Bailiffs. Among the criteria of representativeness used by the Government in accordance with the relevant articles of the Labour Code, mention should be made of the number of members (612 members declared by the organization, which is 19 per cent of bailiffs employing, according to the organization's estimates, 30 per cent of employees in the branch) and contributions (97 per cent of the resources come from members' contributions).
- 631.** The Government also invokes international laws which support its position. In this regard, it explains that as international treaties ratified by France rank above domestic laws, the judge must set aside an order that is incompatible with a treaty. In this case, according to the Government, it was up to the Administrative Court to apply the principles of freedom of association as set out in Convention No. 87 and the European Convention on Human Rights and set aside the interpretation of the Order which was incompatible with international law. More particularly, the Government is of the opinion that recognition of the exclusive authority of the National Chamber of Bailiffs in collective bargaining deprives the SNHJ of the guarantees provided in Convention No. 87. Following the judgement of Administrative Court, it appears that the SNHJ, unlike any other employers' organization, cannot defend the professional interests of its members in the context of collective bargaining.

The Government's conclusions

- 632.** The Government has taken the necessary steps and provided the means to ensure that the SNHJ is recognized as a representative employers' organization, and more generally that freedom of association and the right to collective bargaining are respected. In this regard, the Government refers to the opening of the inquiry into representativeness, the resulting decision which recognizes the representative character of the SNHJ and its appeal against the judgement of the Administrative Court to cancel that decision.
- 633.** Given that the case is the subject of appeal proceedings providing every guarantee of appropriate procedures and that no urgent interest relating to the exercise of freedom of association is at present at risk, the Government proposes that the Committee, pursuant to the its Rules of Procedure, should defer its decision pending the judgement of the Administrative Court of Appeal concerning which the Government will not fail to keep the Committee informed.

Additional information

- 634.** In a communication dated 20 August, the Government provides the judgement issued on 20 May 2003 by the Administrative Court of Appeal, dismissing the appeals filed by the Government and the SNHJ against the decision of the administrative tribunal. The Government has filed an appeal to the *Conseil d'Etat* against the judgement of the Administrative Court of Appeal, a copy of which is annexed to the Government's communication.

635. In its judgement, which deals specifically with articles 8 and 10 of the Order of 1945, the court considers that "... the National Union of Bailiffs cannot be legally authorized to participate in the negotiation of collective agreements or accords". In addition, the court confirms the interpretation given to these provisions by the administrative tribunal, in particular as regards the exclusive competence of the National Chamber of Bailiffs in collective bargaining matters as an employer "... notwithstanding the existence of freely established professional unions".

C. The Committee's conclusions

636. *The Committee notes that the allegations concern restrictions on the right of bailiffs, as employers, to establish and join the organization of their own choosing and their right to collective bargaining by virtue of the compulsory membership in the National Chamber of Bailiffs and its exclusive authority in collective bargaining. The Committee will therefore analyse, firstly, the question of bailiffs' enjoyment of the right to organize. It will then examine the question of the right of bailiffs' professional organizations to collective bargaining and the conditions for the exercise of that right, having regard to the attributions of the National Chamber of Bailiffs. The latter aspect will in fact lead the Committee to consider the question of the eligibility of the National Chamber of Bailiffs to be a party to a process of collective bargaining.*

637. *Before proceeding to consideration of these two questions, the Committee notes that it is not necessary to reply to the Government's request to defer the hearing of the complaint since the Administrative Court of Appeal has issued its decision, confirming the exclusive competence of the National Chamber of Bailiffs in collective bargaining matters.*

638. *As regards enjoyment of the bailiffs' right to organize, as it did in Case No. 2146 (Yugoslavia) which shows similarities with the present case [see 327th Report of the Committee on Freedom of Association, paras. 884-898], the Committee emphasizes that Article 2 of Convention No. 87 states that employers have the right to establish and to join organizations of their own choosing. The Committee also recalls the importance it attaches to employers being able to exercise that right in practice [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 274]. The Committee takes full note of the Government's position in this case, a position which is based on the provisions of Convention No. 87 and the provisions of the Labour Code which it invokes in support. The Committee also notes that the National Union of Bailiffs (SNHJ) has been in existence since 1968 and that, according to the Government, its existence and statutes have not been disputed since 1982. The Committee must, nevertheless, point out that the right of bailiffs to establish and to join professional organizations of their own choosing is not explicitly laid down in Order No. 45-2592 of 2 November 1945 which governs their statutes. Furthermore, this Order gave rise to an opinion of the Conseil d'Etat which, no matter how old, denies bailiffs the right to establish and to join professional organizations of their own choosing. In these circumstances, even if the Administrative Court in its judgement of the case seems to have differed on this point from the opinion of the Conseil d'Etat, the Committee considers that the right of bailiffs to organize is not fully guaranteed. For that to be so, in the opinion of the Committee, such a right must be an express part of their statutes, such that recognition is no longer a matter of interpretation. Consequently, the Committee requests the Government to amend Order No. 45-2592 accordingly and to keep it informed of the measures taken.*

639. *As regards the right of collective bargaining, the Committee recalls that voluntary negotiation of collective agreements, and thus the independence of the social partners in the bargaining process, is a fundamental aspect of the principle of freedom of association [see Case No. 2146, op. cit., para. 896 and **Digest**, op. cit., para. 844]. This right may, provided that it is in a way compatible with Conventions Nos. 87 and 98, be restricted to*

the most representative professional organizations, provided that this representativeness is determined on the basis of precise, objective, pre-established criteria enshrined in law. In the light of the evidence made available to it, and in particular the information provided by the Government on the representativeness of the SNHJ, the Committee considers that the latter is entitled to participate in the collective bargaining process.

- 640.** *On the other hand, the Committee notes that the Government considers that this participation must be exercised jointly with the National Chamber of Bailiffs. The Committee is thus led to examine whether the National Chamber of Bailiffs is eligible to participate, as an employers' organization, in collective bargaining concerning the conditions of work of bailiffs' employees on the same footing as the SNHJ.*
- 641.** *Firstly, the Committee notes that the statutory compulsory membership in the National Chamber of Bailiffs, allied to the latter's participation in the collective bargaining process, is an infringement of the right of bailiffs, as employers, to choose the organization responsible for representing their interests in the context of collective bargaining [see 327th Report, Case No. 2146, para. 897]. Moreover, having regard to the fact that collective bargaining is conducted on the basis of representativeness, joint participation of bailiffs' professional organizations and the Chamber would unduly favour the latter due to the fact that bailiffs have an obligation to join. On this subject, the Committee refers to Case No. 2146 in which it concluded that "the principle of representation for collective bargaining purposes cannot be applied in an equitable fashion in respect of employers' associations if membership in the Chamber of Commerce is compulsory and the Chamber of Commerce is empowered to bargain collectively with trade unions" [see 327th Report, para. 896]. This consideration applies equally to the present case.*
- 642.** *The Committee also recalls that participation in collective bargaining and the signature of the resulting agreements necessarily means that the signatory organizations must be independent, in particular with respect to the public authorities [see 324th Report, Case No. 1980, para. 671]. This independence is a condition of the voluntary character of collective bargaining envisaged in Article 4 of Convention No. 98. The Committee further recalls that it relies on the free choice of the organization, the functioning and activities of the organizations concerned, and the absence of any intervention by the public authorities such as would impede that freedom, as set out in Article 3 of Convention No. 87.*
- 643.** *In the present case, according to the information provided by the Government, the Committee observes that the particular statutes of the National Chamber of Bailiffs is characterized, inter alia, by a particular control by the administrative or legal authority, the attribution of functions of a public character and by its participation in the exercise of public authority. Furthermore, the Committee observes that the functioning, responsibilities and powers of chambers of bailiffs, and especially the National Chamber, are regulated in detail by Order No. 45-2592 of 2 November 1945. Such is the case of elections of delegates of chambers. In this regard, the Committee points out that under article 7bis of the Order, the National Chamber, unlike the other chambers, is composed of delegates elected by the committees of the regional and departmental chambers and not directly by the bailiffs themselves.*
- 644.** *While the participation of bailiffs in the proper administration of justice may justify such an organization of the profession, another consequence is that the National Chamber of Bailiffs does not offer the guarantees of freedom and independence which would allow it to be considered, in the meaning of Conventions Nos. 87 and 98, as an organization eligible to be a party to the negotiation and conclusion of collective agreements.*
- 645.** *For the purposes of collective bargaining, bailiffs' interests must be represented exclusively by organizations of which the membership, organization and functioning have*

been freely chosen by their members and which are thus independent of the public authorities. From all of the documents made available to the Committee, and especially the judgements of the administrative tribunal of the Administrative Court of Appeal, it is apparent that article 8 of Order No. 45-2592 of 2 November 1945 is considered to be the legal basis for the exclusive authority of the National Chamber of Bailiffs in the area of collective bargaining. In these circumstances, although that authority is not expressly envisaged by law, the Government should, in the opinion of the Committee, amend the Order so as to guarantee fully the right of bailiffs' professional organizations to collective bargaining. The Committee therefore requests the Government to take the necessary measures to that end and to keep it informed thereof.

The Committee's recommendations

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

(a) *The Committee requests the Government to amend Order No. 45-2592 and to keep it informed thereof, so that:*

(i) *the bailiffs' right to organize is an integral part of their status;*

(ii) *as employers, bailiffs can freely choose the organizations representing their interests in the collective bargaining process and that the organizations in question are exclusively employers' organizations which can be considered to be independent of the public authorities in that their membership, organization and functioning has been freely chosen by the bailiffs themselves.*

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

Annex

Explanatory note on the peculiarities of the status of bailiffs

In French law, bailiffs are ministerial officers, i.e. they are private persons, exercising a liberal profession, with duties related to the administration of justice. As such, bailiffs alone have the power to serve and execute decisions of the courts. They also carry out the formalities necessary for the proper conduct of court proceedings. Bailiffs share the status of ministerial officer, with notaries and auctioneers, in particular, who have their own responsibilities relating to the administration of justice. The respective statutes of the various ministerial officers are governed by a series of orders all dating from 2 November 1945. The order concerning bailiffs is Order No. 45-2592, the provisions of which are reproduced below. Under this Order, the profession is grouped and organized at three levels: departmental chambers, regional chambers and National Chamber. Precise powers are attributed by the Order to each chamber (e.g. disciplinary powers, representation of the profession vis-à-vis the public authorities, etc.). Bailiffs have other duties such as private or judicial debt recovery or establishment of affidavits at the request of individuals.

Order No. 45-2592 of 2 November 1945 Order concerning the status of bailiffs

ARTICLE 1

*Amended by Law No. 73-546 of 25 June 1973, article 19, article 29,
Official Journal of the French Republic (JORF) of 26 June 1973*

Bailiffs are the ministerial officers who alone shall have the power to serve documents and writs, serve notices prescribed by laws and regulations when the manner of notification has not been determined and to enforce execution of judicial decisions and binding acts or titles.

Bailiffs may also proceed in the private or judicial recovery of all debts and, where no auctioneer is appointed, auctions and public sales of tangible goods and chattels. They may be empowered by the court to make purely material affidavits, excluding any opinion on the consequences in fact or in law which may result. They may also undertake affidavits of the same kind for private persons. In both cases, these reports shall have the status of mere information.

As court ushers, they shall provide personal service in courts and tribunals.

They may also exercise certain activities or functions in an accessory capacity. The list of activities or functions and the conditions in which those concerned are authorized to exercise them, unless otherwise set out in special laws, shall be fixed by decree of the *Conseil d'Etat*.

ARTICLE 1BIS

*Created by Law No. 91-650 of 9 July 1991, article 80,
JORF of 14 July 1991 in force on 1 August 1992*

Affidavits established at the request of private persons may be drawn up by a "clerk qualified to make affidavits" appointed under conditions fixed by decree and limited to one clerk per bailiff's office and two clerks per office when the office is a professional firm.

In that case, the affidavits shall be signed by the "clerk qualified to make affidavits" and countersigned by the bailiff who has civil liability for the act of his clerk.

Chapter I. Capacity to act as bailiff

ARTICLE 1BIS A

Created by Law No. 92-644 of 13 July 1992, article 4 I, JORF of 14 July 1992

Bailiffs may not, subject to nullity of the act, act on behalf of their parents and relatives and those of their spouse in direct line nor on behalf of their parents and collateral relatives to the sixth degree.

Chapter I. Capacity to act as bailiff

ARTICLE 2

Amended by Law No. 92-644 of 13 July 1992, article 4 II, JORF of 14 July 1992

With the exception of acts in criminal matters and acts from solicitor to solicitor, bailiffs shall be required to establish their acts, writs and reports in two originals. One, exempt from stamp duty and all tax formalities, shall be delivered to the party or his representative and the other shall be retained by the bailiff, under conditions to be fixed by decree of the *Conseil d'Etat*.

By derogation to the provisions of articles 867 and 1937 of the General Taxes Act, the original exempt from stamp duty and all tax formalities may be produced in any legal or administrative jurisdiction even if it requires a writ of summons.

Bailiffs shall be responsible for the drafting of their acts except, when the act has been prepared by another ministerial officer, for material matters which they have not been able to verify themselves.

The National Chamber of Bailiffs shall guarantee their professional liability, including that incurred by reason of their accessory activities set out in article 20 of Decree No. 56-222 of 29 February 1956 concerning the status of bailiffs under conditions fixed by decree of the *Conseil d'Etat*.

Chapter I. Capacity to act as bailiff

ARTICLE 3

Amended by Decree No. 55-604 of 20 May 1955, article 32, JORF of 22 May 1955

A decree shall fix the territorial authority of bailiffs, their number, address, manner in which they may be admitted to establish groups or associations, their professional obligations and capacity to exercise their functions.

Chapter II. Professional organization of bailiffs

ARTICLE 4

Repealed by Decree No. 76-861 of 7 September 1976, article 1, JORF of 12 September 1976

Chapter II. Professional organization of bailiffs

ARTICLE 5

Departmental chambers, regional chambers and the National Chamber are establishments serving the public interest.

Chapter II. Professional organization of bailiffs

ARTICLE 6

Amended by Law No. 92-644 of 13 July 1992, article 4 III, JORF of 14 July 1992

The attributions of the departmental chamber shall be:

1. To establish, as concerns the practices of the profession and relations of bailiffs with each other and their clients, regulations which shall be subject to approval by the Minister of Justice, Keeper of the Seals.
2. To decide or recommend, as applicable, the application of disciplinary measures against bailiffs.
3. To prevent or reconcile any disputes of a professional nature between bailiffs in its jurisdiction; where conciliation fails, to decide such disputes by decisions which shall be immediately binding.
4. To examine any claims by third parties against bailiffs arising out of the exercise of their profession, notably concerning taxation of charges, and punishing offences by disciplinary measures without prejudice to proceedings in the courts where grounds exist.
5. [...]
6. To give their opinion, when requested:
 - (a) on actions for compensation-interest against bailiffs by reason of their professional acts;
 - (b) on disputes submitted to the high court concerning the settlement of fees.

7. To deliver or refuse, giving grounds for the decision, all certificates of good conduct requested of them by trainee bailiffs.
8. To prepare the budget of the chamber and propose it for adoption in the general meeting, to manage its assets and to collect contributions.

The departmental chamber, in joint session, shall be responsible for questions relating to:

1. Recruitment and professional training of clerks and employees.
2. Conditions of work in firms.
3. Unless otherwise provided in specific legislation or regulations, wages and other remuneration.

The departmental chamber of bailiffs, meeting in one or other of its bodies, shall be further responsible within the jurisdiction for executing decisions taken by the National Chamber and the regional chamber.

Chapter II. Professional organization of bailiffs

ARTICLE 7

Amended by Law No. 94-299 of 12 April 1994, article 1, JORF of 19 April 1994

The regional chamber of bailiffs shall represent all bailiffs in the jurisdiction of the court of appeal affecting their common rights and interests. It shall prevent or reconcile any disputes of a professional nature between departmental chambers in its jurisdiction or between bailiffs not in practice in the same jurisdiction and decides, where conciliation fails, such disputes by decisions which shall be immediately binding.

It shall give its opinion:

- (a) on regulations established by departmental chambers in the jurisdiction of the court of appeal;
- (b) on the abolition of offices of bailiffs in the jurisdiction.

The regional chamber shall establish its budget and apportion the charges between the departmental chambers in the jurisdiction.

The regional chamber, sitting in joint session, shall decide all matters concerning the functioning of professional courses in the jurisdiction, institutions and social works concerning staff of firms.

The regional chamber, meeting in one or other of its committees, shall be further responsible for ensuring the implementation in its jurisdiction of decisions taken by the National Chamber.

Chapter II. Professional organization of bailiffs

ARTICLE 7BIS

Amended by Law No. 92-644 of 13 July 1992, article 4 V, JORF of 14 July 1992

The members of the executive committees of the regional chamber and the departmental chambers of each court of appeal shall meet to elect the delegate designated to participate in the National Chamber.

Chapter II. Professional organization of bailiffs

ARTICLE 8

The National Chamber shall represent the entire profession vis-à-vis the public services. It shall prevent or reconcile any disputes of a professional nature between regional chambers, between departmental chambers in its jurisdiction or between bailiffs not in practice in the same jurisdiction and, where conciliation fails, decide such disputes by decisions which shall be immediately binding.

It shall organize and control the budget of all social works concerning bailiffs. It shall give its opinion on the rules of procedure of departmental and regional chambers.

The National Chamber shall establish its budget and apportion the charges between the departmental chambers in the jurisdiction.

The National Chamber, meeting in joint session, shall decide questions of a general nature concerning the recruitment and training of clerks and employees, admission of trainee bailiffs, organization of professional courses, creation, functioning and budget of social works concerning staff of firms, conditions of work in firms and, except as otherwise provided in specific legislation or regulations, wages and other remuneration.

The National Chamber, sitting in one or other of its committees, shall give its opinion when requested by the Keeper of the Seals, Minister of Justice, on professional questions within its purview.

Chapter II. Professional organization of bailiffs

ARTICLE 9

Amended by Decree No. 78-264 of 9 March 1978, article 13, JORF of 10 March 1978

By derogation to the provisions of article 3 of the present Order, in the jurisdiction of the Paris Court of Appeal, the Paris departmental chamber of bailiffs shall fulfil the role of regional chamber for bailiffs belonging to that chamber, independent of the regional chamber established for the remainder of the jurisdiction.

Chapter II. Professional organization of bailiffs

ARTICLE 9BIS

Created by Decree No. 55-604 of 20 May 1955, article 33, JORF of 22 May 1955

A fund shall be established for the purpose of providing loans to trainee bailiffs. The resources of the fund, which is a special service of the National Chamber of Bailiffs, shall be constituted in particular from a special levy paid by each bailiff.

The debt resulting from a loan to a trainee under the provisions of the Law of 28 April 1916 shall be guaranteed by a preference on the finance of the office. This preference shall be recorded in a register kept at the Ministry of Justice and may be exercised after the preferences of the Treasury. Other trainee bailiffs shall provide the loan fund with personal or real sureties to guarantee repayment of the sums lent to them.

A decree of the *Conseil d'Etat* shall determine the organization and functioning of the fund described in the first paragraph of this article.

Chapter III. Miscellaneous provisions

ARTICLE 10

Bailiffs may form associations under the regime of the Law of 1 July 1901.

However, the purpose of these associations shall in no case extend to questions which, by virtue of the present Order, form part of the attributions of the various chambers.

Chapter III. Miscellaneous provisions

ARTICLE 11

Repealed by Law No. 92-644 of 13 July 1992, article 4 VI, JORF of 14 July 1992

Chapter III. Miscellaneous provisions

ARTICLE 12

Amended by Law No. 92-644 of 13 July 1992, article 4 VI, JORF of 14 July 1992

A decree of the *Conseil d'Etat* shall determine the manner of application and transitional measures relating to the present Order.

Chapter III. Miscellaneous provisions

ARTICLE 13

The Order of 25 January 1945 relating to certificates of capacity required from trainee bailiffs is repealed.

Chapter III. Miscellaneous provisions

ARTICLE 14

Acts known as acts under the Law of 20 May 1942 and the Law of 22 June 1944 on discipline and professional representation of bailiffs are expressly declared null and void.

However, this declaration of nullity shall not affect the results of its application prior to the publication of the present Order.

CASE NO. 2261

DEFINITIVE REPORT

Complaint against the Government of Greece presented by the Federation of Industries of Northern Greece (FING)

Allegations: The complainant alleges that Act No. 1876/1990 violates the principle of free and voluntary collective bargaining because it establishes a regime of compulsory arbitration at the initiative of one of the parties to collective bargaining

647. The complaint is contained in a communication from the Federation of Industries of Northern Greece (FING) dated 16 April 2003.

648. The Government replied in a communication dated 22 July 2003.

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

1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainants' allegations

- 650.** In its communication of 16 April 2003, the Association of Industries of Northern Greece states that it is an employers' organization consisting of 450 members, mainly enterprises and unions of enterprises, which develop industrial activity in northern Greece. The complainant indicates that it is an independent organization, not affiliated to a national organization of employers.
- 651.** The complainant alleges that Act No. 1876/1990 (the Act) establishes a regime of compulsory arbitration at the initiative of one of the parties to collective bargaining, contrary to Article 6 of Convention No. 154, ratified by Greece. In particular, a private entity denominated Mediation and Arbitration Organization (OMED) has been founded on the basis of article 17 of the Act. According to the complainant, OMED has been authorized to undertake mediation and the settlement of collective disputes, by persons, so-called "arbitrators", who are linked to it by virtue of contracts for the provision of services according to article 18 of the Act in question. The complainant further states that paragraph 1 of article 17 of the Act grants the Minister of Labour the power to decide upon the establishment of the executive board and the appointment of its chairman as well as his deputy.
- 652.** The complainant states that articles 14 to 16 of the Act have established a system of arbitration for the resolution of collective disputes, according to which one party can unilaterally force the other party to arbitration. In particular, article 14, paragraph 1, provides that if the parties do not reach an agreement through negotiations, they are entitled to have recourse to mediation or arbitration. Article 15 sets out the procedure for mediation. Article 16 enumerates the parties that have the right to unilaterally submit a dispute to arbitration. These are:
- the trade unions, if they accept the mediator's recommendations and the employer rejects them (article 16, paragraph 1(c));
 - any of the parties, if the other party has objected to having recourse to mediation (article 16, paragraph 1(b));
 - regarding in particular collective agreements in enterprises, the party that accepts the mediator's recommendation, which is rejected by the other party (article 16, paragraph 1(d)).
- 653.** The complainant states, moreover, that according to article 16, paragraph 4, if the parties do not agree on the appointment of an arbitrator, the arbitrator is chosen by lot among the OMED arbitrators. According to article 16, paragraph 3, the arbitrator's decision has the force of a collective agreement and its effect begins the day following the submission of the request for arbitration.
- 654.** The complainant alleges that pursuant to the above provisions, when the employer does not agree to the trade union's demands, the trade union can resort to mediation. If the employer does not accept the mediator's decision, then the trade union can force him to arbitration. The arbitrator's decision is absolutely binding and there is no possibility to challenge it before the public authorities or the courts. The complainant concludes that given that the employer can be forced to binding arbitration in case of disagreement with the trade union or the mediator, the Act establishes a regime of compulsory arbitration.

B. The Government's reply

- 655.** In a communication dated 22 July 2003, the Government states that Act No. 1876/1990 (the Act) which on the whole ensures and promotes a system of free collective bargaining, is the first of its kind as it constitutes the result of a “social agreement reached by high-level parties” and adopted by the All-Party Government in 1990 with the unanimous consent of all the political parties represented in Parliament. The Act succeeded in providing a comprehensive system of checks and balances. Any partial change in its provisions cannot take place without revising the whole series of collective employment relationships. Its equilibrium must not be disturbed, as the Act has demonstrated its validity in the course of time. For this reason, the Government submits that it would not be advisable to review the Act without the necessary social consent from which it emanated.
- 656.** The Government notes that the issue raised in the complaint concerns the possibility of unilateral recourse to binding arbitration on the basis of article 16, paragraph 1(b), (c) and (d), of the Act. However, the Government emphasizes that arbitration has a secondary role in relation to the right to undertake effective dialogue in good faith, which is safeguarded in article 4, paragraphs 1 and 3, of the Act. This article embodies the fundamental principles of free collective bargaining based on the right and the obligation to bargain collectively and on the principle of dialogue in good faith. Unilateral recourse to arbitration, where and when it is permitted, is considered as an exceptional step either in the case of refusal by one of the parties to participate in dialogue and bargaining or in the case of rejection of the mediator's proposal. Moreover, unilateral recourse to arbitration constitutes the exception and the general rule is that the parties have recourse to arbitration by mutual consent (article 16, paragraph 18(a), of the Act).
- 657.** The Government emphasizes that the mechanism provided for the resolution of disputes is secondary to the will of the parties, who have the right to create if they wish, other more appropriate mechanisms for the resolution of their disputes by means of a special collective agreement. The Government states that only in the absence of an agreement between the parties for the resolution of collective disputes can the OMED intervene on a supplementary basis by providing the services of mediation and arbitration in order to reinforce collective bargaining (articles 15-17 of the Act). Mediation, and especially arbitration, are established in the spirit and the letter of article 22, paragraph 2, of the 1975 Constitution and do not aim at replacing bargaining, but have a clearly supplementary character in relation to the autonomy of the parties (article 14, paragraph 2, of the Act). For this reason, the parties can at any time, before or after the mediator's proposal, or the arbitrator's award, conclude a collective agreement and cancel the mediation-arbitration. Thus, the Government supports that the autonomy of the parties is respected throughout the bargaining procedure, even at the stage of arbitration, which may lead to the conclusion of a collective agreement. Only in exceptional cases does the decision of the arbitrator replace the common will of the parties, after having considered their interests, on the grounds of their proposals and the relevant documentation.
- 658.** The Government states, moreover, that the system established by the Act has succeeded in addressing the imbalance in negotiating power between employers' and workers' organizations so that the terms and conditions of employment, especially wages, can be determined and periodically readjusted (in practice every one or two years). The Government states that in the absence of these provisions, in cases where workers' organizations did not have enough bargaining power to put effective pressure on the employers' side, a freeze of workers' remuneration would take place. Thus, the readjustment of remuneration is, *in extremis*, ensured in principle.
- 659.** The Government states, moreover, that the existing statistics, since the beginning of OMED's operation, confirm that autonomous collective bargaining by the parties is

prominent, while the role of arbitration is supplementary. In particular, only one (1) arbitration award corresponds to seven (7) collective agreements. In practice, the arbitration procedure comes into operation in cases of unsuccessful negotiations, where the existence of an institution destined to remove the impediments is necessary.

- 660.** As far as the judicial review of arbitration awards is concerned, the Government states that the arbitration award, just like collective agreements, constitutes an institution of civil law, through which collective interests disputes are settled. Consequently, the arbitrator does not act as an administrative official and the arbitration award is not an administrative act. As arbitration awards are governed by civil law, they fall under the jurisdiction of the ordinary civil courts. The competence of the courts extends only over procedural questions, lack of jurisdiction and cases of conflict between the content of arbitral awards and superior rules of law (the Constitution and emergency laws). Judicial review does not pertain to the substance of the award, unless there is an obvious and self-evident mistake.
- 661.** The Government stresses that the Legal Council of the State, by a series of decisions, has ruled that the Act and the mediation - arbitration system it establishes is in compliance with the Constitution (article 22, paragraph 2, and article 23). Moreover, by recent decisions of higher civil courts, it has been decided that the Act and in particular the provisions of article 16, paragraph 1, comply with Convention No. 154. Finally, the members of the administrative board of OMED who represent all the social partners, have expressed support for the mediation-arbitration system provided in the Act.

C. The Committee's conclusions

- 662.** *The Committee notes that the present complaint concerns allegations that Act No. 1876/1990 (the Act) violates the principle of free and voluntary collective bargaining because it establishes a regime of compulsory arbitration at the initiative of one of the parties to collective bargaining.*
- 663.** *The Committee observes that according to article 14 of the Act, in case the parties fail to reach agreement through negotiations, they can request the services of a mediator or have recourse to arbitration. Article 14 provides that the conditions under which recourse to arbitration may take place and the relevant procedures will be determined in special clauses inserted in collective agreements. In the absence of such clauses, they will be determined by common agreement of the parties. It seems that the provisions of the Act apply only in the absence of such agreement. Article 15 of the Act lays down the procedure for mediation which can take place at the initiative of any of the parties. Article 17 concerns the creation of an organization of mediation and arbitration (OMED) which is a private law entity run by an executive board composed, inter alia, of university professors in economics, industrial relations and labour law, and representatives of the national organizations of employers and workers. The convocation of the executive board takes place on the basis of a decision of the Minister of Labour and the president of the board is nominated by the same decision. Article 16 provides that recourse to arbitration can take place, firstly, by common agreement between the parties and, secondly, unilaterally:*
- *at the initiative of one of the parties if the other refuses recourse to mediation (paragraph 1(b));*
 - *at the initiative of workers' organizations, if they accept the proposals of the mediator and the employer rejects them (paragraph 1(c));*
 - *in case of collective agreements in enterprises and in organizations of public interest, the right to have recourse to arbitration can be exercised only by the party which accepts the proposals of the mediator that the other party rejects (paragraph 1(d)).*

664. *The Committee notes that both the Government and the complainant agree that recourse to compulsory arbitration can take place unilaterally by the party which acquiesces to the mediator's recommendations, which the other party rejects (article 16, paragraph 1, of the Act). The complainant notes in particular that article 16, paragraph 1(c), applies only with regard to employers in order to ensure that they can be forced to arbitration if they reject the mediator's recommendations. The complainant considers these provisions as a violation of the principle of free and voluntary collective bargaining embodied in Conventions Nos. 98 and 154, ratified by Greece. The Government, on the other hand, places emphasis on the peculiar character of the system established by the Act which, in its view, as confirmed by judicial decisions of the civil courts and the Legal Council of the State, does not amount to a violation of the relevant Conventions. Thus, according to the Government:*

- the system does not constitute interference in collective bargaining by the public authorities as OMED is a private entity and the social partners are represented in its executive board;*
- the provisions of the Act are the result of a “social agreement reached by high-level parties” and adopted by the All-Party Government in 1990 with the unanimous consent of all the political parties represented in Parliament;*
- the Act establishes a comprehensive system of checks and balances which is an essential aspect of harmonious industrial relations in the country;*
- the parties have the right to create if they wish, other more appropriate mechanisms for the resolution of their disputes by means of a special collective agreement;*
- arbitration has a secondary character in relation to the will of the parties, who can conclude a collective agreement and cancel the mediation-arbitration at any time before or after the mediator's proposal or the arbitrator's award;*
- unilateral recourse to arbitration is rare while the general rule is that the parties have recourse to arbitration by mutual consent (one arbitration award corresponds to seven collective agreements);*
- the system aims to address the imbalance in negotiating power between employers' and workers' organizations and to avoid deadlock in negotiations over the terms and conditions of employment, especially wages.*

665. *The Committee recalls that the imposition of a compulsory arbitration procedure if the parties do not reach agreement on a draft collective agreement raises problems in relation to the application of Convention No. 98. Recourse to compulsory arbitration in cases where the parties do not reach agreement through collective bargaining is permissible only in the context of essential services in the strict sense of the term (i.e. services the interruption of which would endanger the life, personal safety or health of the whole or part of the population) [see **Digest of decisions and principles of the Freedom of Association Committee**, paras. 860-861].*

666. *The Committee notes, however, that article 14 of Act No. 1876/1990 allows the parties to create, if they wish, other more appropriate mechanisms for the resolution of their disputes by means of a special collective agreement. Moreover, according to the statistics provided by the Government, recourse to compulsory arbitration is an exceptional measure, and even in such cases the parties retain the right to conclude a collective agreement and cancel the mediation-arbitration at any time before or after the mediator's proposal or the arbitrator's award. Finally, the Committee takes note of the context in which the Act was adopted, in particular, by a unanimous decision of all the parties in Parliament with the*

support of the national employers' and workers' organizations which are represented in the Executive Board of OMED.

667. *While taking into account that the factors mentioned above attenuate the compulsory nature of the arbitration regime established by Act No. 1876/1990, the Committee considers that there is still room for improvement in the application of the principle of free and voluntary collective bargaining and Conventions Nos. 98 and 154 ratified by Greece. The Committee therefore suggests that the Government initiates consultations with the most representative organizations of employers and workers with a view to considering measures to ensure that compulsory arbitration is only possible in essential services in the strict sense of the term.*

The Committee's recommendation

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

The Committee suggests that the Government initiates consultations with the most representative organizations of employers and workers with a view to considering measures to ensure that compulsory arbitration is only possible in essential services in the strict sense of the term.

CASE NO. 2103

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

Complaint against the Government of Guatemala presented by

- **the Workers' Union of the Office of the Auditor-General (SITRACGC) and**
- **the Organization for Worker Unity (Unidad Laboral)**

Allegations: The complainants allege various anti-union acts (compulsory resignations of union members, dismissals, suspensions and transfers of union officers and members) in the Office of the Auditor-General

669. The Committee last examined this case at its March 2003 meeting [see 330th Report, paras. 756-768, approved by the Governing Body at its 286th meeting in March 2003].

670. The Government sent new observations in the communication of 29 August 2003.

671. 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

672. At its March 2003 meeting, when it examined allegations of anti-union discrimination in the Office of the Auditor-General, the Committee made the following recommendations [see 330th Report, para. 768]:

The Committee urges the Government to implement without delay the recommendations made in the previous examination of the case and to send complete observations on the following pending allegations concerning the Office of the Auditor-General:

- (i) with regard to the allegations of forced resignations of more than 200 trade union members, the Committee requests the Government to provide greater details on the reasons for these resignations;
- (ii) with regard to the dismissals of the five members named in the conclusions, the Committee again strongly urges the Government to carry out urgent investigations and, should the anti-union nature of these actions be confirmed, to take the necessary measures to reinstate the workers concerned in their posts with the payment of any outstanding wages;
- (iii) with regard to the dismissal proceedings and the failure to assign duties to the members of the SITRACGC and Unidad Laboral executive committees, the Committee again requests the Government to urge the Auditor-General's Office to abandon the dismissal actions and proceed by common agreement with the assignment of duties in such a way that the performance of union activities is not affected;
- (iv) with regard to the alleged transfer and subsequent suspension without pay of Mr. Sergio René Gutiérrez Parrilla, in reprisal for exercising the right of petition, the Committee again requests the Government to take the necessary steps to ensure that investigations are carried out and, should the transfer and subsequent suspension prove to be the result of legitimate union activities, to ensure that the transfer is rescinded or, if it has already taken effect, to provide compensation and pay any outstanding wages; and
- (v) with regard to the dismissals of Ms. Ivana Eugenia Chávez Orozco and Mr. Otoniel Antonio Zet Chicol, the Committee again requests the Government to comply with the court ruling and reinstate the workers concerned in their posts without loss of pay.

B. The Government's reply

673. In its communication of 29 August 2003, the Government states that the Ministry of Labour and Social Security, through the General Labour Inspectorate, convened a meeting on 28 August 2003 with trade union officers of both the Workers' Unions of the Office of the Auditor-General, that is to say, the SITRACGC and the Organization for Worker Unity (Unidad Laboral), in order to ascertain the current status of case No. 2103.

674. The Government indicates that these union members stated that following the arrival of the new Auditor-General, the situation of labour rights in the Office of the Auditor-General improved, for example, there is respect for freedom of association and full compliance with the collective agreement on working conditions in force in this institution. The union members added that there is a very good level of communication with the employer and stated that they have also been given extensive freedom to carry out their activities as trade union officers. Furthermore, they indicated that all the dismissed workers have been reinstated in their posts, and that trade union officers are being granted the time required to carry out activities resulting from their duties as trade union leaders.

675. The Government adds that the union members took the opportunity to request the withdrawal of legal action relating to the plenary proceedings for the termination of contracts of employment of various trade union officers, which were initiated by the former Auditor-General, since they considered that the problems were now solved.

676. Lastly, the Government states that the union members acknowledged that the General Labour Inspectorate has ensured that employers, workers and trade unions comply with and respect labour and social security legislation as well as regulations, pacts and collective labour agreements. Before doing all of this, the General Labour Inspectorate conducted a comprehensive investigation based on the facts into the alleged acts of

violations of labour and trade union rights by the former Auditor-General. The Government sent documents relating to its previous statements.

677. The Government reiterates that the new administration of the Office of the Auditor-General made a commitment to comply with the recommendations made by the Committee on Freedom of Association in the present case.

C. The Committee's conclusions

678. *As regards the dismissal of five union members, the dismissal proceedings (with failure to assign duties) relating to members of the SITRACGC and Unidad Laboral executive committees and the dismissals of Ms. Ivana Eugenia Chávez Orozco and Mr. Otoniel Antonio Zet Chicol, the Committee notes with satisfaction that according to the Government (echoing the statements made by the two trade unions in question), these workers have been reinstated in their posts and resumed their activities, and the union members have therefore withdrawn their legal action. The Committee notes with interest that according to the Government (echoing the statements made by the two trade unions in question), following the appointment of the new Auditor-General, the situation of labour and trade union rights improved, trade union officials are granted the time required to carry out their activities, and the General Labour Inspectorate has ensured compliance with legislation and collective agreements.*

679. *The Committee observes that the Government has not referred specifically to the alleged transfer and subsequent suspension without pay of Mr. Sergio René Gutiérrez Parrilla for exercising the right of petition, or to the alleged compulsory resignations involving the termination of membership of more than 200 union members during the mandate of the previous Auditor-General. However, the Committee notes that the new administration of the Office of the Auditor-General has made a formal commitment to comply with the Committee's recommendations in the present case. The Committee requests the Government to confirm that these problems outlined by the complainants have been resolved.*

The Committee's recommendation

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

While noting with satisfaction the reinstatement of the trade unionists who had been dismissed, the Committee observes that the Government has not referred specifically to the alleged transfer and subsequent suspension without pay of Mr. Sergio René Gutiérrez Parrilla for exercising the right of petition, or to the alleged compulsory resignations involving the termination of membership of more than 200 union members during the mandate of the previous Auditor-General. However, the Committee notes that the new administration of the Office of the Auditor-General has made a formal commitment to comply with the Committee's recommendations in the present case. The Committee requests the Government to confirm that these problems outlined by the complainants have been resolved.

CASE NO. 2179

DEFINITIVE REPORT

**Complaint against the Government of Guatemala
presented by
the International Textile, Garment and Leather Workers' Federation (ITGLWF)**

Allegations: The complainant organization alleges numerous anti-trade union acts (various forms of pressure, threats with firearms, physical assaults, forced resignations, non-payment of wages, closure of the undertaking, etc.) directed against officials and members of the trade unions established in two companies (Choi Shin and Cimatextiles) in an export processing zone

- 681.** At its meeting in March 2003, the Committee examined this case and presented an interim report [see 330th Report, paras. 769-781, approved by the Governing Body at its 286th meeting in March 2003]. The Government sent new observations in its communication dated 29 August 2003.
- 682.** 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

- 683.** The allegations in this case refer to the following anti-trade union acts at the Choi Shin and Cimatextiles enterprises operating in the Villanueva free zone: (i) proposals to workers that they should join a *solidarista* association; (ii) dissemination of propaganda against the union and slanders against its officials; (iii) threats to place trade union officials on blacklists; (iv) unsuccessful offers of financial inducement to the general secretary of the union at the Choi Shin enterprise to leave the union, followed by assaults and threats by the company management, as well as pressure put on other union officials to make them leave the union; (v) a threat with a firearm and harassment of the trade unionist, Ms. López, and members of the family of the general secretary of the Cimatextiles union; (vi) pressure on workers to sign documents expressing opposition to the union; (vii) assaults and death threats against union officials at the Choi Shin enterprise made by non-unionized workers in the presence of company managers, which resulted in the resignation of some officials; (viii) death threats against the legal adviser of FESTRAS, which resulted in his resignation; (ix) closure of the enterprise for two days, during which wages were not paid; (x) questioning without prior notification of two trade union officials by officials of the Attorney-General's Office; (xi) physical assaults against the union official, Mr. Sergio Escobar, inside the company; and (xii) the resignation of the general secretary of the union at Choi Shin following assaults and intimidation [see 330th Report, para. 778].
- 684.** At its meeting in March 2003, the Committee made the following recommendation [see 330th Report, para. 781]:

Noting with considerable concern the seriousness of the allegations, such as threats and physical assaults, and deeply regretting that the Government has not sent specific enough observations, the Committee strongly urges the Government to ensure that the investigation covers all the allegations made in this case concerning serious acts of violence and other anti-union acts at the Choi Shin and Cimatextiles enterprises in the Villanueva free zone, with a view to clarifying the facts, determining responsibility and punishing those responsible. The Committee requests the Government urgently to send complete observations in this respect and to consult without delay the enterprises and trade unions concerned through the national organizations.

B. The Government's further reply

- 685.** In its communication of 29 August 2003, the Government states that, through the Ministry of Labour and Social Welfare, which seeks to apply sanctions on *maquiladora* plants which violate labour legislation, fines are imposed, fiscal privileges suspended and the closure of the undertaking may even be ordered. The Government adds that the Ministry of Labour carried out administrative proceedings to deal with the non-compliance of the Choi Shin and Cimatextiles textile enterprises, imposing sanctions on the offending companies in accordance with the law on the development and promotion of the *maquila* and export industry and contacting the Ministry of Finance so that it could proceed to withdraw the two firms' special status regarding customs tariffs. In a press release published on 4 June 2003 in the daily newspaper *Prensa Libre*, the Ministry of Finance warned all companies of their duty to comply with standards, as well as of the sanctions that would be imposed in cases of non-compliance.
- 686.** The Government is pleased to announce that the labour dispute between employers and workers represented by the SitraChoi and SitraCima trade unions was resolved with the acceptance on 14 July 2003 of the Collective Agreement on Working Conditions.
- 687.** The Government adds (the relevant official document has been sent to the Committee) that against this background, on 15 July 2003, the trade unions gave written assurance that they would drop all legal actions brought by themselves and their members against both companies, as well as all complaints made to the General Labour Inspectorate within the space of eight working days.

C. The Committee's conclusions

- 688.** *The Committee notes with interest the Government's declarations according to which the trade unions established in the Choi Shin and Cimatextiles enterprises and the enterprises themselves signed a collective agreement on 14 July 2003 that put an end to the collective dispute. The Committee also notes that the trade unions undertook to drop all legal actions brought by them and their members, as well as any complaints made to the General Labour Inspectorate.*
- 689.** *The Committee notes with deep concern the seriousness of the allegations related to acts of violence against trade unionists (death threats and assaults). The Committee recalls that trade union rights can only be exercised in a climate free of violence and threats and expects that acts of violence will not reoccur in the companies in question in the future.*

The Committee's recommendations

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

- (a) The Committee notes with interest that the trade unions established in the Choi Shin and Cimertextiles enterprises and the enterprises themselves signed a collective agreement on 14 July 2003 and observes that the trade unions dropped all legal actions brought by them, as well as any complaints made to the General Labour Inspectorate.*
- (b) Noting with deep concern the seriousness of the allegations related to acts of violence against trade unionists (death threats, assaults), the Committee recalls that trade union rights can only be exercised in a climate free of violence and threats and expects that acts of violence will not reoccur in the companies in question in the future.*

CASE NO. 2187

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

**Complaint against the Government of Guyana
presented by
Public Services International (PSI)
on behalf of
the Guyana Public Service Union (GPSU)**

Allegations: The complainants allege that the Government attempts to weaken the GPSU's bargaining power through various acts, such as refusal to implement an agreement concerning arbitration over wages in the public service, denunciation of the Agency Shop Agreement, withdrawal of check-off facilities, dismissals of trade union officers and members, withdrawal of GPSU certification as majority union in the Guyana Forestry Commission, pressure on fire officers to quit the GPSU and closing down of the Guyana Energy Authority without consulting the GPSU which is the majority union

691. The Committee examined this case at its May-June 2003 meeting [see 331st Report, paras. 416-447, approved by the Governing Body at its 287th Session (June 2003)].

692. The GPSU sent additional allegations in a communication dated 2 September 2003. The Government sent its observations in communications dated 9 July and 13 August 2003.

693. Guyana has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. Previous examination of the case

694. In its previous examination of the case in June 2003, the Committee made the following recommendations [see 331st Report, para. 447]:

[...]

- (b) The Committee recalls that in general, agreements should be binding on the parties and requests the Government to supply it with a copy of the court ruling on the enforceability of the 1999 Memorandum of Agreement as soon as it becomes available, so that it may reach a conclusion on this aspect of the case in full possession of all the relevant information.

[...]

- (d) The Committee requests the parties to provide sufficiently detailed information on the content of the 1976 Agency Shop Agreement and the legal grounds for its denunciation and to transmit a copy of the court ruling on this issue as soon as it becomes available, so that it may reach a conclusion on this aspect of the case in full possession of all the relevant information.
- (e) The Committee requests the parties to indicate whether the introduction of a requirement for written authorization of the deduction of trade union dues is a measure of general application or an individual decision limited to the GPSU. If the measure is an individual decision, the Committee requests the Government to take all necessary measures as soon as possible with a view to ending such situation of discrimination and interference, and to keep it informed in this respect. The Committee also requests the Government to ensure that in the future, the introduction of measures affecting trade union rights is preceded by full and frank consultations with all trade unions concerned.
- (f) The Committee requests the Government to take all necessary measures as soon as possible with a view to ensuring the full implementation of the High Court's decision ordering the reinstatement of seven GPSU officers and members who have been dismissed from the High Court Registry on anti-union grounds and the payment of outstanding wages, and to keep it informed in this respect.
- (g) The Committee requests the Government to supply it with a copy of the court ruling on the dismissal of GPSU officers and members in other branches of the public sector, and if the court finds that the dismissals were on anti-union grounds, to take all necessary measures with a view to the reinstatement of the dismissed trade union officers and members and the payment of outstanding wages, and to keep it informed in this respect.
- (h) The Committee requests the Government to take all necessary measures as soon as possible so that allegations of anti-union discrimination in the High Court Registry are investigated by an independent body and if the allegations are confirmed, to ensure that such acts cease immediately and that appropriate remedies are adopted. The Committee requests to be kept informed in this respect.
- (i) The Committee notes that the issue of the certification of the majority union in the Guyana Forestry Commission is currently pending before the courts and requests the Government to supply it with a copy of the court ruling as soon as it becomes available, so that it may reach a conclusion on this aspect of the case in full possession of all the relevant information.
- (j) The Committee requests the complainants to specify the acts by which fire workers are allegedly coerced to join an association other than a trade union, the type of association promoted and in what way it affects the freedom of association of fire workers. The Committee requests the Government to transmit a copy of the court ruling as soon as it

becomes available so that it may reach a conclusion on this aspect of the case in full knowledge of all relevant facts.

- (k) The Committee requests the Government to take all necessary measures to ensure that the Guyana Energy Authority initiates consultations with the GPSU as the certified majority union and to keep it informed in this respect.

B. The complainants' additional allegations

695. In a communication dated 2 September 2003, the complainants provide additional information pursuant to requests made by the Committee during the previous examination of the case.

Withdrawal of facilities

696. The GPSU attaches a copy of the 1976 Memorandum of Agreement between the Public Service Ministry and the GPSU concerning the check-off of agency fees according to which new entrants into the public service who opt not to be members of the GPSU, shall pay an amount equivalent to trade union dues as agency fees (clauses 1 and 3). The Permanent Secretary/Head of Department shall furnish the GPSU with a monthly return of employees together with a statement of the monthly remittance of agency fees and a separate statement on monthly remittance of union dues (clause 5). The GPSU shall furnish duly audited annual statements concerning the agency fees received (clause 8). The Agreement shall take effect as of 1 March 1976 and continue in force unless terminated by the giving of not less than 90 days notice by either party (clause 11). Agency fee facilities are granted on condition that the Agreement is observed (clause 14).

697. The GPSU alleges that to date, the Government has not forwarded to the GPSU the names of newly recruited employees opting to pay agency fees as required by the Agreement, thus preventing the GPSU from accurately determining how much of the money received represented union dues and how much came from agency fees. The non-provision of information had been a constant source of problems with members who claimed that they had never opted to pay agency fees and that they thought that they were paying union dues as members of the union entitled to all membership benefits including hospitalization, dental, optical, funeral and other benefits. Thus, in 1987 Rule 3(b) of the GPSU was unanimously amended by adding: "Provided that persons recruited into the public sector [...] in areas falling within the bargaining units of the Guyana Public Service Union, shall automatically become members upon their recruitment, unless they exercise the option of not becoming members at the time of their recruitment, whereupon they are required to pay to the union the equivalent of union dues as agency fees [...]." According to the GPSU, although this amendment was registered in accordance with the Trade Union Act, the Public Service Ministry refused to recognize the new rule. The GPSU also states that although it submitted membership forms and authorizations for the deduction of trade union dues in accordance with Rule Q4 of the Public Service Rules, the relevant ministries and departments continued to make deductions as agency fees instead of trade union dues.

698. The GPSU adds that the Government blocked the union's total income twice, in 1988 and 2000, claiming breaches of the Agency Shop Agreement, so as to suffocate the union financially. In 1988 the matter was settled out of court and the Government restored all deductions and advanced adequate funds to the union to meet its outstanding commitments. In 2000 the Government again accused the GPSU of breaches of the Agreement, but this time its main goal was to block the check-off of union dues, a facility which existed since 1954 and which was the source of approximately 85 per cent of the union's income. According to the GPSU, the check-off of union dues is applicable to all public service unions and is today the norm in all collective agreements. Both the check-off rule and the Agency Shop Agreement are legally binding under the Labour Act since

they are standing rules that have been maintained under the revised Public Service Rules of 1987. Moreover, deductions were made from an employee's salary based on signed authorizations as in signing an application for membership, GPSU members authorized unequivocally the deduction of union dues.

- 699.** The GPSU adds that the Government started harassing it after a 57-day strike, which lasted from 29 April to 23 June 1999 and ended with an arbitral award granting salary increases to public sector employees. By Circular No. 7/1999 of 25 November 1999, the regional executive officer of region No. 9 informed the staff that a decision had been taken by the GPSU to increase the rate of union dues and agency fees consequent to the arbitral award. The regional executive officer then states: "Employees who subsequently object to the increase being deducted from their salaries should be required to record their objections, in writing, to their accounting officers." According to the GPSU, this form of harassment continued for several years disrupting its relationship with the members whose contributions remained smaller than the payable sum. Another action to destabilize the union was taken by the Minister of Public Service who issued on 10 August 2000 a press release assuring all public sector employees that even if they did not pay trade union dues, the Government would extend to them all benefits deriving from successful trade union representation. The press release also emphasized that "employees should be aware of their fundamental right [...] to choose to which trade union they should or should not belong".
- 700.** The GPSU adds that on 8 April 1999 the Government served a 90-day notice to terminate the Agency Shop Agreement because of the alleged non-compliance by the union with clause 8 concerning the audit of annual statements. The GPSU sought the intervention of the auditor-general who issued two reports dated 14 March 2000 and 29 July 2002, in which it is indicated that the audited financial statements of the GPSU presented fairly, in all material respects, the financial position of the GPSU as at December 2001. The GPSU further alleges that although it initiated conciliation proceedings with the Minister of Labour, the Government discontinued the deduction of trade union dues as of 7 June 2000, i.e., the day after a conciliation meeting was held in accordance with the Agreement for the avoidance and settlement of disputes which is legally binding on both parties.
- 701.** The GPSU adds that it took the matter to the High Court. However, notwithstanding the fact that the parties had agreed to the full reinstatement of union dues, and that agency fees would continue to be deducted and be held in an escrow account, the Chief Justice ruled on 21 July 2000 that union dues would be deducted from a future date, in August 2000, and that agency fees would be discontinued until further determination. The GPSU lodged an appeal against the High Court ruling. Parallel to the appeal, the GPSU members rapidly and fearlessly responded to the GPSU's call for the resubmission of membership forms and authorizations so as to access its main source of income, i.e., trade union dues. According to the GPSU, this positive display of solidarity and commitment led to further actions to undermine the union through delays in processing authorizations and in paying deducted dues over to the union, as well as the removal of financial records from the union's premises without authorization and subsequent accusations that the union did not have vouchers for expenditure (some of the documents, which were apparently removed by the audit staff, were subsequently recovered in the Ministry of Finance).

Pressure to quit the union

- 702.** With regard to the Guyana Fire Service, the GPSU states that in May 2002, the newly appointed Minister of Home Affairs, instructed the Permanent Secretary of the Ministry to cease the deduction of union dues from firemen, after several failed attempts by the Minister to coerce firemen to set up an association which would replace the GPSU, because in his view, the fire service could not be unionized. Pursuant to resolutions by firemen rejecting the Minister's interference, protest letters by the GPSU and efforts to

seek the intervention of the Minister of Public Service, the GPSU eventually took the Minister of Home Affairs and the Permanent Secretary to court. Although this case was fixed for hearing on 15 November 2002, it was postponed due to a circular by the Chief Justice recalling all cases due to a reorganization of the registry. The GPSU claims that the circular aimed at preventing the hearing of the specific case which has not been reassigned since then.

C. The Government's new observations

703. In communications dated 9 July and 13 August 2003, the Government provides its observations on a number of issues raised during the last examination of this case.

Refusal to implement an agreement on arbitration

704. With regard to the allegation of refusal to implement the Memorandum of Agreement, which ended a 57-day strike in 1999 and which provided for arbitration on future disputes over salaries and wages in the public sector, the Government states that it is important to give an account of the events that led to the Agreement. According to the Government, the GPSU unleashed a campaign of terror and intimidation during a strike over wage claims in March-June 1999. Gates of ministries and other government offices were chained by the strikers in collaboration with criminal and opposition elements. Persons who wanted to work were beaten. Bombs and molotov cocktails were thrown at government offices. Citizens were beaten and robbed. The commercial sector was grinding to a halt as "strikers" marched and invaded stores. It was in this tense situation that the Agreement was signed. The Government attaches copies of news reports published in one newspaper on this issue. The Government requests the Committee to pronounce itself on whether the above acts are permitted during a strike and whether agreements reached under such conditions are acceptable.

705. As to allegations made by the complainants that it has been difficult to establish a working relationship with the new ruling party since it came to power in 1992, the Government responds that historically, the GPSU has only called strikes when the currently ruling party has been in office and never went on strike while the previous regime was in power, despite anti-worker legislation adopted during that time.

Withdrawal of facilities

706. With regard to allegations concerning the unilateral termination of the check-off facilities, the Government refutes the allegation that it is seeking to destroy the financial base of the GPSU. The Government attaches the text of the High Court ruling of 21 July 2000, which orders the deduction of trade union dues upon submission of authorization. The Government states that it complies with the ruling by making deductions based on the check-off system. On the contrary, the GPSU has not observed the requirement for written authorization which is contained in Rule Q4 of the Public Service Rules and which applies to both the public and private sectors for the lawful deduction of trade union dues.

707. With regard to allegations concerning the unilateral termination of the Agency Shop Agreement, the Government attaches a copy of the 1976 Memorandum of Agreement between the Public Service Ministry and the GPSU concerning the check-off of agency fees. Concerning the legal grounds for the denunciation of this Agreement, the Government states that the Agreement could be deemed to be in breach of the Labour Act which provides that no employer shall impose any condition as to the place at which, or the manner in which, or the person with whom, any wages or portion of wages paid or payable to an employee are to be expended. Moreover, provision for agency fees has been made

only where the GPSU has bargaining rights while there is no corresponding right in the private sector.

- 708.** Moreover, the Government states that further grounds for the denunciation of the Agreement relate to certain facts which occurred in 1988. At that time, the GPSU amended Rule No. 3 so that “persons recruited [...] in areas falling within the bargaining units of the Guyana Public Service Union shall automatically become members upon their recruitment, unless they exercise the option of not becoming a member. [...]”. The Government considers that this rule is in breach of Article 2 of Convention No. 87 in that no union should be allowed to force a worker to become a member. It is also in breach of article 147 of the Constitution of Guyana which provides that except with his own consent no person shall be hindered in the enjoyment of his freedom of assembly and association, and section 26(2) of the Trade Union Recognition Act which provides that an employer shall not make the employment of a worker subject to the condition that he shall or shall not become a member of a trade union or shall relinquish his membership of a trade union. The Government further states that the registrar registered this amendment at the time of its adoption, but that this fact should be evaluated in the light of the dictatorial regime in place at the time, a regime of which the GPSU was an integral part, and of which the 1976 Agency Shop Agreement was a product.
- 709.** Moreover, the Government notes that the GPSU’s financial records have not been audited in the last eight years (since 1991) in clear violation of clause 8 of the Agency Shop Agreement. On 8 April 1999, the Permanent Secretary of the Public Service Management wrote to the union notifying them that the above violation had been brought to his attention via the auditor-general’s report/letter No. 79/TU:4/2 dated 12 March 1999 and gave the GPSU 90 days’ notice in accordance with clause 11 of the said Agreement, to terminate the Agreement. On 11 January 2000, the current Permanent Secretary wrote to the union informing them of the expiration of the 90 days’ notice and that the union continued to be in default. He appealed to the union to comply with the Agreement and gave them a further 30 days to comply.
- 710.** According to the Government, the GPSU responded that any failure on their behalf to comply with the Agreement was due to the Government’s failure to furnish accurate statements to the union concerning the deduction of agency fees and union dues. The Government indicates that in fact, the Agreement places on the Permanent Secretary/Head of Department an obligation to forward to the union information in this respect. However, the compilation and forwarding of this information is only possible in so far as the union makes available a list of members from whom union dues should be deducted and the signed authorizations to make such deductions. Therefore, the Government submits that any failure on its part to furnish accurate statements as claimed by the GPSU, was due entirely to the GPSU’s refusal to supply information on union members so that the distinction could be made as to who should pay union dues and who should pay agency fees.
- 711.** The Government adds that after several letters and meetings between the Ministry and the GPSU, the latter continued in its blatant breach of the terms and conditions of the Agreement. According to the Government, is it unfair, unethical and unjust for the union, the defaulting party, to insist that the Government continue to honour its obligations under the Agreement. Thus, when the Permanent Secretary wrote on 7 June 2000 to the union informing them that agency fees would no longer be deducted, he acted in a manner which may not be deemed unreasonable, unlawful, arbitrary, or in excess of jurisdiction.
- 712.** The Government states that the GPSU filed an application to the High Court on 5 July 2000 seeking prerogative writs of certiorari and mandamus against the Permanent Secretary of the Public Service Management. On 21 July 2000, the court delivered a

judgement which authorized the deduction of union dues based on written authorization by members. No order was made as regards the deduction of agency fees, a decision which the GPSU has appealed. The Government adds that on 11 July 2000, an application was filed on behalf of two public service employees in which they sought, inter alia, a declaration that the Agency Shop Agreement of 1976 was unconstitutional and in direct violation of their fundamental rights. Any further decision by the Government as regards the 1976 Agreement has to be put on hold pending the outcome of this application. The Government asks the Committee to advise it on whether ILO Conventions permit the subjecting of an employee's contract of employment to the conditions that he shall compulsorily contribute part of his earnings to an organization.

- 713.** Finally, the Government states that contrary to what the complainant has alleged, agency fees have not been continuously deducted since 1976. In November 1988, the previous Government had interrupted the deduction of agency fees and union dues on the ground of failure by the union to comply with the provisions of the Agreement with respect to the disbursement of funds, the maintenance of proper records, the submission of financial statements to the auditor-general, and the submission of annual statements to the registrar of trade unions. The Government recommenced the deductions in May 1989 upon promises to rectify the breaches. However, these promises were never kept and the GPSU continued to be in breach of its obligations.

Anti-union dismissals

- 714.** With regard to allegations of anti-union dismissals in the High Court Registry, the Ministry of Agriculture, the Guyana Forestry Commission and the MMA-ADA (William Blackman – Branch Officer, High Court Registry; Yvette Collins – Ministry of Agriculture; Leyland Paul – Branch Officer, MMA-ADA; Bridgette Crawford – Branch Officer, MMA-ADA; Barbara Moore – Guyana Forestry Commission; Karen Vansluytman – Member of the Central Executive Council and third Vice-President, High Court Registry) the Government refers first to the information already provided during the previous examination of this case, according to which the cases of Leyland Paul, Bridgette Crawford and Karen Vansluytman are currently pending before the High Court. Concerning Yvette Collins, the Government states that she was chief accountant at the Ministry of Agriculture when the police was called in to investigate a fraud. At that time, she was absent and had left the country without permission. Thus, her services were subsequently terminated. The Government adds that the relevant court ruling will be communicated to the Committee once issued. As to Barbara Moore, the Government states that her services in the Guyana Forestry Commission were terminated in the process of reorganization and attaches the termination letter which was addressed to her. According to the termination letter, Barbara Moore was informed that her services would no longer be required because it was discovered, in the context of an institutional strengthening programme, that a number of areas were overstaffed and the services of some persons would become redundant in the absence of opportunity for their relocation in the organization.
- 715.** The Government also provides the text of a High Court decision ordering the reinstatement of seven GPSU members and officers who were dismissed from the High Court Registry (Cheryl Scotland, William Blackman, Marcia Oxford, William Pyle, Yutze Thomas, Anthony Joseph, Niobe Lucius and Odetta Cadogan). The Government clarifies that the court's order was not based on a finding that the workers were dismissed on anti-union grounds, but that the dismissals were not carried out in accordance with the applicable procedures (in particular, the registrar had no legal authority to terminate the contracts). The Government also states that the ruling has been appealed. Moreover, the GPSU officers were not the only persons whose employment was terminated in the agencies listed in the complaint. These agencies, except the High Court Registry and Ministry of Agriculture, are controlled by boards of directors.

Withdrawal of certification as majority union

716. With regard to the certification of the majority union in the Guyana Forestry Commission, the Government states that the certification of the GPSU was never withdrawn since the union had never been certified. The Government also rejects allegations that there were attempts including dismissals to modify the bargaining unit in the Guyana Forestry Commission and invites the GPSU to produce evidence. The Government adds that the poll was called by a unanimous decision by the Trade Union Recognition and Certification Board which included as a member the acting GPSU General Secretary. The Government has no representation on the board except for the chairman who is appointed by the minister after consultation with workers' and employers' organizations. As for the fact that the President of the Guyana Agricultural and General Workers' Union is a member of Parliament sitting on the benches of the ruling party, the Government states that it is no secret that most of the political leaders in the Caribbean, including in Guyana, emerged from the trade union movement.

Pressure to quit the union

717. With regard to alleged acts of anti-union pressure in the Guyana Energy Authority (GEA), the Government indicates that on 13 September 2002 the head of the presidential secretariat (HPS) met with the Staff of the GEA and pointed out that the GEA would be restructured for reasons of efficiency and effectiveness. Subsequently, the GEA provided the office of the HPS with information on personnel and development plans as requested. The process of restructuring of the agency is yet to be finalized.

D. The Committee's conclusions

718. *The Committee recalls that this case concerns allegations that the Government has been attempting to weaken the GPSU's bargaining power through various acts, such as refusal to implement an agreement concerning arbitration over wages in the public service, denunciation of the Agency Shop Agreement, withdrawal of check-off facilities, dismissals of trade union officers and members, withdrawal of GPSU certification as majority union in the Guyana Forestry Commission, pressure on fire officers to quit the GPSU and closing down of the Guyana Energy Authority without consulting the GPSU which is the majority union.*

Refusal to implement an agreement on arbitration

719. *The Committee recalls that during the previous examination of this case it had noted allegations of refusal by the Government to implement an agreement on arbitration which was negotiated in 1999 with the assistance of a mediating team in order to end a 57-day strike over wage claims and address the loss of purchasing power allegedly suffered by public employees. The Committee recalls that the Agreement provided that in the future, whenever salary and wage negotiations failed and a third party conciliation of 30 days was unsuccessful, the parties would adopt the method of arbitration set therein. The Committee also recalls that in 2000 after negotiations over salaries and wages failed, the Government contested the enforceability of the Agreement. The issue is now pending before the Courts [see 331st Report, paras. 421 and 437]. The Committee notes that in its response, the Government emphasizes that the Agreement was adopted in an environment of terror and intimidation and questions its validity. The Committee recalls that the principles of freedom of association do not protect against abuses consisting of criminal acts while exercising the right to strike and that although the holding of trade union meetings is an essential aspect of trade union rights, the organizations concerned must observe the general provisions relating to public meetings, which are applicable to all [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition,*

1996, paras. 598 and 140]. The Committee also stresses, however, that illegal acts should be investigated through an independent judicial inquiry with all due process safeguards and that apparently, there has been no investigation of any incidents which might have occurred during the 1999 strike.

720. *As to the validity of the Memorandum of Agreement, a question which is currently pending before the courts, the Committee observes that this Agreement was the outcome of negotiations conducted with the assistance of a mediating team in order to settle a dispute over wages in the public sector. The Committee notes that any challenge to this Agreement should be evaluated in the light of two principles. First, that agreements should be binding on the parties and second, that the harmonious development of labour relations would be facilitated if the public authorities, when dealing with the problems concerning the workers' loss of purchasing power, adopted solutions which did not involve modifications of agreements without the consent of both parties [see **Digest**, op. cit., paras. 818 and 880]. The Committee notes that the issue of the enforceability of the 1999 Memorandum of Agreement is currently pending before the courts and trusts that in rendering a decision, full account will be taken of these principles. The Committee requests the Government to keep it informed of the progress of judicial proceedings and to transmit a copy of the court ruling on this case as soon as it becomes available.*

Withdrawal of facilities

721. *The Committee notes that on 8 April 1999 the Government denounced the 1976 Memorandum of Agreement concerning the check-off of agency fees. The Committee observes that beyond the specific reasons put forward for the unilateral termination of the Agreement, the examination of which is currently pending before the courts, the denunciation took place in the context of a more general policy change, favouring trade union pluralism instead of a closed shop system in the public sector. The Committee recalls that problems related to union security clauses should be resolved at the national level, in conformity with national practice and the industrial relations system in each country. In other words, both situations where union security clauses are authorized and those where these are prohibited can be considered to be in conformity with ILO principles and standards on freedom of association [see **Digest**, op. cit., para. 323]. Thus, the denunciation of the Agreement is not per se contrary to freedom of association principles. However, the Committee regrets that it was not preceded by consultations and emphasizes the importance that should be attached to full and frank consultation taking place on any questions or proposed legislation affecting trade union rights [see **Digest**, op. cit., para. 927]. The Committee requests the Government to ensure in the future that full and frank consultations take place on any questions or proposed legislation affecting trade union rights.*

722. *The Committee notes that according to the complainants, the Government started revising its stance on the collection of trade union dues in 1999 when a 57-day strike and an arbitral award led to increases in the salaries of public employees. At that time, the regional executive officer of region No. 9 issued a circular in which the staff was notified that the GPSU had decided to increase trade union dues consequent to the salary raise, and invited any workers who objected to increases in trade union dues to place such objections on record with the auditor-general. The Committee also notes that in another press release, the Minister of Public Service indicated that employees should not feel constrained to pay increased trade union dues because in any case, the Government would extend the negotiated benefits to all of them regardless of trade union membership. The Committee considers that in keeping with the principles of freedom of association, it should be possible for collective agreements to provide for a system for the collection of union dues, without interference by the authorities [see **Digest**, op. cit., para. 808]. The Committee calls upon the Government to ensure the exercise of great restraint in relation*

to any form of interference which might occur in the context of the collection of trade union dues, and to undertake consultations with representative trade unions as soon as possible in order to consider improvements to the current check-off system through the adoption of adequate safeguards against interference. The Committee requests to be kept informed of developments in this respect.

- 723.** *The Committee observes that the Government finally discontinued the check-off facility on 7 June 2000, while conciliation was pending, and that on 21 July 2000 the High Court ordered the reinstatement of the deduction of trade union dues as of August 2000, on condition of submission of authorization. The Committee notes the GPSU's allegations that although it conformed to the court ruling by resubmitting membership forms and written authorizations to the public authorities, the latter failed to abide by the ruling by delaying and obstructing the collection and payment of trade union dues. Moreover, the Committee notes that the GPSU contests the time limits set in the ruling as a result of which trade union dues which were deducted in the months of June and July 2000 would not be reinstated, causing a financial deficit. The Committee also notes that the type of services provided by the GPSU to its members, including welfare programmes such as medical care, require a constant stream of revenue. The Committee notes that the Government's statements contradict some of the GPSU's allegations. In particular, the Government states that although it has been complying with the High Court ruling and making deductions of trade union dues on the basis of written authorization, the GPSU has failed to produce such authorizations. In this context, the Committee emphasizes that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided [see **Digest**, *op. cit.*, para. 435]. With regard to the deduction of trade union dues, the Committee calls on both parties to implement the High Court ruling of July 2000 on the one hand, by providing written authorizations for the deduction of trade union dues and on the other hand, by ensuring that such deductions and their payment to the GPSU are carried out promptly and in full. The Committee also invites the Government to undertake consultations with the GPSU without delay in order to forward to the GPSU any contributions made in June and July 2000 which have been retained. The Committee requests to be kept informed of developments in this respect.*

Anti-union dismissals

- 724.** *The Committee notes that cases concerning the dismissal of 12 GPSU officers and members allegedly on anti-union grounds (Leyland Paul, Bridgette Crawford, Karen Vansluytman, Yvette Collins, Cheryl Scotland, William Blackman, Marcia Oxford, William Pyle, Yutze Thomas, Anthony Joseph, Niobe Lucius and Odetta Cadogan) are pending before the courts and expresses the hope that the judicial proceedings will be concluded soon and will shed light onto the reasons for the dismissals. If it is found that the dismissals were on anti-union grounds, the Committee requests the Government to take all necessary measures to have the trade union officers and members reinstated in their posts without loss of pay. The Committee requests the Government to keep it informed in this respect and to communicate the text of the decisions rendered.*
- 725.** *The Committee also notes that according to the Government, Barbara Moore's services in the Guyana Forestry Commission were terminated along with those of other workers due to a reorganization. In this respect, the Committee notes that the Government does not provide information as to how many workers were affected by the reorganization and the measures taken to ensure that trade union officers would be protected from acts of anti-union discrimination in this context. The Committee also notes that the termination letter addressed to Ms. Moore did not indicate the reasons for which she was selected for dismissal among other workers in her unit. The Committee recalls that acts of anti-trade union discrimination should not be authorized under the pretext of dismissals based on*

economic necessity [see Digest, op. cit., para. 718], and that where public servants are employed under conditions of free appointment and removal from service, the exercise of the right to freely remove public employees from their posts should in no instance be motivated by the trade union functions or activities of the persons who could be affected by such measures [see Digest, op. cit., para. 708]. The Committee requests the Government to institute an independent inquiry into the reasons for the dismissal of Barbara Moore and if it is found that the dismissal was on anti-union grounds, to take all necessary measures to ensure her reinstatement in her post without loss of pay or, if reinstatement is not possible, to ensure that she is paid adequate compensation. The Committee requests to be kept informed in this respect.

Withdrawal of certification as majority union

726. *With regard to the withdrawal of the certification of the GPSU as majority union in the Guyana Forestry Commission the Committee takes note of the Government's statement that technically there was no withdrawal of the GPSU's certification since the union had never been certified, that the poll was called by the Trade Union Recognition and Certification Board following a unanimous decision by all members of the board, including the acting GPSU General Secretary, and that the Government has no representation on the board except for the chairman who is appointed after consultation with workers' and employers' organizations. The case is pending before the courts. In this regard, the Committee would like to recall that competent authorities should, in all cases, have the power to proceed to an objective verification of any claim by a union that it represents the majority of the workers in an undertaking, provided that such a claim appears to be plausible [see Digest, op. cit., para. 824]. Finally, concerning the fact that the President of the Guyana Agricultural and General Workers' Union is a member of Parliament with the ruling party, the Committee notes that according to the Government it is no secret that most of the political leaders in the Caribbean, including in Guyana, emerged from the trade union movement. The Committee requests the Government to keep it informed of the progress of judicial proceedings concerning the certification of the majority trade union in the Guyana Forestry Commission and to provide it with a copy of the court ruling when it becomes available.*

Pressure to quit the union

727. *The Committee notes that according to the GPSU, the Minister of Home Affairs instructed the Permanent Secretary to interrupt the check-off of trade union dues in the Guyana Fire Service in violation of the abovementioned High Court Order of July 2000. Moreover, the Minister has allegedly attempted to coerce firemen to quit the union and join an association which would replace the union because in his view, the fire service could not be unionized. In addition to this, according to the GPSU, the hearing of proceedings initiated on this issue did not take place on 15 November 2002 due to a reorganization of the court registry and has not been reassigned since then. The Committee notes that the Government has not provided any observations on this issue. The Committee recalls that justice delayed is justice denied [see Digest, op. cit., para. 105], and that firemen, like all other workers, have the right to establish and join organizations of their own choosing in conformity with Article 2 of Convention No. 87 ratified by Guyana. The Committee requests the Government to take all necessary measures to ensure that the case concerning the Guyana Fire Service is heard in court as soon as possible, and trusts that in rendering a decision on this issue, full account will be taken of Article 2 of Convention No. 87, ratified by Guyana, pursuant to which firemen, like all other workers, have the right to establish and join organizations of their own choosing. The Committee requests the Government to keep it informed of developments in this respect and to transmit the court ruling when it becomes available.*

728. *The Committee notes that in the framework of a restructuring process in the Guyana Energy Authority, the management provided the presidential secretariat with information on personnel and development plans, apparently without consulting with the GPSU which is the majority union in that unit. The Committee has emphasized that it is important that governments consult with trade union organizations to discuss the consequences of restructuring programmes on the employment and working conditions of employees [see Digest, op. cit., para. 937]. The Committee regrets that no consultations were carried out with the GPSU on the restructuring process under way in the Guyana Energy Authority and requests the Government to ensure that consultations with representative organizations take place in the future in the context of restructuring programmes.*

The Committee's recommendations

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

- (a) The Committee notes that the issue of the enforceability of the 1999 Memorandum of Agreement is currently pending before the courts and trusts that in rendering a decision, full account will be taken of the principles according to which agreements should be binding on the parties and the harmonious development of labour relations would be facilitated if the public authorities, when dealing with the problems concerning the workers' loss of purchasing power, adopted solutions which did not involve modifications of agreements without the consent of both parties. The Committee requests the Government to keep it informed of the progress of judicial proceedings and to transmit a copy of the court ruling on this case as soon as it becomes available.*
- (b) The Committee regrets that the denunciation by the Government of the 1976 Memorandum of Agreement concerning the check-off of agency fees was not accompanied by consultations and requests the Government to ensure in the future that full and frank consultations take place on any questions or proposed legislation affecting trade union rights.*
- (c) The Committee calls upon the Government to ensure the exercise of great restraint in relation to any form of interference which might occur in the context of the collection of trade union dues, and to undertake consultations with representative trade unions as soon as possible in order to consider improvements to the current check-off system through the adoption of adequate safeguards against interference. The Committee requests to be kept informed of developments in this respect.*
- (d) With regard to the deduction of trade union dues, the Committee calls on both parties to implement the High Court ruling of July 2000 on the one hand, by providing written authorizations for the deduction of trade union dues and, on the other hand, by ensuring that such deductions and their payment to the GPSU are carried out promptly and in full. The Committee also invites the Government to undertake consultations with the GPSU without delay in order to forward to the GPSU any contributions made in June and July 2000 which have been retained. The Committee requests to be kept informed of developments in this respect.*

- (e) *The Committee notes that the cases concerning the dismissal of 12 trade union officers and members allegedly on anti-union grounds (Leyland Paul, Bridgette Crawford, Karen Vansluytman, Yvette Collins, Cheryl Scotland, William Blackman, Marcia Oxford, William Pyle, Yutze Thomas, Anthony Joseph, Niobe Lucius and Odetta Cadogan) are pending before the courts and expresses the hope that the judicial proceedings will be concluded soon and will shed light onto the reasons for the dismissals. If it is found that the dismissals were on anti-union grounds, the Committee requests the Government to take all necessary measures to have the trade union officers and members reinstated in their posts without loss of pay. The Committee requests the Government to keep it informed in this respect and to communicate the text of the decisions rendered.*
- (f) *The Committee requests the Government to institute an independent inquiry into the reasons for the dismissal of Barbara Moore and if it is found that the dismissal was on anti-union grounds, to take all necessary measures to ensure her reinstatement in her post without loss of pay or, if reinstatement is not possible, to ensure that she is paid adequate compensation. The Committee requests to be kept informed in this respect.*
- (g) *The Committee requests the Government to keep it informed of the progress of judicial proceedings concerning the certification of the majority trade union in the Guyana Forestry Commission and to provide it with a copy of the court ruling when it becomes available.*
- (h) *The Committee requests the Government to take all necessary measures to ensure that the case concerning the Guyana Fire Service is heard in court as soon as possible, and trusts that in rendering a decision on this issue, full account will be taken of Article 2 of Convention No. 87, ratified by Guyana, pursuant to which firemen, like all other workers, have the right to establish and join organizations of their own choosing. The Committee requests the Government to keep it informed of developments in this respect and to transmit the court ruling when it becomes available.*
- (i) *The Committee regrets that no consultations were carried out with the GPSU on the restructuring process under way in the Guyana Energy Authority and requests the Government to ensure that consultations with representative organizations take place in the future in the context of restructuring programmes.*

CASE NO. 2228

INTERIM REPORT

**Complaint against the Government of India
presented by
the Centre of Indian Trade Unions (CITU)**

Allegations: The complainant alleges acts of anti-union discrimination including dismissals, the suppression of a strike by the police and refusal to negotiate in the Worldwide Diamond Manufacturers Ltd. which is situated in the EPZ of Visakhapatnam in the state of Andhra Pradesh

730. The Committee examined this case at its May-June 2003 meeting [see 331st Report, paras. 448-472, approved by the Governing Body at its 287th Session (June 2003)].

731. India has ratified neither the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) nor the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

732. In its previous examination of the case in June 2003, the Committee made the following recommendations [see 331st Report, para. 472]:

- (a) The Committee requests the Government to transmit sufficiently detailed information on the conditions under which trade unionists were allegedly dismissed, and on allegations that a trade union officer was arrested, meetings in the complainant's local office were prohibited and striking workers were threatened by the police during and after the strike staged at the Worldwide Diamonds Manufacturing Ltd. in the EPZ of Visakhapatnam concerning the workers who have been dismissed, suspended or fined and to confirm whether there have been restrictions of their trade union rights.
- (b) The Committee requests the complainant to provide more specific information concerning allegations of anti-union discrimination in the EPZ of Visakhapatnam concerning the workers who have been dismissed, suspended or fined and to confirm whether there have been restrictions of their trade union rights.
- (c) The Committee requests the Government to take all necessary measures as soon as possible with a view to reaching a settlement of the current dispute through collective bargaining and to keep it informed in this respect.
- (d) The Committee requests the Government to take all necessary measures as soon as possible with a view to promoting a settlement of all disputes and grievances in this case through inexpensive, expeditious and impartial conciliation procedures and to keep it informed in this respect.
- (e) The Committee requests the Government to review the situation where the two functions of Deputy Development Commissioner and Grievance Redressal Officer are performed by the same person and to indicate whether access to justice continues to depend on the permission of the competent labour authorities. If this is the case, the Committee requests the Government to amend the legislation so that no such permission is required. The Committee requests to be kept informed in this respect.

B. The Government's new observations

- 733.** In a communication dated 5 August 2003, the Government states that the appropriate government in respect of the subject concerning this complaint is the provincial government of Andhra Pradesh. The Government further states that as informed by the government of Andhra Pradesh, the Development Commissioner vested with the powers of Commissioner of Labour in Export Processing Zones submitted a detailed report on 29 May 2003 on the issues raised in the complaint. The Government attaches a copy of the report and further notes that the recommendations as contained in the 331st Report of the Committee on Freedom of Association have been forwarded to the Government of Andhra Pradesh for a reply which will be communicated to the ILO as soon as it is received.
- 734.** In a report dated 29 May 2003, the Development Commissioner clarifies that the company in question is divided into two units named Worldwide Diamond Manufacturers Ltd. and LID Jewellery (India) Private Ltd. The Development Commissioner reports that specific allegations of discrimination against individual workers have been thoroughly verified and it has been ascertained that action taken against these individuals is based on the merits of each case and that there has been no discrimination. Moreover, the workers are free to approach "appropriate authorities" (quotations original) with their grievances. In addition to this, the reasons mentioned for imposing fines are false and far from the truth. Furthermore, the Development Commissioner reports that there is no ban on workers forming into a trade union in accordance with the law. The Visakhapatnam EPZ (VEPZ) (hereinafter VEPZ) administration is not the registering authority of a trade union and does not in any way interfere with the unionization of the workers.
- 735.** With regard to the absence of grievance redressal mechanisms, the Commissioner states that the union had to that day not furnished a list of the office bearers while the management had been attending all the meetings conducted by the local labour authorities. The Development Commissioner further states that it is wrong and untrue to say that the administration did not take action to resolve the dispute. In fact, the VEPZ administration took action immediately after hearing about the strike by workers. A meeting was convened with the workers' representatives to negotiate a solution. Discussions were also held with the management and local labour authorities. Some of the workers stopped the vehicles transporting certain officers of the Ministry of Commerce, Development Commissioners of other Export Processing Zones and other officers to the VEPZ and staged a "*dharna*". When repeated requests to allow free passage failed, looking at the mood of the workers, fearing safety to public servants the local police were requisitioned. As a precautionary measure to avoid any loss or damage to Government property, the police "clamped" section 144 of the Code of Criminal Procedure in the vicinity of VEPZ. The Commissioner further states that according to the information available to the VEPZ, the workers called off the strike voluntarily and unconditionally and he is not aware of any kind of assurance given by any of the persons mentioned in the complaint.
- 736.** As to allegations of anti-union dismissals following the strike, the Commissioner reports that the management of Worldwide Diamonds Ltd. was questioned on the issue of unfair dismissals and stated that they had never resorted to illegal termination or forced any worker to resign. Finally, with regard to the allegations of the dismissal of Mr. Sudhakar one month after his participation in the strike, the Commissioner states that he was a trainee and, since his performance was not up to standard, his traineeship was discontinued. The Development Commissioner provides further information with regard to two other workers the names of whom were not on the list provided by the complainants. One of them, Ms. Vijaya Velangini, had resigned on health grounds and after her health improved, she was re-employed on her request. The other, Mr. Immunall, was caught leaving with company property.

737. The Development Commissioner provides further information on certain allegations by the complainant concerning conditions of work, which are allegedly not in conformity with the applicable labour law, and abusive management practices (note: these allegations, which had constituted the basis for staging a strike, had not been retained during the initial examination of the complaint as they did not directly concern freedom of association issues).

C. The Committee's conclusions

738. *The Committee recalls that this case concerns allegations of acts of anti-union discrimination including dismissals, the suppression of a strike by the police and refusal to negotiate in the Worldwide Diamond Manufacturers Ltd., which is situated in the EPZ of Visakhapatnam in the state of Andhra Pradesh. The Committee takes note of the clarification provided by the Government that the company in question is divided into two units named Worldwide Diamond Manufacturers Ltd. and LID Jewellery (India) Private Ltd.*

739. *During the previous examination of the case, the Committee had requested the complainant and the Government to provide sufficiently detailed information concerning the allegations related to workers who had been dismissed, suspended or fined and to confirm whether there had been restrictions of trade union rights [see above para. 3, recommendations (a) and (b)]. The Committee recalls in particular that the complainant had alleged that the management of Worldwide Diamond Manufacturers Ltd. had dismissed two workers for being active in the union (Aruna and Vijaya), had suspended one for trade union activities (Neelakanteswara Rao) and had imposed arbitrary fines on 22 others for trade union activities (R.T. Santosh, Praveen, Babu Khan, Srinu, Ravi, Babu Rao, Sita Rama Raju, Raju, Nooka Raju, Kalyani, Aruna, N. Sailaja, Girija, Neeraja, Chandram, Veerajju, T. Lakshmi Kanta, P. Govinda Raju, P. Manga Raju, Subba Raju, Rajeswari, Krishna) [see 331st Report, para. 452].*

740. *The Committee notes that in its response, the Government attaches a report by the Development Commissioner of the VEPZ which had been prepared before the last examination of this case. The Committee takes note of the Development Commissioner's statement that there is no ban on the right of workers to establish trade unions in accordance with the law since the VEPZ administration is not the registering authority of a trade union and does not in any way interfere with the right of workers to establish trade unions. The Committee further notes that the Development Commissioner affirms that allegations of discrimination against individual workers have been thoroughly verified and it has been ascertained that action taken against these individuals is based on the merits of each case without discrimination. Moreover, the Commissioner states that the reasons alleged for imposing fines are false and untrue. The Committee observes that the Development Commissioner's conclusions concerning alleged acts of anti-union discrimination are very general and totally contradict the complainant's allegations, without providing any indication on the concrete facts which led to these sanctions, and thereby preventing the Committee from determining whether these measures had an anti-union purpose or not. The Committee requests the Government to take all necessary steps urgently in order to ensure that an independent and thorough investigation, with the cooperation of the complainant organization, is carried out on the concrete facts which motivated the alleged workers' dismissals, suspensions and fines in Worldwide Diamonds Manufacturers Ltd. and if it is found that these measures were by reason of workers' trade union activities, to take all necessary steps to reinstate the dismissed workers and compensate those who were suspended or fined. The Committee requests to be kept informed of developments in this respect.*

- 741.** *With regard to additional dismissals which allegedly took place later on, in the context of a strike in Worldwide Diamonds Manufacturers Ltd., the Committee notes that during the previous examination of the case, it had requested the Government to transmit sufficiently detailed information on the conditions under which trade unionists were allegedly dismissed during and after the strike [see above para. 3, recommendation (a)]. In particular, it had been alleged that termination letters were sent to eight workers during the strike (G. Sony, Srinivasa Rao, Ganesh Reddy, Nagapaidi Raju, D.V. Sekhar, Ramesh Kumar, Rajaratnam Naidu and Prasad) and that another seven workers were dismissed after the strike, on 25 March 2002 (K. Sudhakar Rao, Ch. Hemalatha, P.U. Kishore Reddy, T. Guru Murthy, G.V. Raju Kumar, K.R.A.S. Varma and I. Kanaka Raju) despite assurances that workers would not be victimized as a result of their participation in the strike [see 331st Report, paras. 455-56].*
- 742.** *The Committee takes note of the information provided by the Development Commissioner with respect to the dismissal of one of the above workers (Mr. Sudhakar), on grounds of poor performance during his traineeship. With regard to the other 14 persons dismissed during and after the strike, the Committee observes that according to the Commissioner, the management of Worldwide Diamonds Manufacturers Ltd. stated that they had never resorted to illegal termination or forced any worker to resign. The Committee points out that this statement does not sufficiently indicate whether the dismissals which took place had anti-union purposes and does not specify the concrete facts which motivated them. The Committee wishes to emphasize moreover, that the response to allegations of anti-union discrimination in this case should not be confined to reproducing the reply of the accused party without any concrete supporting evidence or official investigation. The Committee requests the Government to take all necessary steps urgently in order to ensure that an independent and thorough investigation, with the cooperation of the complainant organization, is carried out on the concrete facts which motivated the alleged dismissals of 14 persons during and after the strike staged at Worldwide Diamonds Manufacturers Ltd. and, if it is found that the dismissals were on anti-union grounds, to take all necessary steps to have the workers reinstated without loss of pay. The Committee requests to be kept informed of developments in this respect.*
- 743.** *The Committee further notes from the Development Commissioner's report, that according to the information available to the VEPZ, the workers called off the strike voluntarily and unconditionally and the Development Commissioner is not aware of any kind of assurance against reprisals given by any of the persons mentioned in the complaint. The Committee wishes to stress however that according to the allegations, the assurances were provided not by the VEPZ administration but by the Minister for Heavy Industries, the District Collector and the Commissioner of Police [see 331st Report, para. 455]. The Committee requests the Government to undertake consultations urgently with the Minister for Heavy Industries, the District Collector and the Commissioner of Police with a view to ensuring that any assurances which might have been given to the workers of Worldwide Diamonds Manufacturers Ltd. to the effect that they would not be victimized by reason of their participation in a strike are fully observed in practice.*
- 744.** *With regard to the same strike, the Committee had also requested the Government to provide sufficiently detailed information on the conditions under which one trade union officer was arrested, meetings in the complainant's local office were prohibited and striking workers were threatened by the police [see above para. 3, recommendation (a)]. The Committee recalls that the complainant had alleged that a peaceful strike had been brutally suppressed by the VEPZ administration and the police, that instead of taking steps to resolve the issue through discussions, the administration had chosen to terrorize the workers through arrests, illegal detention in police stations and prohibiting public meetings in an area up to 20 km from the VEPZ, and that meetings in the local CITU office were not permitted, hundreds of workers were arrested and detained, including one of the*

national secretaries of the CITU as she was walking out of the CITU local office, one worker was chained while in custody, workers and their leaders were brutally caned by the police and a reign of terror was unleashed, while the police went to the houses of individual workers and threatened them so that they returned to work [see 331st Report, para. 454].

- 745.** *In this respect, the Committee notes that the Government has not provided any new information, and that the Development Commissioner's report reiterates the information already examined by the Committee at its June 2003 meeting [see 331st Report, para. 463]. In particular, the Development Commissioner states in his report that: (1) Some of the workers stopped the vehicles of officers of the Ministry of Commerce and Development Commissioners of other Export Processing Zones when they were on their way to the VEPZ and staged a "dharna" (protest-blockade) in the framework of their strike. (2) When repeated requests to allow free passage failed, and considering that the mood of the workers posed a threat to the safety of public servants, the local police were called in. (3) As a precautionary measure to avoid any loss or damage to government property, the police applied section 144 of the Code of Criminal Practice in order to isolate the vicinity of the VEPZ.*
- 746.** *The Committee notes that the information provided with regard to the suppression of a protest-blockade held in the framework of a strike staged in Worldwide Diamonds Manufacturers Ltd., is very general and does not address the specific allegations made by the complainant. The Committee therefore requests the Government to take all necessary steps urgently in order to ensure that an independent and thorough investigation, with the cooperation of the complainant organization, is carried out on allegations concerning the brutal suppression of the strike, the detention of hundreds of striking workers and a trade union officer by the police, the prohibition of meetings in the complainant's local office, excessive police violence (caning and chaining of workers), and the visit of police officers to workers' homes in order to threaten them so that they return to work. The Committee requests to be kept informed of the outcome of this investigation so as to fully clarify the facts, and if the allegations are confirmed, determine responsibility, punish those responsible and prevent the repetition of such acts.*
- 747.** *With regard to the resolution of the dispute which gave rise to the strike, the Committee had requested the Government to take all necessary measures as soon as possible with a view to reaching a settlement through collective bargaining or inexpensive, expeditious and impartial conciliation procedures [see above para. 3, recommendations (c) and (d)]. The Committee recalls that the complainant had alleged that in general, there was no appropriate mechanism in the VEPZ for the redressal of grievances and that in particular with regard to the strike, no steps had been taken to resolve the issue by holding discussions, thereby encouraging the management to refuse to talk to the representatives of the workers [see 331st Report, paras. 451 and 454]. The Committee notes that in response to these allegations, the Development Commissioner states that the workers whose names are mentioned in the complaint are free to approach "appropriate authorities" with their grievances (quotations in the original) without specifying exactly which authorities are referred to. The Committee also notes that according to the Development Commissioner, the union has not furnished the necessary list of officers while the management has been attending all the meetings conducted by the local labour authorities. Furthermore, the Development Commissioner states that the VEPZ administration took action immediately after hearing about the strike, convened a meeting with the workers' representatives to negotiate a solution and held discussions with the management and local labour authorities. The Committee observes that there is no indication of the results of the meeting or any follow-up to such results after the end of the strike. The Committee requests the Government to provide information on the actual situation with regard to the dispute in*

Worldwide Diamonds Manufacturers Ltd. and of any settlement in this respect. The Committee requests to be kept informed of developments concerning such settlement.

- 748.** *The Committee recalls that in its previous conclusions it had noted that there could be incompatibility between the two functions of Deputy Development Commissioner and Grievance Redressal Officer when performed by the same person and had requested the Government to review this situation [see above para. 3, recommendation (e), and 331st Report, para. 470]. The Committee notes that the Government has not provided any information in this respect. The Committee emphasizes that the Deputy Development Commissioner should not perform the functions of Grievance Redressal Officer since mechanisms for the redressal of grievances should be independent and have the confidence of all parties. The Committee requests the Government to take all necessary steps so as to ensure that the functions of Grievance Redressal Officer (GRO) are not performed by the Deputy Development Commissioner (DDC) in the VEPZ (currently the GRO and the DDC are the same person) but by another independent person or body, having the confidence of all parties and to keep it informed in this respect.*
- 749.** *The Committee had finally requested the Government to indicate whether access to justice continues to depend on the permission of the competent labour authorities and if this is the case, amend the legislation so that no such permission is required [see above para 3, recommendation (e)]. The Committee notes that the Government has not provided any information on this point. The Committee requests the Government to ensure that no permission by the labour authorities is required for trade unions to have access to justice, and if necessary, to amend the legislation accordingly. The Committee requests to be kept informed of developments in this respect.*
- 750.** *The Committee hopes that the forthcoming report by the provincial government of Andhra Pradesh, mentioned by the Government in its communication, will fully address all the points raised above.*

The Committee's recommendations

- 751.** *In the light of its foregoing interim conclusions, the Committee requests the Governing Body to approve the following recommendations:*
- (a) *The Committee requests the Government to take all necessary steps urgently in order to ensure that an independent and thorough investigation, with the cooperation of the complainant organization, is carried out on the following:*
- (i) *The concrete facts which motivated the alleged workers' dismissals, suspensions and fines in Worldwide Diamonds Manufacturers Ltd. If it is found that these measures were by reason of workers' trade union activities, the Committee requests the Government to take all necessary steps to reinstate the dismissed workers and compensate those who were suspended or fined. The Committee requests to be kept informed in this respect.*
- (ii) *The concrete facts which motivated the alleged dismissals of 14 persons during and after the strike staged at Worldwide Diamonds Manufacturers Ltd. If it is found that the dismissals were on anti-union grounds, the Committee requests the Government to take all necessary steps to have the workers reinstated without loss of pay. The Committee requests to be kept informed of developments in this respect.*

- (iii) *The allegations concerning the brutal suppression of the strike, the detention of hundreds of striking workers and a trade union officer by the police, the prohibition of meetings in the complainant's local office, excessive police violence (caning and chaining of workers), and the visit of police officers to workers' homes in order to threaten them so that they return to work. The Committee requests to be kept informed of the outcome of this investigation so as to fully clarify the facts, and if the allegations are confirmed, determine responsibility, punish those responsible and prevent the repetition of such acts.*
- (b) *The Committee requests the Government to undertake consultations urgently with the Minister for Heavy Industries, the District Collector and the Commissioner of Police with a view to ensuring that any assurances which might have been given to the workers of Worldwide Diamonds Manufacturers Ltd. to the effect that they would not be victimized by reason of their participation in a strike, are fully observed in practice.*
- (c) *The Committee requests the Government to provide information on the actual situation with regard to negotiations in Worldwide Diamond Manufacturers Ltd., and any settlement in this respect. The Committee requests to be kept informed of developments concerning such settlement.*
- (d) *The Committee requests the Government to take all necessary steps so as to ensure that the functions of Grievance Redressal Officer (GRO) are not performed by the Deputy Development Commissioner (DDC) in the EPZ of Visakhapatnam (currently the GRO and the DDC are the same person) but by another independent person or body, having the confidence of all parties and to keep it informed in this respect.*
- (e) *The Committee requests the Government to ensure that no permission by the labour authorities is required for trade unions to have access to justice, and if necessary, to amend the legislation accordingly. The Committee requests to be kept informed of developments in this respect.*
- (f) *The Committee hopes that the forthcoming report by the provincial government of Andhra Pradesh mentioned by the Government in its communication, will fully address all the points raised above.*

CASE NO. 2234

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

**Complaint against the Government of Mexico
presented by
the Metropolitan Rail Transport Workers' Union (SMTSTC)
supported by
the National Workers' Union (UNT) and the
Workers' Revolutionary Confederation (CAT)**

Allegations: The complainant organization alleges that following industrial action in support of a claim in the underground railway (Metro), criminal proceedings were instigated against the participants in the action, charging them with "coalition of public servants" and "attacks on means of communication"

752. The complaint is contained in a letter from the Metropolitan Rail Transport Workers' Union (SMTSTC) dated 10 October 2002. The National Workers' Union (UNT) and the Workers' Revolutionary Confederation (CAT) supported the complaint in letters dated 6 and 21 November 2002. The complainant organization sent additional information in a letter of 14 January 2003. The Government sent its observations in a letter dated 28 May 2003.

753. Mexico has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

754. In its letters dated 10 October 2002 and 14 January 2003, the Metropolitan Rail Transport Workers' Union (SMTSTC) states that in March 2002 it submitted to the employer (Public Transport Authority) a request for revision of the regulations on general conditions of work, in accordance with the provisions of provisional article 3 of those regulations. In the absence of a reply, the workers' assembly and the general council of delegates, the trade union's governing body, agreed on 5 August 2002 to a partial stoppage in some facilities (Metro lines 9 and B).

755. The complainant organization adds that the stoppage took place on 8 August 2002 on lines 9 and B of the underground railway (Metro). The action was conducted peacefully, without violence and without threats or injuries of any kind, for the sole purpose of protesting against the failure to pay wages and the negligence of the Public Transport Authority and the Federal District Government to address the defects and structural weaknesses in the installations and trains used to provide the public urban passenger service in the metropolitan area as set out in the requests. The complainant organization reports that, as a result of this form of action, the Federal District authorities and the employer agreed with the trade union to address the various points set out in the claims, which confirms the legitimacy of that action.

- 756.** The complainant organization alleges that after the 8 August stoppage, the Public Transport Authority and the Federal District Government instigated criminal proceedings in the Federal District and the State of Mexico against its General-Secretary, the other members of the executive committee and the other workers who participated by commission or omission. They were accused of promoting and carrying out a suspension of work, whereby they were deemed to have committed the offences of “coalition of public servants” and “attacks on means of communication” (articles 216 and 167 of the Criminal Code).
- 757.** The complainant organization adds that the partial stoppage was a decision adopted by the executive committee and, in particular by the General-Secretary of the general executive committee, who simply acted as the representative of his members. The partial stoppage consisted solely of abstaining from work on 8 August 2002. The presence of the workers in stations on Metro lines 9 and B was solely to explain the decision not to work that day, and did not cause any damage to facilities.
- 758.** They say that the Metro trains were not paralysed, because when the workers arrived at the facilities, the trains were stopped and not running, and they simply did not operate them. Something which is not operating cannot be paralysed, and no train had started on that day. At the request of the Public Transport Authority, the Attorney-General of the State of Mexico initiated a preliminary inquiry against the workers and the members of the executive committee in order to establish the facts, and decided that there were no grounds to pronounce criminal charges against them. Nevertheless, the Federal District Prosecutor’s Office proceeded with the criminal proceedings, forgetting that the Attorney-General’s Office was considered in the doctrine as an institution acting in good faith.
- 759.** On the facts, the only responsibility that can be attributed to the General-Secretary of the general executive committee of the SMTSTC is to have implemented the decision of the grass-roots workers and the general council of the trade union delegates to stop work on the abovementioned two Metro lines on that day. In the course of that action, the workers went to the stations concerned and entered in a peaceful manner (access was not hindered and no doors were damaged), and inside the facilities, they explained their decision not to work on that day. Neither did they prevent access by passengers, since that was the responsibility of the employer’s supervisory staff who were at their posts. Thus, transport system officials, various authorities, members of the public and representatives of the media had access to the facilities throughout the day.
- 760.** They pointed out that not working on a working day is indeed a failure to fulfil employment obligations which could involve civil responsibility but on no account is it a ground for the application of criminal sanctions. The intention of the prosecuting authority is clear, since by its actions it seeks to weaken, frighten and intimidate workers in the trade union by attacking their representatives (General-Secretary and other members of the executive committee) by instigating criminal proceedings when they could have recourse to industrial proceedings.
- 761.** The complainant organization indicates that on 27 November 2002, the Attorney-General of the State of Mexico issued a decision confirming that criminal proceedings would not be taken against the participants in the strike on 8 August, among other reasons, because:

From all the above, we must conclude that the facts presented by the plaintiff must be considered in the context of labour standards set out in the legislation which the employers and trade unions consider applicable in resolving industrial disputes, since here we have a case of suspension of work by the workers, in their own workplace for no purpose other than to pursue claims of a strictly industrial order and without that suspension of work straying into the criminal sphere. On the facts, property was certainly occupied, but the occupation was

peaceful, public and not clandestine, and was even announced several days in advance. Moreover, it was considered to be temporary and for a purpose other than to exercise control over the property, since in fact the occupation was intended to force the employers to address the workers' demands with respect to safety, refurbishments, training, improved conditions of work, etc., from which it is clear that their requests were to seek better conditions of work, but there is no sense of deception or intent of a criminal nature.

762. The decision by the Attorney-General of the State of Mexico leaves no room for doubt. The suspension of work did not give rise to criminal offences, and the nature of the case is clearly of an industrial character. However, the Federal District Government, through its public transport authority, sought to designate them as criminal offences, something which is not borne out by the facts. The work stoppage, even when carried out collectively, is not subject to criminal sanctions, the more so when it is asserted that the employer, among other things, is addressing the structural weaknesses and defects in the installations and trains. No one can be forced to work in conditions which endanger his life and the lives of others, and work stoppage was the only way to draw the authority's attention to the conditions in which the service is provided.

763. As a result of the strike, for which it is sought to charge the General-Secretary with criminal responsibility, on 15 August 2002, a week after the strike, the employer and the representative of the Federal District Government signed an agreement with the trade union recognizing that the union's demands were justified and then announced the closing of certain Metro lines "for maintenance". If the strike action drew attention to the union's demands, the eminently industrial character of the event is clear. Moreover, there is case law which establishes that if the employer admits the obligation to meet the workers' demands through an express agreement following a supposedly illegal industrial action, that fact alone justifies the industrial action and the conduct of those involved in the action becomes exceptional.

B. The Government's reply

764. In its letter of 28 May 2003, the Government states that none of the facts indicated in the letter sent by the Metropolitan Rail Transport Workers' Union of the Federal District Transport Authority constitute failure by the Government of Mexico to observe the principle of freedom of association and the right to organize enshrined in Convention No. 87. At no time does the Metropolitan Rail Transport Workers' Union (SMTSTC) indicate that it had been prevented from freely exercising its right to be established, possess legal personality and own property, to defend the interests of its members in the way and on terms considered appropriate. Neither has it been prevented from exercising its right to draw up its statutes and regulations, freely elect its representatives, organize its administration and activities and draw up a programme of action. Neither is it alleged that the union has encountered obstacles in forming federations and confederations and becoming affiliated to them. For these reasons, the Government of Mexico has at no time failed to comply with the provisions of the ILO's Convention No. 87. However, in order to contribute in good faith to the work of the Committee on Freedom of Association, the Government sent its comments on the complaints submitted by the SMTSTC.

765. In March 2002, the SMTSTC submitted to the Public Transport Authority a request for review of the regulations setting out the general conditions of work. The review of the regulations was concluded on 7 June of the same year. The SMTSTC agreed a wage increase of 8 per cent with the employer. The complainant organization was aware of the review of the regulations setting the general conditions of work. The Public Transport Authority addressed its request.

- 766.** It should be noted that if the industrial dispute raised by the SMTSTC had not been satisfactorily resolved, national legislation provides the necessary mechanisms for having recourse to dispute settlement bodies in order to ensure respect for and compliance with rights and obligations granted by law or contract and it should be emphasized that the State guarantees that disputes arising in that connection are settled in accordance with the law. Trade unions that have serious objections to the general conditions of work can resort to the Federal Conciliation and Arbitration Tribunal. Where public sector workers consider that their rights at work are generally and systematically violated, they may exercise the right to strike (article 94 of the Federal Public Employees Act).
- 767.** The Government indicates that as far as it knows, the SMTSTC did not make use of these legal mechanisms. On the contrary, the assembly of workers of the transport area of Metro line B, members of the SMTSTC, without having recourse to the remedies under the law, decided to stop work on that line from the start of operation to the end of the service, on the grounds that the letters addressed to the Federal District Transport Authority had not received a reply.
- 768.** The Government explains that the concept of “collective suspension of work” does not exist in the Federal Public Employees Act, in its secondary legislation or in the regulations setting the general conditions of work governing the employment relationship between the Metropolitan Rail Transport Workers’ Union and the Public Transport Authority. The Federal Public Employees Act sets out the obligation of workers to conscientiously perform their duties. Where a public sector employee is absent for a day without due cause, the proportion of his wages for the day not worked is deducted from his wages. Under the regulations setting the general conditions of work, where a worker in the public transport system is absent from work for more than three consecutive days, or more than five separate days within a 30-day period without due cause, he may be dismissed subject to a decision by the Federal Arbitration and Conciliation Tribunal.
- 769.** The Government indicates that in the investigation by the Federal District Public Prosecutor’s Office, a leaflet was found at Lagunilla station on line B which stated that “on 2 August 2000, the assembly of transport sector workers for line B decided to suspend the service of that line on 8 August”. In the early hours of 8 August 2002, some 300 people took over the installations at the stations of Ciudad Azteca, Tacubaya and Pantillán on Metro line 9 of the public transport system, preventing the staff exercising duties involving the employer’s confidence, who came to work, from carrying out their duties, and running the various trains to operate the public service for which the Public Transport Authority is responsible.
- 770.** The Government states that it is not evident from the documents sent by the complainant organization on the agreement with the Public Transport Authority that it was the result of the “collective withdrawal” or suspension of the service, much less that it confirms the legality of the acts undertaken on 8 August 2002.
- 771.** As to the alleged criminal proceedings against persons who participated in the action on 8 August, the legal representative of the Public Transport Authority made an application on 7 August 2002, one day before the events, to Central Investigation Agency No. 50 of the prosecution service of the Federal District Public Prosecutor’s Office. The purpose of the application was to complain of acts which might constitute offences, committed against the party he represented and the travelling public, by any person or persons responsible, on the basis of information obtained from the leaflets placed in the Public Transport System which called for a suspension of service on 8 August 2002, although the general conditions of work did not allow that kind of action, and there had been no notice of a strike or stoppage of work. On 8 August 2002, the legal representative extended his complaint to include the events that had occurred.

- 772.** The Federal District Public Prosecutor's Office did not instigate ex officio the preliminary proceedings, Case No. FACI/50T1/1008/02-08 against Mr. Fernando Espino Arévalo, General-Secretary of the SMTSTC, as the complainant organization incorrectly indicates. Rather, following the complaint by the legal representative of the Public Transport Authority of matters which might constitute offences, it opened preliminary proceedings against the person or persons responsible. The Federal District Public Prosecutor's Office, on receiving a complaint, accusation or dispute of a matter which constitutes an offence under the law, is required to pursue and investigate possible offences, undertaking such inquiries as are necessary to ascertain the existence of the offence and the probable responsibility in the light of the facts, and this function is assigned to it under the Constitution of the United States of Mexico. On completion of the necessary inquiries, the Federal District Public Prosecutor's Office established the existence of the offence and the probable criminal responsibility of Mr. Fernando Espino Arévalo in committing the offences of: (a) *attacks on means of communication*, under article 167, section VII of the Federal District Criminal Code which provides prison terms of one to five years or fines of 500 to 50,000 pesos. The investigations concluded that Mr. Fernando Espino Arévalo, acting together with other persons, took over the installations of the underground railway system (Metro) on 8 August 2002, paralysing trains which provide a service to the public; and (b) *coalition of public servants*, under article 216, paragraph 1, in conjunction with articles 7, section I; 8, single paragraph; 9, paragraph 1; and 13, section III of the Federal District Criminal Code, in conjunction with articles 122, last paragraph and 124 of the Federal District Criminal Procedures Code. (Article 216 states that "any public servant who combines with others to take measures in violation of the law or regulations, prevents their implementation or leaves his post for the purpose of hindering or suspending any branch of public administration commits the offence of "coalition of public servants". Workers who associate in the exercise of their constitutional rights or resort to the right to strike do not commit such an offence.") The investigations uncovered the existence of a call to stop work on 8 August from the start of operation to the end of the service, and the placement of a series of posters in the stations of Metro line B informing the workers of the underground railway system and the travelling public, of a suspension of service on that day. The posters also invited the workers not to carry out work of any kind in Metro line B.
- 773.** According to the Government, it is noteworthy that the complainant organization states in its letter that it carried out a "collective suspension of work" on 8 August 2002, meaning that they did not attend work, and then indicates that it was exercising its right to assemble and strike, enshrined in part B, section X of the Constitution of the United States of Mexico, which necessarily means that they went to the installations of the underground railway system. It should be recalled that the judicial authority will be the one which determines whether the Federal District Public Prosecutor's Office had sufficient grounds for charging Mr. Fernando Espino Arévalo with the offences of "attacks on means of communication" and "coalition of public servants".
- 774.** The Government adds, however, that certain clarifications are appropriate as to the scope of articles 9 and 123, part A, section XVI; and part B, section X of the Constitution of the United States of Mexico. The first paragraph of the constitutional provision enshrines freedom of association and peaceful assembly. However, like any human right or constitutional guarantee, these rights are not absolute or unlimited. When the right of free association is exercised in violation of provisions which prohibit a certain conduct, the parties exceed their constitutional rights and thus, transgress the law, committing what secondary legislation, such as the Federal District Criminal Code, define as offences, i.e. conduct which affects the rights of others, undermines public order and endangers social peace. Neither is the right of assembly laid down in the Mexican Constitution an absolute right since it must be exercised in a peaceful manner, which means that its purpose must not be in contravention of the laws on public order.

- 775.** The second paragraph of article 9 of the Constitution addresses freedom of association or assembly to present a petition or a proposal concerning an official act. This guarantee must be understood as the collective exercise of the right of petition, enshrined in article 8 of the Constitution, but the exercise of this right is subject to not making slanderous allegations against the authority nor using violence or threats to intimidate it or in any way pressure it or force it to decide the petition in a particular way. The right of petition does not necessarily require the authority to grant the petition, but only to consider the petition and decide on it in accordance with the law, always provided that it is formulated in accordance with the Constitution. The prohibition in article 17 of the Constitution, the first paragraph of which states that no one may take the law into his own hands or use violence to obtain their ends, should be understood in this light.
- 776.** Section XVI of part A, and section X of part B, of article 123, of the Mexican Constitution enshrine the right to organize of workers generally and the right of public employees to organize and strike. According to the inquiries conducted during the preliminary investigation in Case No. FACI/50T1/1008/02-08, Mr. Fernando Espino Arévalo (General-Secretary of the complainant organization) was found to be probably responsible for the offence of attacks on means of communication, from which it can be inferred that the meeting was not peaceful and its purpose was not lawful, in terms of article 9 of the Constitution. In addition, the trade union was not exercising the right to strike, as laid down in article 123, part B, section X, of the Constitution. Thus, the fact that the rights were not exercised in the form and according to the terms laid down in the Constitution and the Federal Public Servants Act indicates that Mr. Fernando Espino Arévalo and his companions are not covered by the exception in article 216 of the Federal District Criminal Code, since their purpose was to interrupt a public service and not the exercise of a labour right.
- 777.** Section X of part B of the Mexican political Constitution sets out the right to strike of public servants, subject to compliance with the requirements set out by law, for one or various government departments, when the rights set out in that article are generally and systematically violated. This principle is reproduced in article 94 of the Federal Public Employees Act. Articles 92-109 of this law set out the relevant strike procedures. To exercise the right to strike, national legislation sets out certain prior requirements as to form, substance and majority (articles 93, 94, 99 and 100 of the Federal Public Employees Act). Trade unions must issue a strike notice (*emplazamiento a huelga*), i.e. submission of a petition to the president of the Federal Conciliation and Arbitration Tribunal, which did not happen in this case, since there is no evidence from the inquiries to show that any petition was submitted or notified in accordance with the law, or the record of the meeting in which it was decided to call a strike or collective suspension of work by the SMTSTC. If this trade union considered that the supposed violation of its rights warranted the extreme acts of stopping work and occupying the installations of Metro lines 9 and B, it should have resorted to the right to strike enshrined in the law and applied to the Federal Arbitration and Conciliation Tribunal.
- 778.** Finally, the Government reports that the investigation showed that the acts of Mr. Fernando Espino Arévalo and the persons involved in the events of 8 August 2002 involved preventing the provision of the public service, since by exercising pressure, they paralysed the Metro trains. This situation is addressed in article 167, section VIII of the Federal District Criminal Code. Article 21 of the Constitution allows the Attorney-General to prosecute offences, and the latter performs its function strictly in accordance with the law and independent of the federal or local authorities to which its officials belong, as in the present case. As regards the decision of the Attorney-General's Office of the State of Mexico not to authorize penal action pursuant to preliminary investigation SAG/I/7139/02, it should be noted that this body is independent in its function concerning penal law. Moreover, it should be noted that the Attorney-General's Office of the State of Mexico

reached this conclusion solely and exclusively with respect to the acts which occurred at the time when the installations of the Ciudad Azteca station on Metro line B were occupied.

C. The Committee's conclusions

- 779.** *The Committee observes that the complainant organization alleges that after a peaceful “partial stoppage” of activities on lines 9 and B of the Metropolitan passenger train on 8 August 2002, following the failure of the Public Transport Authority to reply to a petition requesting the revision of the regulations on general conditions of work, the authority instigated criminal proceedings against its General-Secretary and the other members of the executive committee, and the other workers who took part in the industrial action (charging them with the offences of “coalition of public servants” and “attacks on means of communication”). According to the complainant organization, the Federal District Public Prosecutor’s Office opened a preliminary investigation into the complaint.*
- 780.** *The Committee notes that the Government provided the following information: (1) where public employees consider that their rights are generally and systematically violated, they can invoke the right to strike guaranteed by the Federal Public Employees Act, but the complainant organization did not use the legal mechanisms and suspended the service of Metro line B on 8 August 2002; (2) on 8 August, some 300 persons occupied the installations of several stations on Metro line 9, preventing the staff who carried out duties involving the employer’s confidence and came to work, from carrying out their duties and running the trains in order to operate the public service; (3) on 7 August, the legal representative of the Public Transport Authority made an application to the Federal District Public Prosecutor’s Office to complain of acts which might constitute an offence on the basis of information that a stoppage of the service was being called without a strike notice or the existence of a strike; on 8 August, he extended the complaint as a result of the acts that had taken place; (4) the Federal District Public Prosecutor’s Office established the existence of the offence and the probable criminal responsibility of the General-Secretary of the complainant organization, Mr. Fernando Espino Arévalo and his companions, for the offence of attacks on means of communication (according to the Prosecutor’s Office, the investigations concluded that Mr. Espino Arévalo, acting in concert with other persons, occupied the installations of the metro public transport system paralysing the public train services; (5) the investigations conducted by the Prosecutor’s Office concluded that the acts committed by Mr. Espino Arévalo and the persons involved in the matter prevented the provision of the public service and the meeting was neither peaceful nor lawful in intent, and the trade union was not exercising the right to strike; and (6) the judicial authority will be the one to determine whether the Federal District Public Prosecutor’s Office had sufficiently justified the probable criminal responsibility of Mr. Fernando Espino Arévalo and his companions.*
- 781.** *In this regard, the Committee notes firstly that the versions of the Government and the complainant organization differ as to the violent and/or criminal character of the industrial action carried out on 8 August 2002 in the metropolitan passenger train. The Committee observes that on the one hand, the Federal District Public Prosecutor’s Office considered that the offences of attacks on means of communication and coalition of public servants had been committed, while the Attorney-General’s Office of the State of Mexico indicated that “the facts presented by the plaintiff must be considered in the context of labour standards set out in the legislation which the employers and trade unions consider applicable in resolving industrial disputes, since here we have a case of suspension of work by the workers, in their own workplace for no purpose other than to pursue claims of a strictly industrial order and without that suspension of work straying into the criminal sphere”. It added that “property was certainly occupied, but the occupation was peaceful, public and not clandestine, and was even announced several days in advance”.*

782. *The Committee observes that although the provisions laid down in the legislation for holding a strike were not followed and that, it was therefore an illegal strike, it was conducted peacefully according to the Attorney-General's Office of the State of Mexico. This latter point is nevertheless seen differently by the Federal District Public Prosecutor's Office. In this regard, the Committee considers that whether a strike is peaceful or not must be determined by the judicial authority. In any case, the Committee recalls that no one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 602]. In these circumstances, observing that the judicial authority has yet to decide on the charges against Mr. Fernando Espino Arévalo and the other participants in the industrial action carried out on 8 August 2002 in the metropolitan passenger train, the Committee expresses the hope that in handing down its decision, the judicial authority will take the above principle fully into account. The Committee requests the Government to keep it informed in this respect.*

The Committee's recommendation

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

Observing that the judicial authority has yet to decide on the charges against Mr. Fernando Espino Arévalo, General-Secretary of the Metropolitan Rail Transport Workers' Union (SMTSTC) and the other participants in the industrial action carried out on 8 August 2002 in the metropolitan passenger train, the Committee expresses the hope that in handing down its decision, the judicial authority will take fully into account the principle according to which no one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike. The Committee requests the Government to keep it informed in this respect.

CASE NO. 2247

DEFINITIVE REPORT

**Complaint against the Government of Mexico
presented by
the National Trade Union of Workers of the National Institute of Statistics,
Geography and Informatics (SNTINEGI)**

Allegations: Interference by the employer in trade union affairs, forced entry into trade union premises, cancellation of trade union leave, recognition of a new executive committee which was not elected according to the rules

784. The complaint is contained in a communication by the National Trade Union of Workers of the National Institute of Statistics, Geography and Informatics (SNTINEGI) of January 2003.

785. The Government sent its observations in a communication dated 29 May 2003.

786. Mexico has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but not the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

787. In its communication of January 2003, the National Trade Union of Workers of the National Institute of Statistics, Geography and Informatics (SNTINEGI), through its Secretary-General, Ms. Areli Hernández Rodarte, states that the National Institute of Statistics, Geography and Informatics (INEGI) is an organization of the Federal Government of Mexico and alleges that, since the election of the union leaders for the 2001-04 period, representatives of the authorities have attempted to exercise undue interference in the internal affairs of the union. Since July 2001, the authorities have obstructed union management, unnecessarily delaying certain formalities and refusing to provide the premises and equipment needed for union meetings and events, to which the union is entitled.

788. The complainant also alleges that, despite the fact that, according to the General Terms of Employment of the Institute, workers have an obligation to attend the meetings convened by the union, representatives of the Institute circulated orders expressly forbidding the workers to leave their activities to attend the union meetings. In response to the interference mentioned and the violations of fundamental workers' rights, the complainant organization presented a list of demands for salary raises and for respect for the union, but received no reply. In December 2002, the complainant filed a complaint with the Internal Supervisory Body of INEGI against representatives of the Institute for undue interference in union affairs (file No. 762/2002).

789. In addition, on 4 December 2002, at an event convened by the employer authority itself, the president of the Institute presented a so-called new union committee without having gone through any statutory or jurisdictional procedure for legally dissolving the previous committee or electing a new union executive committee.

790. Subsequently, on 6 December 2002, representatives of the Institute broke into the union premises under the pretext that it was located in the same building as the Institute headquarters, and removed furniture and documents belonging to the union, while forbidding union members to enter. As a result, a criminal complaint was filed with the Attorney-General's Office of the State of Aguascalientes (file No. A-02/09912).

791. Beginning on 1 December 2002, the Institute suspended the payment of union dues to the legally recognized committee, indicating that they would be handed over to Ms. Gilda Martínez Martínez, who had not been elected as a member of the union executive committee by the workers, nor been registered as such with the competent authorities, that is, the Federal Court for Conciliation and Arbitration.

792. The complainant also alleges that all union leave which had been granted by the legally elected executive committee were verbally cancelled so that its members would return to their jobs, which constitutes an anti-union act aimed at limiting or nullifying the ability of the union executive committee to carry out its union activities.

793. The complainant points out that, as of the time the complaint was sent, none of the legal actions mentioned had been resolved, which places the legally elected executive committee and the union members in a vulnerable position.

794. Lastly, the complainant alleges that, in the Mexican legal framework, there are no sufficiently effective or dissuasive remedies or sanctions to prevent and punish undue interference by the State and/or employers in the internal union affairs.

B. The Government's reply

795. In its communication of 29 May 2003, the Government states that, on 18 February 2003, fully exercising their autonomy and freedom of association, more than two-thirds of the members of the complainant trade union requested, through its national executive committee, the intervention of the Federation of Trade Unions of State Workers, to which they are affiliated, in order to consolidate the restructuring of their union executive committee established at the Extraordinary National Conference on 2 December 2002, and nominated Ms. Gilda Martínez Martínez as the new secretary-general of the national executive committee of the complainant union.

796. The Government states that none of the allegations by the complainant constitute a violation of Convention No. 87 and that the events described are solely the result of a dispute between unions.

797. Regarding union meetings, the Government denies that the General Terms of Employment of INEGI establish the obligation for workers to attend meetings convened by the union. On the other hand, they do stipulate the right of workers to request permission to attend union meetings or events scheduled during working hours, subject to the consent of the person in charge of the administrative unit (section 60, paragraph XXVIII). Regarding the allegation that INEGI representatives gave orders forbidding workers to leave their work in order to attend the meetings, the Government denies that any INEGI representative prevented the workers from meeting, as this is their constitutional right, and notes that this assertion was not supported by any names or documents.

798. Regarding the complaint filed with the Internal Supervisory Body of INEGI against Institute representatives for undue interference in union affairs (file No. 762/2002), the Government notes that, as of the date of its communication, the action filed by the complainant union had not been successful, from which it can be inferred, in its view, that INEGI representatives had not interfered in the internal affairs of the union.

799. Regarding the allegation that, on 4 December 2002, the president of the Institute, during an event convened by the employer, introduced a so-called new union committee, the Government reiterates that it was aware of the fact that more than two-thirds of the workers of INEGI had requested the intervention of the Federation of Trade Unions of State Workers to consolidate the restructuring of the union executive committee. No INEGI official took part in the restructuring process, since it is for the unionized workers to exercise this right within the context of freedom of association. The Government explains that unions have legal means to enforce their rights: section 85 of the Federal Act respecting state workers provides that any dispute arising between the Federation and the unions or among the unions shall be settled by the Federal Court for Conciliation and Arbitration. The Government notes, however, that the complainant union, through the secretary-general who signed the complaint, did not refer the case to this court, which is the competent authority to settle the dispute between the unions of the INEGI.

800. Regarding the allegation of breaking into union premises, the Government states that, since the lease under which INEGI was paying for use of the premises which the union occupied outside the INEGI headquarters had expired, and given the austerity policies being implemented, a space had been adapted in the building of the INEGI headquarters for the use of union members, which was still operational at the time of the communication.

Regarding the criminal complaint filed for the alleged break-in, it was currently being handled by the competent authority.

- 801.** Regarding the suspension of the withholding of union dues, the Government indicates that, subsequent to the apparent restructuring of the National Executive Committee of the complainant union, the INEGI received a request from Ms. Gilda Martínez Martínez, who introduced herself as the new secretary-general, for the union dues to be handed over to her. They received the same request from Ms. Areli Hernández Rodarte, who also introduced herself as the secretary-general. Faced with this dilemma, the solution of which lay outside the competence of the INEGI, the Institution decided to return the dues which had been withheld to the workers in order for them to decide to whom they should be paid, and refrained from withholding dues during the month of February.
- 802.** Regarding the cancellation of union leave, the Government maintains that it has not been cancelled, either verbally or in writing, and those who had been granted leave have received their full salaries without having been at work, which shows that they will continue to benefit from their leave until a decision is taken as to which union executive committee will represent the workers.
- 803.** Regarding the allegation that, as of the time the complaint was communicated, none of the legal actions mentioned had been resolved, the Government states that both the complaint filed with the Internal Supervisory Body of the INEGI on 2 December 2002 and the criminal complaint of 6 December 2002 were undergoing a procedure in accordance with the applicable legislation, and that it took time to carry out the inquiries and give the persons presumed responsible for the acts the right to a hearing. It reiterates once again that the complainant union had not availed itself of the legal means applicable to the case, by not submitting the inter-union dispute to the Federal Court for Conciliation and Arbitration.
- 804.** Regarding the absence of effective and sufficiently dissuasive procedures and sanctions to prevent and punish the undue interference by the State and/or employers in the internal affairs of the union, the Government states that national legislation includes adequate provisions and procedures to guarantee freedom of association, including section 133, paragraph V, of the Federal Labour Act prohibiting employers from any kind of interference in the internal affairs of trade unions. The authorities are governed by the principle of legality according to which all their actions must be provided for by law. Thus, they are not allowed to interfere in the internal affairs of unions since there are no legal provisions granting them such powers in national legislation.

C. The Committee's conclusions

- 805.** *The Committee notes that this complaint, presented by the secretary-general of the complainant organization, Ms. Areli Hernández Rodarte, contains allegations of interference in union activities by the employer, break-in into union premises, cancellation of union leave and recognition of a new executive committee which was not elected according to the rules, with the ensuing consequences on the use of the union premises and the withholding of union dues. The Committee notes the Government's statement that, on 18 February 2003, fully exercising their autonomy and freedom of association, more than two-thirds of the members of the complainant union requested, through its national executive committee, the intervention of the Federation of Trade Unions of State Workers with which they are affiliated, in order to consolidate the restructuring of the union executive committee established at the Extraordinary National Conference of 2 December 2002, and nominated Ms. Gilda Martínez Martínez as the new secretary-general of the national executive committee of the complainant union. The Committee notes that, according to the Government, no INEGI official took part in the union's restructuring*

activities since this was a matter for the unionized workers in the exercise of their right to freedom of association. The Committee also notes that the Government states that the events described above are solely the result of a dispute between unions.

806. *The Committee concludes that the present case refers to an internal dispute of the complainant union on which it is not competent to pronounce itself. Furthermore, since the complaint was presented by a committee which apparently no longer represents the workers, the Committee does not deem it necessary to investigate the allegations further. Under these circumstances, the Committee concludes that the present case does not call for further examination.*

The Committee's recommendation

807. *In the light of its foregoing conclusions, the Committee invites the Governing Body to conclude that this case does not call for further examination.*

CASE NO. 2242

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

Complaint against the Government of Pakistan presented by the International Transport Workers' Federation (ITF)

Allegations: The complainant alleges the suppression of trade union rights of the workers in Pakistan International Airlines (PIA) and failure of the legal system to restore these rights

808. The International Transport Workers' Federation (ITF) presented a complaint – on behalf of its various civil aviation affiliates in Pakistan – in communications dated 7 August and 28 November 2002.

809. The Government forwarded its observations in a communication dated 11 May 2003.

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

A. The complainant's allegations

811. In its communications dated 7 August and 28 November 2002, the International Transport Workers' Federation (ITF) alleges the abolition by the Government of fundamental trade union rights of the workers in Pakistan International Airlines Corporation (PIAC) and the subsequent failure of the legal system to restore these basic rights.

812. In particular, the complainant states that on 7 June 2001, Pakistan International Airlines (PIA) management informed the unions in PIAC that it was suspending all unions and working agreements.

813. On 5 July 2001, by Chief Executive Order No. 6 of 2001 (Suspension of Trade Unions and Existing Agreements) on PIAC, the Government implemented the above decision. The Order had the following effects:

- it banned the existence and operations of all trade unions in PIAC;
- All collective agreements were suspended and the Board of Directors was vested with the power to retire, terminate or remove any employee, and with the authority to fix new terms of employment and conditions of work;
- service with the corporation was declared a service of Pakistan, which subjected the PIAC employees to civil service regulations;
- PIAC was excluded from industrial relations legislation (Industrial Relations Ordinance, 1969, and the Standing Orders Ordinance, 1968, concerning the terms and conditions of employment, became non-applicable to the workers in PIAC).

814. Under the executive order, Administrative Order No. 17, the Cockpit Crew Service Rules, was passed on 17 July 2001. It unilaterally rescinded the agreement between the Pakistan International Airline Pilot's Association (PALPA) and PIAC, which regulated pilots' working conditions. By Administrative Orders Nos. 14 and 18 of 17 July 2001, and No. 16 of 2 August 2001, PIAC management changed the terms and conditions of other airline employees. In addition, facilities conferred to trade union office bearers were withdrawn.

815. Following the passing of the executive order and of Administrative Order No. 17, PALPA filed a suit on the grounds that the original order was illegal and unconstitutional. The case came to court on 28 August and was adjourned on 20 September 2001. The People's Unity of PIA Employees and Air League of PIA Employees filed constitutional petitions with the aim of having the executive and subsequent administrative orders (Nos. 14, 16 and 18) rescinded. The organizations argued the unconstitutionality of the executive order and contested the authority and competence of the Government to pass it (under article 17 of the Constitution). The last three cases were heard on 15 February 2002, where the court found that the president and chief executive of Pakistan were legally competent to issue such an executive order for the advancement and good of the people, as well as in the interests of Pakistan's image abroad. The court refused to strike down the executive order on the grounds that the violation of constitutional provision had not been established and that the law could not be challenged merely "because it violated some principle of justice and fair play". The court further held that, under article 6 of the Constitution, it could be argued that at the time there was a state of emergency in Pakistan and that non-application of article 17 could thus not be challenged. It also found that the existing collective agreements had been obtained by coercion and that the executive order had been necessary to enable the removal of officers and employees who were (allegedly) "inefficient, incompetent and corrupt". It said that the provision relating to the declaration of employees of PIAC as civil servants and empowering the officers of PIAC to dismiss, remove, retire or suspend the trade union activities were inserted into the executive order "as a precautionary measure". Finally, it held that the effect of excluding PIAC employees from industrial relations law meant that there was no other legislation under which the two unions could register, including the Constitution.

816. Finally, the complainant alleges that, in October 2002, the managing director of PIAC issued Administrative Order No. 25 providing for discontinuation of membership in associations of management staff.

B. The Government's reply

- 817.** In its communication of 11 May 2003, the Government states that according to the information received from the Pakistan International Airlines Corporation (PIAC), in view of the undue influence of registered trade unions transforming into collective bargaining agents (CBA), such as misappropriation of public funds, on various facilities extended to office bearers of CBA and political interference in the discipline as well as in the operation of the airline, the then chief executive of Pakistan considered it expedient to suspend trade unions and the operation of certain agreements through Chief Executive Order No. 6 of 2001. The employees of the corporation have been declared civil servants in order to allow them the right to invoke the jurisdiction of the Federal Service Tribunal under the Services Tribunal Act, 1973, for redressal of their grievances.
- 818.** The Government further confirms the information provided by the complainant and states that the Pakistan International Airline Pilot's Association (PALPA), the People's Unity of PIA Employees and Air League of PIA Employees challenged the executive order and subsequent administrative orders before the High Court of Sindh at Karachi. The High Court, through its judgement of 29 March 2002, dismissed the petitions of the two latter unions. Finally, the Government informs that the two unions have lodged appeals before the Supreme Court of Pakistan which, at the moment, are still pending.

C. The Committee's conclusions

- 819.** *The Committee notes that the complainant in this case refers to the adoption of Chief Executive Order No. 6 of 2001, providing for the suspension of trade unions in Pakistan International Airlines Corporation (PIAC) and of existing collective agreements and declaring employees of the PIAC to be civil servants, therefore excluding PIAC workers from industrial relations legislation (Industrial Relations Ordinance, 1969, and the Standing Orders Ordinance, 1968, concerning the terms and conditions of employment). The Committee further notes that under the executive order, Administrative Orders Nos. 14, 18 and 17, which changed the terms and conditions of employment of airline employees, were passed by the management of PIAC. In addition, according to the complainant, facilities conferred to trade union office bearers were withdrawn. The Pakistan International Airline Pilot's Association (PALPA), the People's Unity of PIA Employees and Air League of PIA Employees challenged the executive order and subsequent administrative orders before the High Court of Sindh at Karachi. The first case was adjourned on 20 September 2001 and the petitions of the two latter unions were dismissed. Finally, the complainant alleges that in, October 2002, the managing director of PIAC issued Administrative Order No. 25 providing for discontinuation of membership in associations of management staff.*
- 820.** *The Committee notes the Government's statement to the effect that the promulgation of Chief Executive Order No. 6 was considered necessary in view of the undue influence of registered trade unions transforming into collective bargaining agents (CBA), such as misappropriation of public funds, on various facilities extended to office bearers of CBA and political interference in the discipline as well as in the operation of the airline. The Government further states that the legality of the order was confirmed by the High Court. It indicates further that the complainant had lodged an appeal against this decision to the Supreme Court. The Government states that the employees of the corporation have been declared civil servants in order to allow them the right to invoke the jurisdiction of the Federal Service Tribunal under the Services Tribunal Act, 1973, for redressal of their grievances. No observation as to the newly passed Administrative Order No. 25 was made by the Government.*

- 821.** *The Committee recalls that the trade union situation of PIAC workers was previously examined on two occasions, in Case No. 1075 [218th Report, paras. 273-285, approved by the Governing Body at its 221st Session, November 1982] and in Case No. 1332 [244th Report, paras. 69-76, approved by the Governing Body at its 233rd Session, May-June 1986]. The Committee also observes that the Committee of Experts and the Conference Committee on the Application of Conventions and Recommendations have previously criticized, in the context of Pakistan's application of Convention No. 87, the ban that was previously imposed on trade union activities in PIAC.*
- 822.** *The Committee notes that the Industrial Relations Ordinance (IRO) of 1969 was repealed and replaced, in October 2002, by the Industrial Relations Ordinance of 2002. The Committee also notes that in Case No. 2229, the complainant stated that the new IRO did not mention the lifting of a ban on suspension of trade union rights in PIAC but that the Government stated to the contrary that the new legislation covered PIAC workers [330th Report, paras. 924 and 934, approved by the Governing Body at its 286th Session, March 2003]. The Committee notes, however, that in the present case, the Government confirms the suspension of trade union rights in PIAC. In light of the above, the Committee must express its regret that the employees of PIAC are once again denied the possibility of exercising their trade union rights. In its previous cases, the Committee considered similar arguments put forward by the Government justifying such denial, but reached the conclusion that restrictions on the trade union activity of these workers constituted an infringement of freedom of association. The Committee notes that in the present case, the chief executive order had the following implications: suspension of trade unions and collective agreements in PIAC; and withdrawal of facilities conferred to trade union office bearers.*
- 823.** *The Committee recalls that the terms of Articles 2 and 3 of Convention No. 87 provide that workers without distinction whatsoever (including public servants), shall have the right to join organizations of their own choosing and that these organizations shall be able to exercise their activities in full freedom. As concerns Administrative Order No. 25, which restricts the right to organize of managerial staff, although their right to belong to the same unions as other workers could be restricted, such workers should have the right to form their own associations to defend their interests [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 231].*
- 824.** *As concerns the suspension of collective agreements and their replacement with Administrative Orders Nos. 14, 18 and 17 issued by the PIAC management, the Committee recalls that the suspension – without the agreement of the parties – of collective agreements freely entered into by the parties violates the principle of free and voluntary collective bargaining established in Article 4 of Convention No. 98. A legal provision, which allows the employer to modify unilaterally the content of signed collective agreements, is contrary to the principles of collective bargaining [see **Digest**, op. cit., paras. 848 and 876].*
- 825.** *In view of the above, the Committee urges the Government to repeal Chief Executive Order No. 6 and to take the necessary measures in order to repeal Administrative Orders Nos. 14, 17, 18 and 25 so as to restore full trade union rights to the workers concerned.*
- 826.** *As concerns the allegation of withdrawal of facilities conferred on trade union office bearers, the Committee recalls that workers' representatives should be afforded the necessary facilities for carrying out their representative functions. The Committee requests the Government to take the necessary measures so as to ensure that trade union office bearers enjoy such facilities as may be necessary for the proper exercise of their functions.*

827. *The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of the case. It further requests the Government to keep it informed of the measures taken to restore full trade union rights to PIAC workers.*

The Committee's recommendations

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

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

CASE NO. 2235

DEFINITIVE REPORT

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

- **the Federation of Petroleum Workers of Peru (FETRAPEP) and**
- **the Single Trade Union of Talara Refinery and Petróleos del Peru Workers (SUTRETPPSA)**

Allegations: The complainant organizations object to the state enterprise Petróleos del Peru withholding, in addition to the portion of their wages corresponding to the day of the 14 May 2002 strike (a point which is not disputed by the complainants), an amount equivalent to one-sixth of the biannual bonus for the national holiday. The complainants explain that the enterprise implemented new legislation instead of applying the collective agreement (clause 28), which is more favourable to the workers

- 829.** The complaint is contained in a joint communication dated 14 October 2002 of the Federation of Petroleum Workers of Peru (FETRAPEP) and the Single Trade Union of Talara Refinery and Petróleos del Peru Workers (SUTRETPPSA). The Government sent its observations in a communication dated 19 March 2003.
- 830.** Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

- 831.** In their joint communication of 14 October 2002, the Federation of Petroleum Workers of Peru (FETRAPEP) and the Single Trade Union of the Talara Refinery and Petróleos del Peru Workers (SUTRETPPSA) allege that, on 14 May 2002, the oil workers of the Talara refinery, which belongs to the parastatal enterprise Petróleos del Peru, held a work stoppage in the exercise of their right to strike in protest against the privatization process which the Government intends to pursue. As a result of this 24-hour strike, observed by most of the workers who were members of the local trade unions, the management of Petróleos del Peru proceeded to withhold from the workers' wages, in addition to an amount equivalent to one day's pay for their absence from work on 14 May, a sum equivalent to one-sixth of the bonus for the national holiday, that is one-sixth of their pay, which, according to the complainants, is abusive since it represents an excessive, arbitrary and disproportionate deduction for a one-day strike, as it penalizes the workers twice for the same act.
- 832.** The complainants add that, according to the collective agreement that has been in force for more than 20 years, the oil workers of this enterprise are entitled to a bonus for the national holiday and another end-of-year bonus, both of which are equivalent to one month's salary, payable in July and December.

833. According to the complainants, on 28 May 2002, the Government promulgated Act No. 27735, under which it intends to regulate the award of bonuses to workers subject to private sector labour law for the national holiday and Christmas and, on 4 July 2002, promulgated its implementing regulation (Presidential Decree No. 005-2002-TR); it is on the basis of these provisions that Petr6leos del Peru justifies the double and illegal withholding of the national holiday bonus, under section 3, item 3.4, of said regulation, which provides that the length of service for purposes of the calculation of bonuses shall be determined on the basis of every complete calendar month actually worked during the corresponding period, a provision which the complainants challenge as constituting a flagrant violation of labour rights.

B. The Government's reply

834. In its communication of 19 March 2003, the Government states that the granting of the national holiday and Christmas bonuses to workers subject to private sector labour law is regulated by Act No. 27735 and its implementing regulation, approved by Presidential Decree No. 005-2002-TR. Thus, section 3.4 of that Presidential Decree, as amended by Presidential Decree No. 017-2002-TR, provides that the length of service for calculation purposes is determined on the basis of every complete calendar month actually worked during the corresponding period. It also provides that for each day not deemed to be actually worked, one-thirtieth of the corresponding portion will be deducted.

835. Regarding the impact of the declared strike, the Government states that, in accordance with section 77(b) of Act. No. 25593 (the Collective Labour Relations Act), the declared strike suspended the application of individual employment contracts, including the obligation to pay wages, without affecting the continuation of the employment relationship. Therefore, as this case involves a declared strike, that is one that meets the requirements laid down in section 73 of the abovementioned Act, work is completely interrupted, and hence the workers will not be paid during the duration of the strike.

836. Regarding the work stoppage which occurred in the parastatal enterprise Petr6leos del Peru on 14 May 2002, this constitutes a total suspension of work by the workers, resulting in a corresponding deduction for the day not worked, as well as a corresponding deduction in the bonuses paid to these workers. Regarding the deduction in the bonus for the national holiday, the work stoppage constituted an unjustified absence from the workplace, and therefore it was justified to apply such a deduction.

837. In this respect, it should be pointed out that, when the 24-hour strike occurred at Petr6leos del Peru, that is on 14 May 2002, the regulation under Act No. 27735 had not yet been amended, and therefore it did not take into account that, for each day not deemed to be actually worked, one-thirtieth of the corresponding portion (as is the current practice) should be deducted, but only considered that the length of service for calculation purposes was determined on the basis of every complete calendar month actually worked during the corresponding period.

838. Thus, if a worker's total wages were 1,500 soles and he was absent from work for one day without a justification, this month was considered to not have been worked in its entirety and therefore he lost his right to one-sixth of the bonus to which he would have been entitled for that month. This is why, in addition to the amount equivalent to one day's absence from work on 14 May, an amount equivalent to one-sixth of the national holiday bonus, that is one-sixth of their salary, was also deducted.

839. This type of situation no longer occurs today, since the law has been amended and is now more favourable to the workers. Thus, section 3.4 of Presidential Decree No. 005-2002-TR, as amended, provides that the length of service for calculation purposes

is determined on the basis of every complete calendar month worked during the corresponding period, and that days not deemed to be days actually worked would be deducted at the rate of one-thirtieth of the corresponding portion.

- 840.** Regarding the days not considered to be days actually worked, mentioned in the previous paragraph, it should be pointed out that section 2 of Presidential Decree No. 005-2002-TR prescribes the circumstances under which, when the employment relationship is suspended during the payment periods (first half of July or December), the law exceptionally considers these periods to have been worked. The only exceptions are vacation leave, paid leave, vacation or leave established by social security regulations and giving rise to the payment of benefits, leave due to an occupational accident for which social security benefits are paid, and those cases which are expressly considered by law as days worked for legal purposes.
- 841.** In this respect, it is important to mention that, although the Act and its implementing regulation do not explicitly say so, it should be understood, by logical interpretation of the law, that these exceptional cases prescribed by the Act and its regulation are applied not only to determine whether the worker will be considered to have been actually working during the first or second half of July or December (bearing in mind that during this period, his employment relationship may have been suspended for one of the reasons mentioned under section 2 of Presidential Decree No. 005-2002-TR), but these exceptional cases are also used to determine the amount of the paid bonus, since they are useful for determining in turn whether the worker had actually worked during the whole semester, bearing in mind that, during that semester, the worker's employment relationship may have been suspended for the reasons laid down in section 2 of Presidential Decree No. 005-2002-TR.

C. The Committee's conclusions

- 842.** *The Committee observes that, in this case, the complainants object to the state enterprise *Petróleos del Peru* having withheld, in addition to the portion of the workers' wages corresponding to the one-day strike of 14 May 2002 (a point which they do not dispute), an amount equivalent to one-sixth of the biannual bonus for the national holiday. The complainants argue that the enterprise implemented new legislation instead of applying the collective agreement (clause 28), which is more favourable to the workers.*
- 843.** *The Government, on the other hand, states that the withholding of one-sixth of the (biannual) bonus in question was done according to the implementing regulation under Act No. 27735, which was still in force at the time and which provided that the length of service for purposes of calculating each biannual bonus was determined on the basis of each complete calendar month actually worked during the corresponding period. Therefore, a worker who was absent from the workplace for one day would lose the amount of the bonus for that month (that is one-sixth of the biannual bonus). The Government explains nevertheless that, subsequent to the strike in question, according to section 3.4 of the new Presidential Decree No. 005-2002-TR - which elaborates on Act No. 27735 of 9 May 2002 - the national holiday bonus can only be reduced by one-thirtieth for each day not worked.*
- 844.** *The Committee observes that, as stated by the complainants, clause 28 of the collective agreement (forwarded by the complainants) regulates the national holiday bonus with no mention of any exceptions. The text of the clause is as follows:*

Bonus for national holidays and end-of-year bonus

The enterprise shall grant its workers a bonus for the national holiday consisting of 100 per cent of the base monthly salary or 30 days' wages, in addition to the monthly sum corresponding to the five-year increment.

- 845.** *The Committee observes moreover that section 8 of Act No. 27735 of 9 May 2002, respecting national holiday bonuses, provides that “payment of such bonuses cannot be combined with other similar economic benefit ... under ... collective agreements ... in which case the bonus which is more favourable shall be granted.”*
- 846.** *In these circumstances, the Committee considers that, the collective agreement being more favourable than the legislation, that is Presidential Decree No. 005-2002-TR, which amends Presidential Decree No. 017-2002-TR, the amount of the bonus for the national holiday should not have been deducted from the workers' wages after the 14 May 2002 strike. The Committee asks the Government to take measures to ensure compliance with clause 28 of the collective agreement.*

The Committee's recommendation

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

*The Committee requests the Government to take measures to ensure compliance with clause 28 of the collective agreement applicable in the state enterprise *Petróleos del Peru*, and specifically, to refrain from reducing the amount of the national holiday bonus provided for under this clause for the workers who took part in the strike held on 14 May 2002.*

CASE NO. 2252

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

**Complaint against the Government of Philippines
presented by
the Toyota Motor Philippines Corporation Workers'
Association (TMPCWA)**

Allegations: The complainant alleges the Government's failure to secure the effective observance of Conventions Nos. 87 and 98, which led to several infringements of the right to organize and collective bargaining on the part of Toyota Motor Philippines Corporation, such as interference in the trade union's establishment and activities, refusal to bargain collectively despite the certification of the union as the sole and exclusive bargaining agent, anti-union discrimination through the dismissal of union members further to their participation in union activities and in particular in strike action, restrictions on the exercise of the right to strike which includes the intervention of the Secretary of Labor and Employment to put an end to the strike

- 848.** The complaint is set out in a communication dated 24 February 2003 presented by the Toyota Motor Philippines Corporation Workers' Association (TMPCWA). The complainant also communicated copies of documents relating to the procedures implemented before the national labour and judiciary authorities.
- 849.** The Government replied in a communication dated 25 June 2003 and received on 12 August 2003.
- 850.** The Philippines 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

- 851.** The complaint provides basic information on the TMPCWA, an account of the facts which led to the complaint and submits a number of specific allegations.

Brief description of the Association

- 852.** The TMPCWA is an independent labour organization duly registered with the Department of Labor and Employment (DOLE). The TMPCWA is not affiliated to any national or

international organization. The members of the union are rank-and-file workers of Toyota Motor Philippines Corporation working in two plant sites.

Statement of facts

- 853.** On 4 February 1999, the TMPCWA filed a petition for certification election in order to be recognized as the sole and exclusive bargaining agent of all the rank-and-file employees of Toyota Motor Philippines Corporation assigned to two plant sites. The petition was vigorously opposed by the enterprise and subsequently dismissed by the mediator-arbiter of the Bureau of Labor Relations. Following an appeal filed by the union, the Secretary of DOLE ordered, in a decision of 25 June 1999, the holding of the election. Toyota Motor Philippines Corporation sought, through the available procedural means, to obtain a review of the decision. The election eventually took place on 8 March 2000.
- 854.** The results of the election were the following: 1,063 of the 1,100 employees concerned cast their votes. The votes of 105 employees were declared to be “challenged votes” because the voters were considered to hold managerial positions and thereby, under the Labor Code, barred from membership of a union comprising rank-and-file employees; 503 votes were in favour of the TMPCWA and 440 against. Considering that the quorum and the majority requirements had been met, the union filed a motion to be certified as the sole and exclusive bargaining agent of all the rank-and-file employees of the enterprise. The latter opposed the certification. It was of the view that the 105 votes should be considered as valid votes in particular for the purpose of determining the quorum. It submitted the matter to the mediator-arbiter. The latter confirmed, in a decision of 12 May 2000, that the 105 voters should be excluded from the count of the votes and certified the TMPCWA as the exclusive bargaining agent. The decision was appealed against by the enterprise. The Secretary of DOLE rejected the appeal and confirmed the certification in a decision of 19 October 2000.
- 855.** Following the confirmation of the results of the certification election, on 26 October 2000 the TMPCWA submitted a proposal of collective bargaining agreement to Toyota Motor Philippines Corporation. The latter did not reply to the proposal nor did it answer the follow-up letter sent by the union.
- 856.** In the meantime, the enterprise filed a motion for reconsideration with the Secretary of DOLE concerning the rejection of its appeal on the results of the certification election, whereupon the Office of the Secretary issued an order requiring the parties to attend a “clarificatory” hearing on 21 February 2001. While it decided to attend the hearing, the union also decided to hold on the same day a peaceful assembly in front of DOLE premises to express its dismay at the holding of the hearing. The hearing eventually took place on 22 February 2001 and another one was organized the next day. The union organized assemblies which took place from 21 to 23 February 2001. From the documents submitted by the TMPCWA, it appears that at least for 22 and 23 February 2001, the union informed the enterprise that its members would attend the hearings and join the assembly and that, therefore, they would not come to work. In exchange, the union suggested that the workers concerned would come to work on their rest days.
- 857.** The participation in the assembly led, on 16 March 2001, to the dismissal of 227 union officers and members and the suspension of 64 union members for 30 days by Toyota Motor Philippines Corporation. On the same day, the Secretary of DOLE took a final decision on the certification confirming the TMPCWA as the sole and exclusive collective bargaining agent.
- 858.** These terminations and suspensions, deemed to be illegal by the union, prompted the latter to file a notice of strike. In order to give management time to withdraw the decisions in

question, the union did not immediately stage the strike but instead conducted a protest action. Since the decisions were not withdrawn, the union organized a legal and peaceful strike on 28 March 2001.

- 859.** At the request of Toyota Motor Philippines Corporation, the National Labor Relations Commission, a tripartite body, issued a “temporary restraining order” on 4 April 2001, thus providing the company with the necessary justification to disperse the strike participants. On 9 April 2001, while most of the participants had gone home, around 100 policemen and security guards violently dispersed the picket line and forcibly took all the strike paraphernalia. At the same time, workers who did not participate in the strike and management members were escorted inside the plants.
- 860.** On 10 April 2001, and in accordance with article 263(g) of the Labor Code, the Secretary of DOLE certified the dispute to the National Labor Relations Commission, for compulsory arbitration and ordered the workers concerned to return to their work. The union members complied with the order but challenged the decision of the Secretary of DOLE before the Supreme Court. The court sustained the decision.
- 861.** The union questioned the competence of the National Labor Relations Commission over the dispute and did not present its position on the substance of the case. On 9 August 2001, the commission handed down its decision, a copy of which has been transmitted by the complainant. The commission declared that the actions which took place from 21 to 23 February 2001 amounted to illegal strike actions because the union had failed to comply with the procedural requirements applicable to the organization of a strike (the filing of a notice of 30 days or 15 days, the observation of a cooling-off period, the organization of a vote and the submission of the results of the vote to DOLE at least seven days before the strike). Another strike, organized by the union on 23 and 28 May 2001, was also declared illegal because it ignored the order contained in the decision of 10 April 2001 of the Secretary of DOLE. The commission confirmed the dismissal of the 227 workers because of their absence from work that was detrimental to the enterprise’s interest and their concomitant participation in the illegal strike actions of February 2001. The commission ordered the payment of compensation to the workers amounting to one month’s salary per year of service. In addition and in accordance with article 264(a) of the Labor Code, the commission declared that 15 union officers – some of them were included amongst the 227 dismissed workers – had forfeited their employment status by having conducted the illegal strikes from 21 to 23 February and on 23 and 28 May 2001. The enterprise implemented the decision by dismissing more than half of the union members, including all its leaders. In addition, it filed three criminal complaints against several union members and officers for crime of grave coercion. The persons concerned obtained their provisional freedom by posting a bail bond. The complaints are still pending before the Metropolitan Trial Courts. On the other hand, the company obtained a preliminary injunction from the Court of Appeals enjoining the union to demand collective bargaining.

Specific allegations

- 862.** In general, the complainant submits that the Government failed to secure the effective observance of Conventions Nos. 87 and 98 to which it is a party. What is more, the Government also took action that impaired the right to organize and to bargain collectively.

Undue interference by the Toyota management in the right to self-organization

- 863.** Workers of Toyota Motor Philippines Corporation have not been able to effectively exercise their right to organize. Thus, it took more than ten years for the workers of the

enterprise to establish a union duly recognized by the Government. From the moment workers decided to establish a union, the enterprise's management systematically demonstrated its opposition by filing petitions for cancellation of the union's registration. It even received support from the Government, when the latter cancelled the registration of the second union that workers had attempted to establish. At this point, it should be specified, in light of the documents submitted by the TMPCWA, that Toyota Motor Philippines Corporation sought the cancellation of the complainant's registration on 11 March 1999. In support of its request, the company argued that the TMPCWA was in fact formerly known as Toyota Motor Philippines Corporation Employees' and Workers' Union (TMPCEWU) whose registration had been cancelled by DOLE, in accordance with article 239 of the Labor Code. On 30 September 1999, DOLE dismissed the petition, the TMPCWA's registration was thus confirmed.

Refusal to bargain collectively

- 864.** Although the TMPCWA had been duly certified as the sole and exclusive bargaining agent, the enterprise's management refused to negotiate with the union.

Anti-union discrimination

- 865.** Members of the TMPCWA failed to receive any protection from the Government when they were illegally dismissed. These dismissals occurred with the support of DOLE, through the National Labor Relations Commission.

Restrictions on the right of assembly

- 866.** The right to peaceful demonstrations is one of the essential aspects of trade union rights. This right has been violated by Toyota Motor Philippines Corporation with the support of the Government. Thus the union held protest actions on 21, 22 and 23 February 2001 to express its concern over the holding of hearings on its certification as the sole and exclusive bargaining agent. Due notification was given to the enterprise in this respect. Yet Toyota Motor Philippines Corporation declared that these actions constituted a work stoppage prejudicial to the interest of the company and illegally dismissed the participants.

Impairment of the right to strike

- 867.** When the strike was staged, the first act of the enterprise was to lodge a petition for "injunction with prayer for a temporary restraining order" before the National Labor Relations Commission. The petition was granted by the Commission and subsequently led to the dispersion of the strike with the help of the police.
- 868.** The right to strike as a legitimate weapon of the union was effectively diminished when, in accordance with article 263(g), the Office of the Secretary of Labor assumed jurisdiction over the labour dispute although the Toyota industry is not indispensable to the national interest. The effect of this order was to put an end to the strike since workers were instructed to resume work. On the basis of this decision, the enterprise made a selection among the workers who were allowed to return to work and refused those who had been dismissed earlier. The exercise of the right to strike was further violated when some union members were charged with the crime of grave coercion. The TMPCWA argues that its members should not be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike.

Conclusions of the complainant

869. The complainant concludes by inviting the Committee to recommend the reinstatement of the workers who were illegally dismissed, its recognition as the sole and exclusive bargaining agent, and the initiation of negotiations, as well as the withdrawal of the criminal cases filed against some union members.

B. The Government's reply

870. At the outset, the Government specifies that its reply is submitted in light of the provisions of the Labor Code, as amended, and the pertinent jurisprudence of the Supreme Court. The Government further states that, under its commitment to observe the provisions of Conventions Nos. 87 and 98, it enforces the law on the right to organize and collective bargaining so as not to impair the rights not only of workers but also of employers. Thus, when the Government is called upon to intervene in a labour dispute, it renders a decision only on the basis of the evidence presented before it.

871. With respect to the specific allegations and firstly the allegation of undue interference by the management of Toyota Motor Philippines Corporation, the Government stresses that it does not permit any form of interference by an employer in the internal affairs of a union. In this respect, the Government enjoins the strict compliance with the provisions of article 246 of the Labor Code concerning the prohibition of anti-union discrimination and of interference in the exercise of the workers' right to organize. As for the cancellation of the registration of a particular union by DOLE, this does not constitute an act of interference since it occurs in the strict application of articles 238 and 239 of the Labor Code and only when the evidence presented warrants the cancellation of the registration.

872. With regard to the refusal to bargain collectively, the Government's policy is to encourage free collective bargaining. On the other hand, except when the Secretary of DOLE assumes jurisdiction over a labour dispute, DOLE cannot compel the parties to enter into a collective bargaining agreement, all the more so when there are unresolved issues between them. Any aggrieved party may file a petition with the competent court.

873. With respect to anti-union discrimination, the Government points out that, under the exercise of management prerogative, an employer enjoys a wide latitude of discretion in running its affairs and has the authority necessary to ascertain what actions are prejudicial to his interest. Under these circumstances, while the holding of peaceful demonstrations is not prohibited as such, when it results in a work stoppage which may prejudice the employer's interest, the latter is authorized to employ drastic measures to protect his right. Further, the Government emphasizes that in the case under consideration, the National Labor Relations Commission sustained the dismissal of the participants in the peaceful demonstration, on the basis of strong evidence presented before it.

874. Finally, concerning the right to strike, the Government stresses that the alleged peaceful assembly held by the union from 21 to 23 February 2001 was illegal because of procedural flaws. The Government points out that any concerted activity in connection with a labour dispute, which results in work stoppages is considered under the law as a strike. The Labor Code provides for several reasonable procedural requirements applicable to the exercise of the right to strike such as a strike vote (article 263 of the Labor Code). The Government indicates that the Supreme Court has ruled that the strike vote is mandatory because many disastrous strikes had been staged in the past based merely on the insistence of minority groups within the union. The Government underlines that the failure on the part of the TMPCWA to secure the necessary strike vote before it staged the alleged peaceful assembly constitutes a clear violation of the law. Regarding the Secretary of Labor and Employment's intervention, the Government would like to reiterate that the basis of the

Secretary's competence is article 263 of the Labor Code. This provision allows the Secretary of Labor and Employment to submit a dispute causing or likely to cause a strike or lockout in "an industry indispensable to the national interest" to compulsory arbitration before the National Labor Relations Commission. When the Secretary exercises his power under this article, "all the striking or locked out employees shall immediately return to work and the employer shall immediately resume operations and re-admit all workers under the same terms and conditions prevailing before the strike or lockout".

875. As for the criminal charges pressed against some members of the TMPCWA, the Government indicates that the matter is currently being handled by the competent court. Therefore, the Government will not make any comment so as not to influence the court, in accordance with the principle of sub-judice.

C. The Committee's conclusions

876. *The Committee notes that the TMPCWA alleges the non-observance of Conventions Nos. 87 and 98 by the Government. In support of its contention, the complainant alleges a number of violations of the Conventions by Toyota Motor Philippines Corporation, with the support of the Government, and by the Government itself. The Committee notes, on the other hand, that the Government asserts that it has abided fully by both Conventions; to that end, it has strictly enforced the applicable national legislation. The Committee has taken note in this regard of the Government's statement that its observations on the complaint are made in light of the Labor Code and the relevant decisions of the Supreme Court.*
877. *The Committee notes that the actions and decisions questioned by the complainant result from the recourse to various procedures, and the application of the Labor Code by the governmental and labour authorities. The Committee is thus led to examine the compatibility of the national legislation with the principles of freedom of association and Conventions Nos. 87 and 98. This question of compatibility arises mainly in respect of two fields: the certification of a union as the exclusive collective bargaining agent and the exercise of the workers' right to strike. At this point, the Committee must recall that it has already come across these two issues when examining the last two complaints lodged against the Government of the Philippines (Cases Nos. 1826 and 2195).*
878. *With respect to the certification process, the Committee notes that it took more than one year to organize the election and another year to have the complainant confirmed as the exclusive bargaining agent within Toyota Motor Corporation. The Committee notes that those delays resulted from the various petitions, appeals and motions filed by the enterprise with the labour authorities and, in particular, with the Secretary of DOLE who has the final say on the matter.*
879. *In these circumstances, the Committee believes that it is relevant to refer to the principles of freedom of association recalled in its examination of Case No. 1826 as well as to some of its conclusions thereon. The Committee has stated on previous occasions that it is not necessarily incompatible with Convention No. 98 to provide for the certification of the most representative union in a given unit as the exclusive bargaining agent for that unit. This is the case, however, only if a number of safeguards are provided including certification to be made by an independent body [see 302nd Report, para. 407, and **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 834]. The Committee therefore reiterates once more its request that the Government reconsider the relevant provisions, with a view to establishing a legislative framework allowing for a fair, independent and speedy certification process and providing adequate protection against acts of interference by employers in such matters [see 326th Report, para. 139]. The Committee requests the Government to keep it informed in this respect.*

- 880.** *With regard to the absence of reply to the proposal of collective bargaining, the Committee notes that it is linked to the challenge of the results of the certification election by Toyota Motor Philippines Corporation. Nonetheless, the Committee would like to recall the following principles to address the Government's comment that it cannot compel parties to enter into a collective bargaining agreement especially when there are unresolved issues between them, and that a petition may be lodged with the competent court. The Committee recognizes that it has considered that nothing in Article 4 of Convention No. 98 places a duty on the Government to enforce collective bargaining by compulsory means with a given organization; such an intervention would clearly alter the nature of bargaining [see **Digest**, op. cit., para. 846.] On the other hand, the Committee must recall the importance it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations [see **Digest**, op. cit., para. 814]. Further 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 these circumstances, the Committee trusts, since the TMPCWA has been certified as the exclusive collective bargaining agent, that the Government will make every effort to ensure that the TMPCWA and Toyota Motor Philippines Corporation negotiate in good faith with a view to reaching a collective agreement. It asks the Government to keep it informed in this regard.*
- 881.** *Turning now to the issue of the exercise of the right to strike, the Committee notes that the problem in this case lies primarily with, on the one hand, the intervention of the Secretary of DOLE under article 263(g) of the Labor Code and, on the other hand, with the dismissals of workers for their participation in a strike declared to be illegal under the national legislation as well as the criminal charges pressed against some union members.*
- 882.** *With respect to the intervention of the Secretary of DOLE, the Committee notes that it was prompted by the strike organized on 28 March 2001, following the dismissal of the 227 workers. The Committee notes that the legality of this strike has not been questioned; indeed, a notice had been filed by the union on 28 February 2001 and the strike started one month later. The Committee notes, as it did in examining Case No. 2195, that article 263(g) permits the Secretary of Labor and Employment to submit a dispute to compulsory arbitration, thus bringing an end to a strike, in situations going beyond essential services or an acute national crisis. The provision endows the Secretary with such authority where he or she is of the opinion that there exists "a labor dispute causing or likely to cause a strike or lockout in an industry indispensable to the national interest" [see 329th Report, para. 736].*
- 883.** *The Committee notes that according to recent information given by the Government in Case No. 2195, DOLE has submitted a proposal of amendment with respect to article 263(g) to the labour committees of the Senate and of the House of Representatives. The proposal would limit the intervention of the Secretary of DOLE to disputes involving "essential services". Bearing in mind this information, the Committee wishes to underline the following principles of freedom of association already recalled in Case No. 2195. To determine situations in which a strike could be prohibited, the criterion which has to be established is the existence of a clear and imminent threat to life, personal safety or health of the whole or part of the population [see **Digest**, op. cit., paras. 540 and 545]. Furthermore, whenever a total and prolonged strike in a vital sector of the economy might cause a situation in which the life, health or personal safety of the population might be endangered, a back-to-work order might be lawful, if applied to a specific category of staff in the event of a strike whose scope and duration could cause such a situation. However, a back-to-work requirement outside such cases is contrary to the principles of freedom of association [see **Digest**, op. cit., para. 572]. Therefore, like the Committee of Experts on the Application of Conventions and Recommendations, the Committee urges the Government to pursue the measures taken to amend article 263(g) of the Labor Code in*

order to bring it into full conformity with the principles of freedom of association. The Committee asks the Government to keep it informed in this regard.

- 884.** *With regard to the sanctions imposed upon the 227 workers, namely the loss of their jobs, the Committee would like to underline the following elements. First, in light of the National Labor Relations Commission's decision, the reason for these dismissals was the absence from work of the workers concerned to participate in the assemblies held from 21 to 23 February 2001 and the loss thus caused to the company. Second, the Committee has duly noted that these assemblies have been considered by the National Labor Relations Commission as illegal strikes because of the non-observance of the various procedural requirements applicable to strike actions under article 263(c) of the Labor Code. The Committee notes also that the complainant indicates that these assemblies were peaceful and that the Government does not challenge this allegation; at one point, its reply even refers to the "dismissal of participants in the peaceful demonstration".*
- 885.** *Moreover, the Committee notes that union officers have been subject to other types of measures, despite the fact that some of them were amongst the 227 workers dismissed. Thus 15 union officers were declared to have forfeited their employment status under article 264(a) of the Labor Code by the National Labor Relations Committee. The Committee notes that under article 272 of the Labor Code, any person who infringes article 264 shall be punished by the payment of a fine and/or imprisonment. Further, criminal proceedings were initiated by the enterprise against some union officers. In this respect, the Committee cannot, from the information at its disposal, determine the identity of the officers concerned and the grounds for these proceedings, although it is likely that these criminal charges have been pressed under article 272 of the Labor Code. The T MPCWA alleges that the proceedings result from the organization of a peaceful strike and the Government has not commented on this allegation.*
- 886.** *In view of the considerations made above, the Committee must recall that it is of the view that sanctions, such as massive dismissals in respect of strike actions, should remain proportionate to the offence or fault committed [see 329th Report, para. 738]. Further, no one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike [see **Digest**, op. cit., para. 602]. While the Committee recalls that it has, in the past, considered that the obligation to give prior notice to the employer before calling a strike and to take strike decisions by secret ballot are acceptable, it considers that the dismissals of the 227 workers and the union officers entail serious consequences for the workers concerned. Furthermore, concerning the union officers declared to have forfeited their employment status by the National Labor Relations Commission, the Committee recalls that it has always considered that sanctions for strike action should be possible only where the prohibitions in question are in conformity with the principles of freedom of association [see 329th Report, para. 738]. The Committee notes in this respect that the measure was decided by the commission also in view of the organization of the strike on 23 and 29 May 2001 because it infringed the Secretary of DOLE's order of 10 April 2001. As mentioned above, such an order is not compatible with the principles of freedom of association and therefore, the union officers concerned cannot be sanctioned for having ignored it. The initiation of criminal proceedings for organizing and participating in a peaceful strike also constitutes a disproportionate measure. The Committee notes once again, like the Committee of Experts, that the origin of the problem lies with the provisions of the Labor Code which set forth disproportionate sanctions for participation in an illegal strike.*
- 887.** *The Committee notes that the February 2001 actions were considered to be illegal strikes. However, bearing in mind the serious consequences of the dismissals for the workers concerned, the Committee requests the Government to initiate discussions in order to consider the possible reinstatement in their previous employment of the 227 workers of*

Toyota Motor Philippines Corporation as well as of the union officers declared to have lost their employment status by the National Labor Relations Commission and who are not included among the 227 workers, without discrimination based on trade union activities. If reinstatement is not possible, adequate compensation should be paid to the workers concerned. The Committee asks the Government to keep it informed in this regard, as well as of any measures taken to withdraw the criminal charges pressed against some union members and officers.

888. *Finally, concerning the allegation of violent dispersion of the workers participating in the strike by the police on 9 April 2001, to which the Government has not replied, the Committee must underline that the authorities should resort to the use of force only in situations where law and order is seriously threatened [see **Digest**, op. cit., para. 580].*

889. *In view of the considerations made above and of their similarities with those made in the examination of Cases Nos. 1826 and 2195, the Committee considers that the current legislative framework is not fully conducive to harmonious labour relations; there are recurrent difficulties in relation to the certification process and the exercise of the right to strike. In the Committee's view, these difficulties are prompted by the fact that workers' organizations and employers can have recourse in a rather systematic manner to the public authorities (judiciary, administrative and labour authorities) to settle issues between them. The Committee is of the view that the labour relations system does not sufficiently promote dialogue between the social partners. The Committee therefore suggests that steps be taken to reform book five on labour relations of the Labor Code with a view to developing harmonious labour relations in a more effective manner and that, in particular, collective bargaining be conducted in good faith.*

The Committee's recommendations

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

- (a) With a view to bringing the national legislation into full conformity with the principles of freedom of association and collective bargaining and the provisions of the Conventions ratified by the Philippines, the Committee requests the Government:*
 - (i) to amend the relevant legislative provisions in order to establish a legislative framework allowing for a fair, independent and speedy certification process and providing adequate protection against acts of interference by employers in such matters;*
 - (ii) to pursue the measures already initiated to amend the relevant provisions of the Labor Code and, in particular, article 263(g) concerning the exercise of the right to strike; and*
 - (iii) the Committee requests the Government to keep it informed in this respect.*
- (b) Having regard to the principle of bargaining in good faith, the Committee trusts that the Government will make every effort to ensure that the TMPCWA and Toyota Motor Philippines Corporation negotiate in good faith in order to reach a collective agreement. It asks the Government to keep it informed in this respect.*

- (c) *While noting that the actions of February 2001 were considered to be illegal strikes, bearing in mind the serious consequences of the dismissals for the workers concerned, the Committee requests the Government to initiate discussions in order to consider the possible reinstatement in their previous employment of the 227 workers of Toyota Motor Philippines Corporation as well as of the union officers declared to have lost their employment status by the National Labor Relations Commission and who are not included among the 227 workers, without discrimination based on trade union activities. If reinstatement is not possible, adequate compensation should be paid to the workers concerned. The Committee requests the Government to keep it informed in this respect as well as of any measures taken to withdraw the criminal charges pressed against some union officers.*
- (d) *The Committee requests the Government to consider the possibility of accepting a consultative mission in relation to this case.*

CASE NO. 2216

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

**Complaint against the Government of the Russian Federation
presented by
the Seafarers' Union of Russia (RPSM)**

Allegations: The complainant alleges the adoption of legislation contrary to freedom of association and in particular, no recognition by the Labour Code of occupational unions and promotion of a single trade union system, discrimination against minority trade unions, denial of the right to bargain collectively at the enterprise level to higher level trade unions, to federations and confederations, and violation of the right to strike

- 891.** The complaint is contained in a communication dated 12 August 2002 from the Seafarers' Union of Russia (RPSM). The RPSM sent additional information in communications dated 27 September 2002 and 24 July 2003.
- 892.** The Government forwarded its observations in a communication dated 5 September 2003.
- 893.** The Russian Federation 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

- 894.** In its communications dated 12 August and 27 September 2002 and 24 July 2003, the RPSM alleges that the newly adopted Labour Code violates the principles of freedom of association. In particular, the complainant refers to the following discrepancies between

the Labour Code and the Conventions: no recognition of occupational unions and promotion of a single trade union system; discrimination against minority trade unions; denial of the right to bargain collectively at the enterprise level to higher level trade unions, to federations and confederations; and violation of the right to strike.

895. As concerns the first allegation, the complainant states that the overall concept of social partnership in the Russian Federation embodied in the Labour Code reflects the particular situation and interests only of trade unions organized by geographical territory and industrial sector, the principles on which the structure of the Federation of Independent Trade Unions of Russia (FNPR) is based. The rights of trade unions based on occupational criteria are not mentioned in the Code. Such unions are the Russian Confederation of Labour, to which the complainant organization is affiliated, and the All-Russia Confederation of Labour. Furthermore, section 45 of the Labour Code does not permit concluding collective agreements based on professional or occupational criteria and therefore rules out a form of a social partnership where the membership in a trade union is based on this criterion. On the practical level, this translated into a situation where only representatives of the FNPR were involved in discussions on the new Labour Code; representatives of the two other Russian trade union associations were not allowed to participate, despite the fact that they represent workers employed mostly in the private sector and thus have a practical experience under the new market conditions. The complainant concludes, therefore, that the Labour Code foists on workers a single system of trade unions affiliated to the FNPR. The complainant provides an example where the Ministry of Labour and Social Development asked the FNPR to give clarification on the application of section 37 of the Code concerning the determination of the trade union to conduct collective bargaining. Such a request was made by the Ministry following a request by the Ministry of Transport to resolve a dispute between trade unions (affiliated and non-affiliated to the FNPR) regarding the establishment of a joint representative body for the purpose of concluding a branch wage agreement for the maritime transport sector for 2002-03.

896. Secondly, the complainant alleges that the Labour Code gives preference to unions with larger membership. More specifically, and as concerns collective bargaining, the complainant mentions section 37(3) of the Code, according to which, if no agreement is reached between different primary trade union organizations operating at a given enterprise regarding the creation of a single representative body for the purpose of collective bargaining, workers are to be represented by the primary trade union organization that represents more than half of the total workforce. Similarly, according to paragraph (6) of this section, Russian national trade unions or associations of trade unions with the greatest membership enjoy privileged rights to conduct collective bargaining and to conclude collective agreements (e.g. general or industry agreements) at the federation level. Moreover, according to the complainant, these provisions, giving preference to the largest trade unions, apply irrespective of whether or not they have an appropriate authorization from workers, which contradicts the fundamental principle of social partnership set out in section 24 of the Code, according to which, workers' representatives should be duly authorized by workers. These provisions, according to the complainant, deprive workers in smaller trade unions of the right to competent and effective protection of their labour rights. On a practical level, a suggestion made by the Federation of Maritime Transport Trade Unions (FPRMT), to which the complainant organization is affiliated, that a joint representative body be established for the purpose of collective bargaining with a view to concluding a general agreement for the water transport sector for 2002 was rejected by the Water Transport Workers' Trade Union, a member of the FNPR. The latter, in explaining its position, cited section 37(6) of the Labour Code, which in its opinion did not grant such negotiating rights to "representatives of a trade union minority". The agreement for 2002-05 was concluded without the participation of the FPRMT.

- 897.** Furthermore, on the same issue, the RPSM mentions section 372 of the Code, which, according to the complainant, allows an employer to disregard the views of a minority trade union. According to this provision, an employer is required to communicate any proposed local regulation on labour matters to the elected body of a trade union representing all or at least the majority of workers at a given undertaking. The absence of any such requirement for the employer to do the same for minority unions negates, in the view of the complainant, the right of workers to form a trade union of their own choosing.
- 898.** The complainant further states that section 31 of the Labour Code, which provides that “in the absence of a primary trade union at the given undertaking or when the primary trade union has a membership of less than half of the employees, the general meeting of employees can entrust the said primary trade union or any another representative with the representation of their interests”, leaves a decision regarding which union a worker should join to the discretion of a general meeting; in other words, it makes the right of workers to join their chosen union contingent on a decision by other workers who are not members of that union.
- 899.** Thirdly, the complainant states that sections 29(2), 30, 37 and 372 of the Labour Code violate the right of higher level trade unions, federations and confederations to conclude collective agreements, as those provisions give primary trade unions the sole right to represent workers at enterprise level, including the right to engage in collective bargaining, denying such right to trade unions or trade union associations.
- 900.** Finally, regarding the allegation of violation of the right to strike, the complainant mentions two sections of the Code. According to section 399(2), demands or claims made by workers’ representatives to the employer must be confirmed at a general meeting (conference) of employees. According to the complainant, this section deprives unions of the right to organize strikes independently. Similarly, section 410 obliges a trade union to ensure that any decision to declare a strike is confirmed by a general meeting of workers of the undertaking. Moreover, by stipulating that not less than two-thirds of the workforce must attend such a meeting the legislator has made any legal strike action impossible.

B. The Government’s reply

- 901.** In its communication of 5 September 2003, the Government states that the new Labour Code is compatible with the provisions of Conventions Nos. 87 and 98. Section 37 of the Code, concerning collective bargaining, provides for the procedure to follow when no trade union represents over half of the employees. In this case, according to subsection 4, the workers’ general meeting determines by secret vote the labour union, which would form a representative body. Subsection 5 provides for the procedure regarding the creation of a single representative body and therefore for participation of all trade unions in the collective bargaining process. According to this section, primary trade unions can delegate their representatives to the representative body at any time before the signing of the collective agreement. According to the Government, the system of proportionality provided by section 37 is fair and compatible with international standards. In case of violation of this section, the Code of Civil Procedure provides for remedies which could be used prior to the judicial procedure. Moreover, according to section 357 of the Labour Code, a trade union can submit a complaint to the Labour Inspector, who has a right to impose an administrative sanction upon persons found guilty of violation of labour law, as well as to the judicial bodies.
- 902.** The Government further comments on the letter sent by the Water Transport Workers’ Trade Union to the Federation of Maritime Transport Trade Unions (FPRMT) where the first organization rejected a suggestion made by the latter to establish a joint representative body for the purpose of collective bargaining with a view to concluding a general

agreement for the water transport sector for 2002. The Government indicates that the response given by the Water Transport Workers' Trade Union is contrary to section 37(6) of the Labour Code, which provides that the right to collective bargaining at the level of the Russian Federation, an industry or a territory is granted to the relevant trade unions or their associations. Should several trade unions exist at the relevant level, each of them is entitled to a representation within a single representative body formed on the basis of proportionality. The right to conduct collective bargaining and to conclude collective agreements could be exercised by the majority union only in the absence of an agreement to create such a body. The Government also states that the alleged violation of social partnership by the trade unions is rather singular. Moreover, the complainant organization has not appealed to national remedies available to it.

903. As concerns the question of consultation with trade unions during the discussions on the adoption of the Labour Code, the Government states that the draft Code was published in the Russian Gazette so that the interested organizations could submit their remarks. All received proposals were examined in the appropriate manner. The draft Code was examined by the conciliatory commission with the participation of All-Russia trade union, All-Russia employers' associations and other social organizations. During the debate on the amendments to the Labour Code, all opinions sent have also been examined.

C. The Committee's conclusions

904. *The Committee notes that the complainant in this case alleges that the Labour Code violates the principles of freedom of association. In particular, the complainant refers to the following discrepancies between the Labour Code and the Conventions: no recognition of occupational unions and promotion of a single trade union system, discrimination against minority trade unions, denial of the right to bargain collectively at the enterprise level to higher level trade unions, to federations and confederations, and violation of the right to strike.*
905. *As concerns the first allegation, the Committee notes the complainant's statement that the overall concept of social partnership, as defined by the Code, does not reflect the particular situation of workers' organizations based on the occupational or professional criteria and that the Labour Code restricts the level of collective bargaining by not providing, in section 45, for a possibility to conclude an agreement at the occupational or professional level. No comment was made by the Government on this allegation. In this respect, the Committee considers that workers' organizations and employers and their organizations should be free in determining the level of bargaining, including the possibility of concluding agreements at the occupational or professional level. The Committee therefore requests the Government to take all the necessary measures, including the amendment of section 45, so as to allow the possibility of collective bargaining at occupational or professional level both in law and in practice. The Committee requests the Government to keep it informed of the measures taken or envisaged in this respect.*
906. *The Committee further notes the complainant's concern that the Labour Code foists on workers a single system of trade unions affiliated to the FNPR. The complainant mentions an example where the Ministry of Labour turned to the FNPR for interpretation and clarification of one of the sections of the Labour Code. The complainant also states that only representatives of this organization were involved in discussions on the new Labour Code. The Committee notes the Government's statement to the effect that all the interested organizations could make their proposals and remarks and that all opinions received concerning the new Labour Code were examined. As to the request made by the Ministry of Labour to the FNPR to interpret a particular section of the Labour Code, no comment was provided by the Government. The Committee considers that consulting only the most*

*representative workers' organizations during the preparation and application of legislation which affects their interests does not necessarily constitute an infringement of trade union rights. [See **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 926 and 305.]*

- 907.** *As regards the preference given by the Labour Code to majority unions in the collective bargaining process, the complainant describes the procedure set out in section 37 of the Code, according to which, if no agreement is reached between different primary trade union organizations operating at a given enterprise regarding the creation of a single representative body for the purpose of collective bargaining, workers are to be represented by the primary trade union organization that represents more than half of the total workforce. The Committee notes the Government's statement and that according to section 37(5), at the enterprise level, a further protection is afforded by keeping a chair for other primary trade unions for their participation at any further time in the collective bargaining process. The Committee therefore considers that the approach in this case favouring the most representative trade union for collective bargaining purposes is not incompatible with Convention No. 98.*
- 908.** *The Committee further notes section 372 of the Code, which, according to the complainant, allows an employer to disregard the views of a minority trade union as it requires an employer to communicate proposed local regulations on labour matters to the elected body of a trade union representing all or at least the majority of workers at a given undertaking. The complainant states that this provision, by granting privileges to the majority trade union, jeopardizes the workers' freedom of choice. In this respect, the Committee recalls that certain advantages might be accorded to trade unions by reasons of the extent of their representativeness, provided that certain conditions are met and that distinction is limited to the recognition of certain preferential rights and does not deprive other trade union organizations of the essential means for defending the occupational interests of their members, for organizing their administration and activities and formulating their programmes [see **Digest**, op. cit., para. 309].*
- 909.** *The Committee further notes section 31 of the Code, according to which, in a case where there is no trade union at the enterprise, or less than half of the employees are members of an existing trade union, a general meeting of employees could elect the existing trade union or other representative to represent their interests. The Committee notes that according to the complainant, this section leaves a decision on representation in such circumstances to the discretion of the general workforce and this implicitly makes the decision of workers to join any particular trade union contingent on a decision of other workers. There would indeed appear to be a contradiction between this section and section 37 which provides that there shall be a secret ballot for determining "the trade union" to conduct collective bargaining in the event that no trade union unites over half of the employees. The Committee considers that the problem at issue is not whether all employees may have a say in the choice of union representing them where no union represents the majority of employees, but rather that section 31 would appear to give workers the choice to elect non-union representatives even though there may be a union at the workplace. The Committee recalls that the Collective Agreements Recommendation, 1951 (No. 91), stresses the role of workers' organizations as one of the parties in collective bargaining; it refers to representatives of unorganized workers only when no organization exist. In these circumstances, 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**, op. cit., para. 785]. The Committee requests the Government to amend section 31 so as to ensure that it is only where there is no trade union at the workplace that workers can elect other representatives to represent their*

interests. It requests the Government to keep it informed of the measures taken or envisaged in this respect.

- 910.** *As concerns the allegation that the right of higher level trade unions, trade union federations and confederations to conclude collective agreements at the enterprise level are violated, the Committee endorses the point of view expressed by the Committee of Experts that any restriction or prohibition in this respect hinders the development of industrial relations and, in particular, prevents organizations with insufficient means from receiving assistance from higher-level organizations, which are in principle better equipped in terms of staff, funds and experience to succeed in such bargaining [see 1994 General Survey on freedom of association and collective bargaining, para. 249] and considers that these organizations should indeed be able to conclude collective agreements [see **Digest**, op. cit., para. 783]. The Committee therefore requests the Government to amend its legislation so as to ensure that higher union structures, as well as federations and confederations, have access to the collective bargaining process and enjoy the right to conclude collective agreements at the enterprise level. It requests the Government to keep it informed of the measures taken or envisaged in this respect.*
- 911.** *As regards the allegations concerning restrictions on the right to strike, the Committee notes that the complainant cites two sections of the Code. According to the complainant, section 399(2) requires a trade union to obtain an approval of the claims it wishes to make to the employer by the meeting (conference) of employees. The complainant further mentions section 410, which provides that a minimum of two-thirds of the total number of workers should be present at the meeting and the decision to strike should be taken by at least half of the number of delegates present. In respect of section 399, the Committee notes from the wording of this section that “claims, raised by employees and (or) by a representative body of employees of an organization [...] shall be approved by their respective meeting (conference) of employees. The meeting of employees shall be deemed authorized provided the majority of workers are present. The conference shall be deemed authorized provided that at least two-thirds of elective delegates are present”, whereas section 399(6) states, “Claims of trade unions shall be raised and serviced to the respective parties to social partnership.” On the basis of this text, the Committee does not find it clear whether only non-union representatives need to refer to a meeting or conference of employees or whether this provision also applies to trade unions. No information was provided by the Government in this respect. While considering that trade unions should be free to regulate the procedure of submitting claims to the employer and that the legislation should not impede the functioning of a trade union by obliging a trade union to call a general meeting every time there is a claim to be made to an employer, the Committee requests the Government to provide additional information as to how section 399 works in practice.*
- 912.** *Regarding the quorum required for a strike ballot, the Committee considers that the obligation to observe a certain quorum to take strike action may be considered acceptable; the observance of a quorum of two-thirds of workers may be difficult to reach, in particular where trade unions have large numbers of members covering a large area [see **Digest**, op. cit., paras. 510-511]. The Committee requests the Government to amend its legislation so as to lower the quorum required for a strike ballot and to keep it informed of the measures taken or envisaged in this regard.*
- 913.** *The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of the case.*

The Committee's recommendations

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

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

CASE NO. 2255

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

**Complaint against the Government of Sri Lanka
presented by
the International Textile, Garment and Leather Workers' Federation (ITGLWF)
on behalf of
the Ceylon Mercantile Industrial and General Workers' Union (CMU)**

Allegations: The complainant alleges that the Guidelines for the Formation and Operation of Employees' Councils issued by the Board of Investment (BOI) which is the overseeing public authority in free trade zones, hamper the creation of free and independent trade unions and prevent them from exercising the right to bargain collectively for five reasons: (a) they require trade unions and employees' councils to compete for collective bargaining rights; (b) they do not guarantee free elections for employees' councils; (c) they do not safeguard the independence of employees' councils vis-à-vis the employer; (d) they provide employees' councils with favourable treatment which could influence the choice of workers as to which organization they wish to represent them; and (e) they set up a special regime for the resolution of industrial disputes under the authority of the BOI instead of the competent labour authorities

915. In a communication dated 18 March 2003, the International Textile, Garment and Leather Workers' Federation (ITGLWF) presented on behalf of its affiliate, the Ceylon Mercantile Industrial and General Workers' Union (CMU), a complaint of violations of freedom of association against the Government of Sri Lanka.

916. The Government furnished its observations in communications dated 10 May and 20 October 2003.

917. Sri Lanka has ratified the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

A. The complainant's allegations

918. In its communication dated 18 March 2003, the International Textile, Garment and Leather Workers' Federation (ITGLWF) alleges that its affiliate, Ceylon Mercantile Industrial and

General Workers' Union (CMU) and other unions in the textiles sector, have found it virtually impossible to organize and secure recognition in Sri Lanka's free trade zones (FTZs) because, among other things, employers commonly resort to the creation of "employees councils" as promoted by the Board of Investment (BOI), the overseeing authority of Sri Lanka's FTZs, as a means of hampering the creation of free and independent trade unions and preventing them from exercising the right to bargain collectively.

- 919.** The complainant alleges that in, June 2002, the BOI went further still with the publication of a set of revised standards, the "Guidelines for the Formation and Operation of Employees' Councils", many provisions of which blatantly undermine freedom of association and the right to collective bargaining.
- 920.** In particular, the complainant states that employees' councils are under the control of the BOI which has an active participation in all aspects of the activities of employees' councils. For instance, under the revised BOI guidelines, when an employees' council is set up for the first time, it is the BOI that calls for and receives nominations, arranges the election and convenes the first meeting of the elected council. The BOI is empowered to hold an election if the elected council fails to hold an election within one month of the expiry of its term of office. Moreover, the councils must be registered with the BOI and subsequent changes must be notified to the BOI (BOI Guidelines, sections 5 and 7).
- 921.** The complainant further states that employees' councils are not statutorily provided bodies and lack the minimum safeguards to which trade unions are entitled under the Trade Unions Ordinance. Thus, they are not regulated by a legal instrument but solely by the BOI. However, the BOI is a body responsible for promoting, encouraging and regulating investment and clearly has no legitimate mandate to deal with industrial relations.
- 922.** The complainant relies on Article 3 of Convention No. 87 [as well as paras. 353, 354 and 348 of the *Digest of decisions and principles of the Freedom of Association Committee*, 4th edition, 1996] in order to suggest that the well-established principle according to which authorities should refrain from interfering with the right of workers' organizations to elect their own representatives must obviously also apply to associations such as the BOI so that restraint would be required on their behalf. The complainant also suggests on the basis of paragraph 367 of the *Digest of decisions and principles of the Freedom of Association Committee* that the Committee has explicitly extended the right to elect representatives in full freedom to the election of representatives in works councils.
- 923.** According to the complainant, there are a number of provisions in the Guidelines that undermine the independence of the elected councils and their ability effectively to promote the interests of workers, organize their activities and formulate their own programmes. For instance, section 12 of the Guidelines provides that the procedure for the conduct of meetings shall be determined by the employer in consultation with the council. Moreover, section 13 of the Guidelines provides that the employer and the council shall refrain from doing anything likely to impair the efficiency and productivity of the enterprise. The complainant therefore contends that the BOI has no legitimate mandate to regulate industrial relations, that the fact that the employees' councils are not freely elected means that they are not "elected representatives", as defined in Convention No. 135, and that the control exerted by the BOI prevents the employees' councils from acting in full freedom to organize their activities, formulate their programmes and promote effectively the interests of their members.
- 924.** The complainant alleges moreover that the BOI manual clearly favours employees' councils over trade unions. For instance, the employer must allow a period of up to two hours for council meetings at least once a month, and must provide the necessary premises

and facilities for the conduct of the affairs of the council. The complainant alleges that such favouritism influences the choice of workers as to whether they intend to join an employees' council or a union. According to the complainant, such favouritism is particularly serious given that unions and employees' councils are in a position of having to compete for bargaining rights.

- 925.** Moreover, the complainant states that the 1999 Amendment to the Industrial Disputes Act provides that an employer must recognize a union as the collective bargaining agent if 40 per cent of employees are members. The BOI Guidelines say that, if a union represents 40 per cent of the workforce, then it is the union – not the employees' council – that represents workers in collective bargaining. However, if the union does not meet that minimum requirement, then the council can become the collective bargaining agent if authorized by at least 40 per cent of the workforce (Guidelines, clause 10). The complainant contends that putting unions and workers' councils in a position where they must compete for bargaining rights is a breach of freedom of association. According to the complainant, this is all the more so as employees' councils do not meet the criteria set down in Article 3 of Convention No. 135. The complainant also recalls that Recommendation No. 91 refers to collective agreements between employers and the duly elected and authorized representatives of workers in the absence of trade unions. The BOI seems to be wrongly equating, according to the complainant, the absence of a trade union with the absence of a trade union which represents 40 per cent of the workforce.
- 926.** The complainant draws attention to the provisions of Conventions Nos. 135 and 154 according to which, when there exist in the workplace both trade union representatives and elected representatives, appropriate measures must be taken to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned. The complainant further alleges that these safeguards clearly do not exist in this situation. In determining the level of representativity, the BOI is virtually equating unions and employees' councils. In practice therefore, a union representing 39 per cent of the workforce would lose the right to bargain collectively to an employees' council representing 40 per cent of the workers. Unions would only be favoured if both a union and an employees' council were to represent 40 per cent of the workforce, in which case bargaining rights would be granted to the union. Moreover, as indicated previously, if a union is forced to compete with the employees' council for bargaining rights, then it is clearly at a disadvantage in view of the favourable treatment given to the councils, which could influence the choice of workers as to which organization they wish to represent them. The complainant further emphasizes the importance of worker representatives being independent for the conduct of collective bargaining.
- 927.** Finally, the complainant alleges that the dispute resolution mechanism for matters taken up by the employees' council is a further cause for concern, as section 11 of the Guidelines provides the following: "Any matters discussed between the council and the employer but not resolved in a period of 30 days shall be taken up by the council with the Department of Industrial Relations of the BOI for settlement in accordance with the Disputes Settlement Procedure outlined in the Labour Standards and Employment Relations Manual."
- 928.** The complainant concludes by stating that the provisions relating to collective bargaining rights are contrary to the principle of freedom of association and that, by allowing such guidelines to exist, the Government of Sri Lanka is failing in its duty to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations.

B. The Government's replies

929. In its communication dated 10 May 2003, the Government provides, first, general information on the background of the allegations and, second, a specific reply on each point raised by the complainant.

930. The Government states that the current BOI Manual on Labour Standards and Employment Relations and the BOI Guidelines on Employees' Councils were prepared having regard, *inter alia*, to the recommendations of two tripartite workshops on the implementation of Conventions Nos. 87 and 98 held in January 2001 and May 2002. The second tripartite workshop made substantive progress concerning the application of Conventions Nos. 87 and 98 in the free trade zones and recommended, *inter alia*, that the BOI Guidelines be brought into conformity with ILO Conventions Nos. 87 and 98. The Government states that the proposal to confer the right to collective bargaining and to settle collective disputes to employees' councils emanated from the recommendations of this tripartite workshop which also had regard to a research study carried out by two consultants appointed for that purpose by the ILO Office in Colombo. It states moreover that, prior to their adoption, the BOI Manual and Guidelines were placed for discussion before the tripartite steering committee and the National Labour Advisory Council (NLAC), which acquiesced in the proposals. The Ceylon Mercantile Industrial and General Workers' Union (CMU), on behalf of which the complaint has been made, was one of the trade unions that participated in the tripartite workshop, the tripartite steering committee and the NLAC and suggested that the proposals be noted with the expectation that they would be effectively implemented.

931. The Government then provides responses to the specific issues raised in the complaint.

Right of employees' councils to engage in collective bargaining

932. The Government states that the BOI Guidelines were amended, taking into account the provisions of Conventions Nos. 98, 135 and 154. The Government states that employees' councils consisting of elected representatives within the meaning of Convention No. 135 have been operating in enterprises falling under the authority of the BOI, including free trade zone (FTZ) enterprises, since 1994. The Industrial Disputes Act, Chapter 131, section 5, recognizes the right to bargain collectively and to enter into collective agreements, not only to trade unions but also to non-unionized workers. Section 48 of the Industrial Disputes Act enables non-unionized workers to be a party to an industrial dispute whether or not there is a trade union in the enterprise. Section 46 of the Act, read in conjunction with section 38(2) of the Industrial Disputes Regulations, 1958, provide that, for the purpose of representation of non-unionized workers in collective bargaining and industrial disputes proceedings, the affected workers are required to nominate and authorize one-five representatives, depending on the total number of the workforce. The Government states that the provisions of the Industrial Disputes Act, as regards bargaining rights of non-unionized workers in a workplace, whether or not there is a trade union in that workplace, are in conformity with the provisions of Convention No. 154 (Article 3). The bargaining rights of non-unionized workers are not restricted only to a workplace where there are no representative trade unions, as is the case under Recommendation No. 91. On the contrary, the BOI Manual and Guidelines restrict the right of non-unionized workers to bargain collectively only in the absence of a "representative" trade union in the workplace.

Validity of elections to employees' councils

933. As to the validity of the election of members to employees' councils, the Government states that, according to paragraph 5 of the BOI Guidelines on Employees' Councils, elections are held through secret ballot without any influence or interference from the employers or their representatives. The Government states that the paragraphs of the *Digest of decisions and principles of the Freedom of Association Committee* referred to by the complainant are intended for purposes of trade union elections according to Convention No. 87 and have no direct relevance to elections of employees' council members who are deemed to be "elected representatives" within the meaning of Convention No. 135. The Government further notes that the BOI plays the role of a facilitator in establishing employees' councils. Elections for the establishment of the first council in an enterprise will be conducted by an electoral board consisting of BOI Industrial Relations Department representatives. Subsequent elections to the council are to be conducted by an electoral board constituted by the council itself. The BOI representatives will be present at the subsequent elections as observers to ensure that elections are conducted properly and fairly. Apart from this, the BOI has no role to play in the election of the council or the conduct of its business. The nominations of candidates are made voluntarily by the workers, as in any trade union election and elections are conducted by secret ballot where the management representatives have neither a role to play nor the right to be present at the time of elections. The Government cites an independent study conducted by a research team appointed by the ILO Office in Colombo as regards election of members to employees' councils: "All those responding have stated the workers nominated worker representatives to workers' councils and 17 of the 21 responses have indicated that the worker representatives are elected by secret ballot. To that extent, the actual election of representatives by employees appears to be satisfactory."

Favouritism towards employees' councils

934. The Government states that the provision of facilities for the conduct of the affairs of the council, time off for attending council meetings, etc., do not constitute favouritism towards employees' councils over trade unions, but rather mere facilities which an employer is required to provide to elected representatives under Convention No. 135. Hence, according to the Government, the allegation that the BOI Manual favours employees' councils over trade unions is baseless and without substance.

Requirement of 40 per cent representativity

935. The Government states that the Industrial Disputes Act requires 40 per cent representativity for trade unions to bargain collectively. The BOI Manual makes the requirement of 40 per cent representativity applicable to both trade unions and employees' councils. Both Convention No. 154 and the Industrial Disputes Act enable a trade union and non-unionized workers in a workplace to bargain collectively and compete with each other. The BOI Manual favours trade unions over employees' councils by recognizing the right of representative trade unions to bargain collectively and denying such right to employees' councils where both are representative. According to the Government, there is, therefore, no breach of freedom of association involved in requiring 40 per cent representativity for collective bargaining purposes for both trade unions and non-unionized workers.

Independence of worker representatives

936. The Government states that members of employees' councils are elected by secret ballot with no interference or involvement of the employer. Meetings of the councils are conducted by the council members according to their own programmes. They discuss their

own issues and their independence in collective bargaining negotiations and disputes settlement is fully ensured. Meetings between the council and the management can be initiated by either party depending on the nature of issues involved, e.g. welfare matters, productivity issues.

Competence of the BOI to regulate industrial relations

- 937.** The Government states that the labour administration functions in Sri Lanka are vested in the Ministry of Labour and the Department of Labour, while labour law enforcement and industrial relations functions are the prerogative of the Commissioner-General of Labour with the right to delegate his authority to any of his officers or any named person or office. The BOI has not been delegated with such power or functions by the Commissioner-General. All labour administration functions in the FTZs are therefore carried out by the Commissioner-General of Labour and his officers.
- 938.** The Government also states that when the new BOI Bill was presented in Parliament last year (2002), one of the amendments sought to enable the BOI officers to handle conciliation matters and termination of employment cases. In view of these proposals the Labour Standards and Employment Relations Manual also made provisions for employees' councils and employers to report disputes arising from direct negotiations to the BOI Industrial Relations Department for settlement. Since the proposed amendments were withdrawn in Parliament, the labour administration functions, including industrial relations functions, continue to be performed by the Commissioner-General of Labour. The relevant provisions of the Manual have never been applied and will be withdrawn with the next revision of the Manual. However, the Industrial Relations Department of the BOI promotes labour-management consultation and cooperation at the enterprise level and provides advisory services to both employers and workers on labour-related problems without exercising any statutory power or functions.
- 939.** In its communication dated 20 October 2003, the Government states that the BOI Guidelines have been recently amended and transmits a copy of the amended Guidelines and Manual. Section 11(v)(a) of the amended Guidelines and Section 15.2(f) of the Manual confirm the competence of the Commissioner-General of Labour with regard to industrial disputes.

Recognition of freedom of association and collective bargaining rights

- 940.** The Government finally states that, among other things, the BOI Manual on Labour Standards and Employment Relations recognizes workers' rights to form and join unions of their own choosing and to bargain collectively and enjoins employers to respect such rights of workers (paragraph (9)(I-iii) of the Manual). It further enjoins employers against engaging in unfair labour practices (paragraph (9)(iv) of the Manual). The Government adds that currently ten unions are operating in 37 enterprises in FTZs. Two of them have concluded collective agreements with the employers. As against this, out of the 250 other enterprises, only 149 have employees' councils, but none of them have signed any collective agreements over the years. No new councils have been established after the introduction of the bargaining rights to employees' councils.
- 941.** The Government concludes that the existence of employees' councils does not in any way hinder or undermine the role of unions in collective bargaining. The councils only provide an alternative forum to workers, in the absence of a "representative" trade union, for purposes of improving their terms and conditions of employment.

C. The Committee's conclusions

942. *The Committee observes that this case concerns allegations that the Guidelines for the Formation and Operation of Employees' Councils issued by the Board of Investment which is the overseeing public authority in free trade zones (FTZs), hamper the creation of free and independent trade unions and prevent them from exercising the right to bargain collectively for five reasons: (a) they require trade unions and employees' councils to compete for collective bargaining rights; (b) they do not guarantee free elections for employees' councils; (c) they do not safeguard the independence of employees' councils vis-à-vis the employer; (d) they provide employees' councils with favourable treatment which could influence the choice of workers as to which organization they wish to represent them; and (e) they set up a special regime for the resolution of industrial disputes under the authority of the BOI instead of the competent labour authorities. The relevant extracts of the BOI Guidelines can be found in Appendix I.*

Right of employees' councils to engage in collective bargaining and requirement of 40 per cent representativity

943. *The Committee observes that both the complainant and the Government agree that the combined provisions of the Industrial Disputes Act and the BOI Guidelines provide that trade unions and employees' councils have to compete for collective bargaining rights in FTZ enterprises. Either one can become the bargaining agent if it represents 40 per cent of the employees. If however both a union and an employees' council were to represent 40 per cent of the workforce, bargaining rights would be granted to the union. While, according to the complainant, putting unions and employees' councils in a position where they have to compete for bargaining rights is a breach of freedom of association, especially as there are no safeguards concerning the independence of employees' councils, the Government considers that the recognition of bargaining rights to both trade unions and elected representatives is in conformity with Convention No. 154.*

944. *The Committee recalls that Article 3 of Convention No. 154 provides that the extent to which the term "collective bargaining" shall also extend to negotiations with elected representatives shall be determined by national law or practice, where such national law or practice recognizes the existence of elected representatives. The Committee also recalls that the Workers' Representatives Convention, 1971 (No. 135), and the Collective Bargaining Convention, 1981 (No. 154), contain explicit provisions guaranteeing that, where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures are to be taken to ensure that the existence of elected representatives in an enterprise is not used to undermine the position of the trade unions concerned [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 787]. Thus, the Committee considers that there is no breach of principles concerning collective bargaining in enabling both trade unions and elected representatives to engage in collective bargaining as long as adequate safeguards are in place so that the existence of elected representatives is not used to undermine the position of trade unions.*

945. *The Committee notes in relation to the above that, according to the statistical information provided by the Government, only two collective agreements have been signed in the 37 enterprises in which trade unions have been established, out of 287 enterprises operating in FTZs. Moreover, while 149 enterprises in FTZs have employees' councils, not one has signed a collective agreement. The Committee recalls that, according to Convention No. 98, ratified by Sri Lanka, measures appropriate to national conditions should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of*

*employment by means of collective agreements [see **Digest**, op. cit, para. 781]. Taking into account that only two collective agreements have been concluded in FTZs, the Committee requests the Government to take measures with a view to promoting collective bargaining in FTZs in conformity with Convention No. 98 and considering that the 40 per cent rule is too restrictive, to amend this requirement taking into account the views of the parties. The Committee requests to be kept informed in this respect.*

Validity of elections to employees' councils

- 946.** *The Committee notes that the Guidelines authorize the BOI officers to organize the first elections for the creation of an employee's council (section 5(i)) and subsequent elections if the employees' council fails to do so within one month from the expiration of its term of office (section 5(v)). Moreover, the Guidelines provide that the BOI officers will be present at elections as observers to ensure that they are conducted properly and fairly (section 5(iii)). The Committee notes that the complainant contests the validity of elections to employees' councils and claims that the authority granted to the BOI amounts to interference. The Committee notes that the Government rejects this allegation and emphasizes that the candidates are nominated by the workers, and the elections are conducted by secret ballot while the BOI has the role of a facilitator.*
- 947.** *The Committee considers that the calling of a first election for employees' councils by the authorities is not contrary to freedom of association principles. However, the presence of public officials from the BOI, which is the overseeing authority of FTZs, during such elections, even with a role of facilitator or observer, is contrary to the principle of the free election of worker representatives embodied in Article 3 of Convention No. 135, ratified by Sri Lanka. The Committee stresses that, since the creation of works councils and councils of employers can constitute a preliminary step towards the setting up of independent and freely established workers' and employers' organizations, all official positions in such councils should, without exception, be occupied by persons who are freely elected by the workers or employers concerned [see **Digest**, op. cit., para. 367]. Moreover, the Committee emphasizes that, where the BOI calls for a first election of an employees' council, the organization of elections should take place in close consultation with the parties concerned. The Committee requests the Government to take all necessary steps to amend section 5(i), (iii) and (v) of the BOI Guidelines so as to ensure that elections to employees' councils are carried out in the presence of independent persons and only where requested by both parties, and that the first elections are organized in close consultation with all parties concerned. The Committee requests to be kept informed of steps taken in this respect.*

Independence of employees' councils

- 948.** *The Committee notes that section 12 of the BOI Guidelines provides that the procedure for the conduct of meetings between the employer and the employees' council shall be determined by the employer, in consultation with the council, and that the meetings shall be convened by the employer. The Committee notes that the complainant contests the conformity of this provision with freedom of association principles because, in its view, it compromises the independent functioning of employees' councils, thereby hampering the development of independent trade unions in FTZ enterprises. The Committee notes that, according to the Government, the independence of employees' councils is fully ensured and meetings are convened by either party depending on the subject of the meeting. The Committee considers that the procedure applicable to meetings between the employer and the elected representatives should be determined by common agreement between the parties and therefore finds that the provisions of section 12 provide the employer with a disproportionate amount of discretion in this respect. The Committee requests the Government to take all necessary measures to amend section 12 of the BOI Guidelines so*

as to ensure that the procedure for the conduct of meetings between the employer and elected representatives is determined by common agreement between the parties, and to keep it informed in this respect.

- 949.** *The Committee also notes that section 13 of the BOI Guidelines establishes an obligation on the part of employees' councils to refrain from doing anything that might impair the efficiency and productivity of the enterprise. The Committee notes that the complainant objects to this provision because in its view, it undermines the ability of the employees' council to effectively promote the interests of workers, organize its activities and formulate its own programmes, thereby obstructing the development of a genuine negotiations framework in FTZ enterprises. The Committee notes that the Government has not addressed this issue in its response. As stated in the past with respect to measures adopted by a government as part of a stabilization policy, restrictions on collective bargaining based on productivity criteria are acceptable only as an exceptional measure which should be limited in time and scope. Thus, "as regards the obligation for future collective agreements to respect productivity criteria, the Committee recalled that, if, within the context of a stabilization policy, a government may consider for compelling reasons that wage rates cannot be fixed freely by collective bargaining (in the present case the fixing of wage scales excludes index-linking mechanisms and must be adjusted to increases in productivity), such a restriction should be imposed as an exceptional measure and only to the extent necessary, without exceeding a reasonable period and it should be accompanied by adequate safeguards to protect workers' living standards" [see **Digest**, *op. cit.*, para. 890].*
- 950.** *The Committee is of the view that it may be appropriate during voluntary negotiations for the parties to take into account productivity criteria among other elements. However, a prohibition of any action that might affect productivity in the future is contrary to the abovementioned principle, concerning free and voluntary collective bargaining. Moreover, the evolution of productivity in the future cannot always be determined with sufficient certainty. The Committee requests the Government to take all necessary measures to amend section 13 of the BOI Guidelines so as to ensure that the right of employees' councils to engage in collective bargaining is not subject to a prohibition of any action that might affect productivity and to keep it informed in this respect.*

Favouritism towards employees' councils

- 951.** *The Committee observes that, according to section 8(v) of the Guidelines, the employer is required to allow a period of up to two hours for council meetings at least once a month, and to provide the necessary premises and facilities for the conduct of the affairs of the council. The Committee notes that, according to the complainant, this provision clearly favours employees' councils over trade unions and such favouritism influences the choice of workers as to whether they intend to join an employees' council or a union. The Committee notes that, according to the Government, this provision does not constitute favouritism, but rather the granting to elected representatives of the facilities required by Convention No. 135.*
- 952.** *The Committee notes that, according to Article 2, paragraphs 1 and 3, of Convention No. 135, ratified by Sri Lanka, facilities in the undertaking shall be afforded to worker representatives, regardless of whether they are trade union representatives or elected representatives. The Committee considers that where facilities are provided only to elected representatives and not to trade union representatives, such treatment is discriminatory and provides an unfair advantage to employees' councils over trade unions, thus influencing the choice of workers. The Committee requests the Government to take all necessary steps to amend section 8(v) of the BOI Guidelines so as to ensure that representative trade unions enjoy the same facilities in the undertaking as employees'*

councils without discrimination. The Committee requests to be kept informed of developments in this respect.

Competence of the BOI over industrial relations

- 953.** *The Committee notes that the complainant expressed concern at section 11 of the Guidelines which provided that any matter discussed between the employer and the council which had not been resolved in a period of 30 days should be taken up by the council with the BOI Department of Industrial Relations for settlement in accordance with the disputes settlement procedure outlined in the Labour Standards and Employment Relations Manual. The Committee notes that according to the complainant, the BOI has no legitimate mandate to deal with industrial relations, as it is a body responsible for promoting, encouraging and regulating investment. The Committee notes the clarifications provided by the Government in this respect. A new Bill was submitted to Parliament in 2002 to transfer the authority to deal with industrial disputes in FTZs from the Commissioner-General of Labour to the Industrial Relations Department of the BOI. However, the Bill was withdrawn and the labour administration functions continue to be performed by the Commissioner-General of Labour.*
- 954.** *The Committee takes note with interest of the recently amended text of the BOI Guidelines, which, in conjunction with the Labour Standards and Employment Relations Manual, confirm the competence of the Commissioner-General of Labour with regard to industrial disputes.*
- 955.** *The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case and reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.*

The Committee's recommendations

- 956.** *In the light of its foregoing conclusions, the Committee requests the Governing Body to approve the following recommendations:*
- (a) *Considering that certain provisions of the BOI Guidelines for the Formation and Operation of Employees' Councils issued by the Board of Investment, which is the overseeing public authority in free trade zones (FTZs), are contrary to Conventions Nos. 87, 98 and 135, ratified by Sri Lanka, and the principles of free and voluntary collective bargaining, the Committee requests the Government to take all necessary measures to:*
- (i) *amend section 5(i), (iii) and (v) of the BOI Guidelines so as to ensure that elections to employees' councils are carried out in the presence of independent persons and only where requested by both parties, and that the first elections are organized in close consultation with all parties concerned;*
- (ii) *amend section 12 of the BOI Guidelines so as to ensure that the procedure for the conduct of meetings between the employer and elected representatives is determined by common agreement between the parties;*

- (iii) amend section 13 of the BOI Guidelines so as to ensure that the right of employees' councils to engage in collective bargaining is not subject to a prohibition of any action that might affect productivity;*
- (iv) amend section 8(v) of the BOI Guidelines so as to ensure that representative trade unions enjoy the same facilities in the undertaking as employees' councils without discrimination;*
- (b) The Committee requests the Government to keep it informed of the steps taken with regard to the amendments indicated above.*
- (c) Taking into account that only two collective agreements have been concluded in FTZs, the Committee requests the Government to take measures with a view to promoting collective bargaining in FTZ enterprises in conformity with Convention No. 98 and, considering that the 40 per cent rule is too restrictive, to amend this requirement taking into account the views of the parties. The Committee requests to be kept informed in this respect.*
- (d) The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*
- (e) The Committee reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.*

Appendix I

Guidelines for the formation and operation of employees' councils (extracts)

As a measure of promoting employees' participation in decision-making on matters affecting them and labour-market consultation and cooperation on matters of mutual concern at the enterprise level, the Board of Investment (BOI) of Sri Lanka facilitates the establishment of employees' councils consisting of elected representatives of employees in the BOI enterprises.

[...]

2. The objects and functions of the council shall be –

- (a) the regulation of relations between the employees and the management of the enterprise;
- (b) the promotion and maintenance of effective participation of employees in the affairs of the enterprise through consultation and cooperation between the employees and the management of the enterprise on matters of mutual concern to both parties;
- (c) the representation of employees in collective bargaining and settlement of industrial disputes;
- (d) the contribution to the promotion and maintenance of industrial peace and improvement of efficiency and productivity in the enterprise;
- (e) the promotion of the interest, welfare and well-being of the employees in the enterprise generally.

[...]

- 5.
- (i) Election to the council shall be through secret ballot of eligible employees in the enterprise, in case the number of nominations received exceeds the number of members to be elected.
 - (ii) Elections for the establishment of the first council shall be conducted by an electoral board consisting of BOI Industrial Relations Department representatives.
 - (iii) A three-member electoral board for conducting subsequent elections to the council shall be constituted by the council. The BOI Industrial Relations Department representatives will be present at the elections as observers to ensure that the elections are conducted properly and fairly.
 - (iv) When the term of office of the council expires, the electoral board constituted by the council shall hold elections to fill the positions in the council within a period of one month thereafter.
 - (v) Where the electoral board of a council fails to hold the election within one month of the date of expiry of the term of office of the council, the Industrial Relations Department of the BOI will take steps to hold the election.
 - (vi) The electoral board shall –
 - (a) call for and receive nominations;
 - (b) arrange, hold and supervise elections to the council;
 - (c) declare the results of the election;
 - (d) convene first meeting of the council presided by one of the members of the board for the election of a president, vice-president and secretary of the council.
 - (vii) Banners, posters or handbills are not to be exhibited or distributed or meetings held on the premises in the process of canvassing votes in connection with the election.

[...]

- 8.
- (i) The council shall elect a president, vice-president and a secretary at the first meeting convened by the electoral board.
 - (ii) The council shall meet as often as is necessary and at least once a month. The date, time and venue of the meeting shall be arranged by the president of the council.
 - (iii) The council will discuss any matters affecting the interests of the employees of the enterprise and decide on matters to be taken up for discussion with the employer. Decisions of the council will be by majority vote.
 - (iv) Minutes of all proceedings, including names of those present, matters discussed, decisions taken and voting, shall be maintained by the secretary. Minutes will be signed by the president, secretary and at least one other member of the council.
 - (v) The employer shall allow up to two (2) hours' duty leave for a meeting of the council and provide the necessary premises and facilities for the conduct of the affairs of the council.

[...]

12.1. The employer and the council shall meet as often as is necessary and at least once in every three months to –

- (a) discuss matters of mutual concern to both parties; and
- (b) review the employment relations situation at the enterprise with a view to ensuring the maintenance of industrial peace and improving efficiency and productivity.

12.2. The meetings for the purposes referred to in the preceding subparagraph shall be convened by the employer.

12.3. The procedure for the conduct of such meetings shall be determined by the employer, in consultation with the council.

13.

- (i) It shall be the duty of the employer and the council to work together in a spirit of mutual trust for the good of the enterprise and its employees.
- (ii) The employer and the council shall refrain from doing anything likely to impair the efficiency and productivity of the enterprise.

[...]

CASE NO. 2238

DEFINITIVE REPORT

**Complaint against the Government of Zimbabwe
presented by
the International Confederation of Free Trade Unions (ICFTU)**

Allegations: The complainant alleges that, following earlier incidents of harassment and intimidation, several leaders of the Zimbabwe Congress of Trade Unions (ZCTU) have been arrested while attending a trade union symposium; the general secretary of the ZCTU was beaten and intimidated during his detention, warned that he should cease all trade union activities, failing which he would be removed or “eliminated”

957. The complaint is contained in a communication dated 12 December 2002 from the International Confederation of Free Trade Unions (ICFTU). The Government provided its observations in a communication dated 2 January 2003.

958. Zimbabwe has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainant’s allegations

959. In its communication of 12 December 2002, the ICFTU states that on 9 December 2002, nine trade union leaders were arrested while attending a symposium organized by the Zimbabwe Congress of Trade Unions (ZCTU). They were held in police detention until 11 December, when they were released by judicial order. These persons are: Mr. Wellington Chibebe, Mr. Tambaoga Nyazika and Mr. Timothy Kondo (respectively general secretary, regional officer and advocacy coordinator of the ZCTU) and Ms. Patience Mandozana, Mr. Settlement Chikwinya, Mr. David Shambare, Mr. Thomas Nyamanza, Mr. Gideon Shoko and Mr. Hwinya Matambo (leaders of various unions affiliated to the ZCTU).

960. Mr. Chibebe was subjected to intimidation during his time in police custody. He was beaten, although not severely, and warned that he should cease all trade union activities. He was threatened that if he persisted in his activities, he would be removed or “eliminated”.

961. According to the complainant, this was just the latest incident of harassment, following an intimidation attempt less than one week earlier where riot police disrupted a meeting organized by the ZCTU on 4 December at Harare Gardens; after the disruption, the organizers tried to reconvene the meeting at another venue (Gorlon House) but riot police scaled the security fence and brutally assaulted workers as they arrived. Mr. Collin Gwiyo, deputy general secretary of the ZCTU, was arrested but later released through the intervention of ZCTU lawyers.
962. The complainant submits that the Government of Zimbabwe continues to violate fundamental trade union rights, particularly through continued police harassment of trade union leaders.

B. The Government's reply

963. In its communication of 2 January 2003, the Government states that Mr. Chibebe and his colleagues were taken by the police on 9 December for questioning about a mass stay away which had been called for by the National Constitutional Assembly (NCA) and were released the following day, i.e. 10 December.
964. The persons in question are members of the NCA, a quasi-oppositional political organization whose agenda is to topple the legitimate Government of Zimbabwe. They were therefore taken for questioning in connection with activities which are not directly linked to ZCTU's mission, but with a planned mass stay away, which the people of Zimbabwe ignored.

C. The Committee's conclusions

965. *The Committee notes that this complaint concerns allegations of arrests of trade union leaders of the Zimbabwe Congress of Trade Unions (ZCTU), of anti-union intimidation and harassment through repeated interventions by the authorities and the police. The Committee also notes that the arrests of 9 December followed similar incidents just the week before, where the ZCTU was prevented from holding two meetings through violent police intervention and its deputy general secretary was arrested. According to the Government, the arrests and questioning of the nine ZCTU members had nothing to do with the union's mandate but were related to a mass stay away planned by the NCA, a quasi-oppositional political organization, to which all these individuals belonged.*
966. *The Committee notes that Mr. Chibebe was allegedly intimidated and beaten during his detention, and warned that he would be removed or "eliminated" if he did not cease all trade union activities. The Committee further observes that these incidents took place only nine months after the events of March 2002 which also involved police intervention and interference in ZCTU's activities and, as a result of which, the Committee requested the Government to exercise great restraint in relation to intervention in the internal affairs of trade unions [see 329th Report of the Committee, paras. 818-831, approved by the Governing Body at its 285th Session].*
967. *Regarding the political aspect raised by the Government, the Committee recalls that trade union activities cannot be restricted solely to occupational matters since government policies and choices are generally bound to have an impact on workers; workers' organizations should therefore be able to voice their opinions on political issues in the broad sense of the term. While trade union organizations should not engage in political activities in an abusive manner and go beyond their true functions by promoting essentially political interests, a general prohibition on trade unions from engaging in any political activities would not only be incompatible with the principles of freedom of*

association, but also unrealistic in practice. Trade union organizations may wish, for example, to express publicly their opinion regarding the Government's economic and social policy [see *Digest of decisions and principles of the Freedom of Association Committee*, 1996, 4th edition, paras. 454-455].

- 968.** *Irrespective of the considerations above, the Committee emphasizes that in the present case, both the symposium of 9 December 2002 and the tentative meetings of 4 December 2002 were legitimate trade union activities; no evidence has been adduced that these meetings had purposes other than regular trade union activities; indeed, according to the allegations, Mr. Chibebe was intimidated during his detention and warned of dire consequences if he did not cease "all trade union activities" which confirms that the arrest and detention were related to trade union activities. The Committee recalls that the right to organize public meetings constitutes an important aspect of trade union rights [Digest, ibid., para. 464] in which the Government should not interfere. It once again requests the Government to refrain in future from interfering in ZCTU's trade union activities, including the holding of public meetings.*
- 969.** *As regards the detention of nine ZCTU leaders, and the earlier imprisonment of Mr. Collin Gwiyo, the Committee recalls that the detention of trade union leaders or members for reasons connected with their activities in defence of the interests of workers constitutes a serious interference with civil liberties in general and with trade union rights in particular [see Digest, ibid., para. 71]. The Committee is particularly concerned since this kind of government interference seems to be recurrent in the country, and may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities [see Digest, ibid., para. 76]. While noting that the trade union leaders in question have been released by judicial order, the Committee requests the Government to abstain in future from resorting to such measures of arrest and detention of trade union leaders or members for reasons connected to their trade union activities. The Committee also requests the Government to take the necessary measures to institute a thorough and independent investigation and to punish those responsible for these detentions.*

The Committee's recommendations

- 970.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *Noting with grave concern the complainant's allegations in this instance and the continued and serious nature of government interference in trade union affairs, the Committee once again requests the Government to refrain in future from interfering in ZCTU's trade union activities, including the holding of public meetings, and from resorting to measures of arrest and detention of trade union leaders or members for reasons connected to their trade union activities.*

(b) As concerns the detention of trade union leaders, the Committee requests the Government to take the necessary measures to institute a thorough and independent investigation and to punish those responsible for these detentions.

Geneva, 14 November 2003.

(Signed) Professor Paul van der Heijden,
Chairperson.

Points for decision:

Paragraph 227;	Paragraph 457;	Paragraph 751;
Paragraph 247;	Paragraph 535;	Paragraph 783;
Paragraph 266;	Paragraph 550;	Paragraph 807;
Paragraph 283;	Paragraph 613;	Paragraph 828;
Paragraph 300;	Paragraph 646;	Paragraph 847;
Paragraph 362;	Paragraph 668;	Paragraph 890;
Paragraph 381;	Paragraph 680;	Paragraph 914;
Paragraph 399;	Paragraph 690;	Paragraph 956;
Paragraph 424;	Paragraph 729;	Paragraph 970.